

SOME REFLECTIONS ON THE ISRAELI LEGAL SYSTEM AND ITS JUDICIARY

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1. History

Until the end of World War I, for four hundred years Palestine had been part of the Ottoman Empire. Ottoman law was basically Moslem religious law, but it has steadily been influenced - as of the nineteenth century - by European law (French, Swiss, Austrian). As part of the capitulation, some religious autonomy was given to the non-Moslem community. They were granted the right to have their own courts and their own laws in matters of personal status. At the end of World War I, Palestine was conquered by the British Army. It became a British Mandate under the League of Nations. This status was continued until Israel's independence in 1948. Thus, for more than thirty years Palestine has been under English legal influence. Most of the statutes enacted during that period were copied - sometimes verbatim - from parallel British or other commonwealth statutes. The principles of English common law (including the doctrines of equity) were applied whenever there was a gap (lacuna) in the local law.

In 1948 Israel gained independence. In order to prevent a vacuum, the two previous layers of law - the Ottoman and the English - continued to be in force, subject to the new developments. The fifty-two years of Israel's independence - in terms of its legal development - may be divided into three main periods. The first period covers the fifties. We just emerged from the War of Independence, in which 1 percent of the population was killed. A wave of Jewish immigration swept the country. We were 600,000 in 1948, and two million in 1952. From the legal point of view, it was a period of stabilization. Many statutes concerning social security and labor relations were enacted. The Law of Return was enacted. Parliament decided not to draft a constitution, but to prepare Basic Laws - each to be a chapter in the future constitution. The main changes started to take place in the second period - the sixties, seventies, and eighties. Three main trends took place. First, our Constitution started to take shape. Nine Basic Laws were enacted during that period. Second, the large enterprise of codification of private law took place. More than twenty statutes were enacted - each of a codifying nature - that covered most of the areas of private law (excluding family law, commercial law, and labor law). Almost all of the Ottoman laws were abolished. This codification lacked a unified concept. It was enacted through separate statutes, lacking any effort at harmonization. The legislature looked for good pragmatic solutions, not for a solid analytical basis. The codification was influenced by both European and common law ideas. It

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has its own original solutions. It worked well. At the end of that period, the formal link to English common law was abolished. A statute was enacted in 1980, providing that gaps in the law should be filled by analogy, and in its absence by reference to the principles of liberty, justice, equity, and peace of Israel's heritage. Third, the Israeli judiciary started to develop its own common law - 'common law Israeli style.' Large parts of Israel's laws are the product of Israel common law (e.g., administrative law, evidence, compensation).

The third period started with the nineties. In the public law sphere, two additional Basic Laws were enacted, dealing with human rights. They constitute our Bill of Rights. In the private sphere, a new effort of unifying and modernizing our codification took place. A committee, chaired by myself, finished its report. We prepared a new and modern Civil Code, which will be presented soon to our Parliament. This period was also marked by very important developments instigated by our judiciary. We decided that all the Basic Laws are the supreme law of the land, and that there is judicial review of legislation in light of the Basic Laws. We have done so, in spite of the fact that there is no supremacy clause in the Basic Laws, and against a line of cases that provided that until the unification of the Basic Laws into a constitution, the Basic Laws should be viewed as regular statutes. With these judgments, a whole process of constitutionalization of our law started. All statutes are interpreted in light of the new balance between the individual and society, as provided in our Bill of Rights.

2. Characteristics

Israel's legal system is part of Western legal culture. The state's ideology is governed by the rule of law; the basic approach is secular, liberal, and rational. The social system aspires to solve problems by means of law and the courts; law is understood as a concept that ensures social progress and change. The individual has rights as well as obligations.

Religious law - Jewish, Moslem, Druze, and Christian - is positive law. Its force comes from the secular legislator. Its scope is limited. It applies basically to questions of marriage and divorce, which are adjudicated by religious courts. In other family matters, it applies only if all parties concerned agree. Questions of marriage and divorce are subject to private international law. Thus, nonreligious marriages performed outside Israel, will be recognized by the civil - though not by the religious - courts. There is no state religion, and religious law does not apply outside family law.

This state of affairs is subject to great concern at home. The religious people think it is not enough. Secular people - who constitute more than three-quarters of the population - think it is too much. This situation continues for political reasons. It creates many difficult problems. It violates human rights, as there is no civil marriage or civil divorce. It is a question we shall have to solve soon, mainly because of the Russian immigration to Israel. Over the last ten years, more than one million people from Russia came to Israel under the Law of Return. A third of them are not Jewish. Interreligious questions are coming up more and more.

3. A mixed jurisdiction

Within the Western legal culture, to which legal traditions do we belong? We have some Roman-German influences. Our codification is basically a civil law codification. It is

influenced by civil law ideas - good faith, abuse of right, etc. A judge's power to fill gaps in statutes also originates from the civil law tradition; however, we cannot be classified as having a civil law tradition. We are much closer to the common law tradition than to the civil law tradition. We do recognize an Israeli common law. The role of judge-made law in Israel - and the role of judges in our society - is typically common law. We have the rule of precedents. Judgments of the Supreme Court bind any court but the Supreme Court. Our judicial system has a pyramidal structure - with one Supreme Court. We write judgments as a common law court does. The judgments are personalized; there are majority, minority, and concurring opinions. At times, the judgments are very long and detailed. They provide extended reasons for the judgment. The main common law legal institutions, like trust and equitable rights Israeli-style, are recognized. Our jurisprudence - the *Methodenlehre* - is common lawish. It is adopted by our judges to serve our needs. It is created and changed mainly by the judiciary. It creates, of course, many problems. In normal circumstances, doctrine precedes, and gives rise to legislation and judicial decisions. In Israel, the process is the reverse. The legal plant creates the ground from which it blossoms.

With all the influences of the common law, we are not a purely common law country. What are we? To which family do we belong? Are we legal orphans? It seems to me that we belong to the legal system of 'mixed jurisdictions.' Other members of our family are, inter alia, Quebec (French and English influences), Scotland (French and English), Louisiana (French and American), South Africa (Roman-Dutch and English), Sri-Lanka (Roman-Dutch and English), and Cyprus (Greek and English).

Legal systems of mixed jurisdictions are a recognized phenomenon, though not enough research has been done on their common behavior; however, with all their similarities, they cannot be grouped into a single family. Their legal style is different; they lack a common history. Thus, though Israel belongs to the Western legal culture, we do not belong solely to the commonly accepted families of Western legal culture. We have our own style, which is similar to but different from the common law family. Let me describe some of our peculiarities.

4. A Jewish and democratic state

Our Bill of Rights - Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation - provides: 'The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and Democratic State.'

The values of the State of Israel as a democratic state have two aspects, a formal aspect and a substantial aspect. The formal aspect - the formal democracy - means free elections and majority rule; the substantial aspect - the substantial democracy - means an independent judiciary, separation of powers, and human rights. Too often many people - including politicians - refer to democracy only in its formal aspect. This is regrettable. When the majority takes away human rights from the minority, this is against democracy. There is no democracy without human rights. Of course, different democracies may have different concepts of human rights, or separation of powers, or the independence of the judiciary. Thus, in shaping our understanding of the values of the State of Israel as a democratic state, all those different concepts will be taken into account.

What do we mean by the values of the State of Israel as a Jewish state? And what is the relationship between the values of Israel as a democratic state and a Jewish state?

The values of the State of Israel as a Jewish state mean two things: First, Israel as Zionist state. It means that the *raison d'être* of Israel is to solve the Jewish problem by creating a state to which every Jew has a right to come. It is expressed by the Law of Return (1950), which provides that every Jew (and his non-Jewish family) has the right to enter Israel and to become Israeli citizens. Second, Israel as a Jewish heritage state. This does not mean faith in God but that Jewish values, of different levels of abstraction, and the Jewish heritage, are part of our basic values.

There is, of course, a tension between the values of the State of Israel as a Jewish state and its values as a democratic state. We should not intensify these contradictions. We should find a synthesis between the conflicting values. A good example is Israel's attitude toward the non-Jews in Israel. Out of more than six million citizens, more than a million are non-Jews - Moslems, Christians, and Druze. A non-Jew has no right to immigrate to Israel. He has to be nationalized. This reflects Israel as a Jewish state. But in Israel itself, all are equal. Jew and non-Jew should have full and equal rights. True, a special key to enter the home was given to Jews and their families as Israel was established to solve the Jewish problem; however, once the individual is inside the house, he enjoys the same rights as every other member of the house. There is no discrimination among the members of the house. In a great number of cases, the Israeli Supreme Court expressed this principle. Recently, I delivered a judgment in which we pronounced that the state must treat Jews and Arabs equally in the allocation of state land. We were criticized that that decision would be the end of Zionism. Nothing could be more false. Zionism is not based on discrimination between Jews and Arabs. Zionism views Israel as a national home for Jews; however, it is based on the negation of racism, and on concepts of equality.

5. State and church

Israel has no 'official religion.' The Jewish religion is not a state religion; however, unlike most legal systems of the Western legal culture, we do have a duality of civil and religious law. It was inherited from the Ottoman tradition. By it, questions of personal status (mainly marriage and divorce) are adjudicated by religious courts that apply religious law. Thus, we do not have civil marriage or civil divorce. Furthermore, for political reasons, there are statutes that enforce some religious beliefs. For example, in some cities there is no transportation on the Sabbath. All state facilities - like the army - keep kosher. There is no separation of state and church. The state provides religious services for those who need it. All this creates many tensions in our society. It is a time bomb that, if not dealt with properly, may have severe consequences.

6. A quasi-presidential system

Our political system is peculiar. As far as elections to the 120-seat Parliament are concerned, we have the proportional system. All Israel is one district. Every 30,000 or so citizens can elect one Member of Parliament. It tends, of course, to encourage the existence of many political parties. In the current Parliament, seventeen parties are represented. There is a very

low threshold requirement: 1percent. Unlike in a parliamentary system, Parliament does not elect the Prime Minister. The Prime Minister is elected - like a president in a presidential system - directly by the people; however, unlike in the presidential system, our Parliament may - by vote of no confidence of 61 members or more - oust the Prime Minister and his government from office. In such a case, there are new elections, both for Parliament and for the Prime Minister. The rationale of this peculiar system was to weaken the small parties, and to strengthen the stability of the government. Many think that this original system failed, and that we should go back to the pure Parliamentary system.

7. Codification

One of our main characteristics is our present law is the codification of civil law. It is spread over more than 20 statutes. We have by now finished - more than 15 years of work - a new draft of our Civil Code. It will not include commercial law, family law, or labor law.

In the tradition of a civil code, it is not detailed. It does not include administrative or criminal aspects. Consumer protection legislation is also excluded.

The general part includes some general concepts, e.g. good faith, and the idea that he who wronged should not benefit from his wrongdoing. These general concepts will apply throughout the whole Code. We have a general provision as to the purpose of the Code. Such a provision should serve merely for interpretive purposes. The purpose of the Code is:

1. to protect human rights;
2. to achieve justice and honesty;
3. to further security, certainty, and efficiency;
4. to create harmonization in the civil law;
5. to protect vested rights;
6. to protect reasonable expectations and reliance interests;
7. to achieve reasonable results.

Generally, the Code is based on a number of substantive principles, such as the autonomy of the private will, protection of the reliance interest, the good faith principle, and the precedence of substance over form.

- We have added a chapter dealing with juristic acts - a continental concept unknown to most of our lawyers.

- We have added a special chapter on remedies. It combines remedies for breach of contracts, torts, and violation of statutes.

- We have an interesting chapter about frustration, which includes *force majeure* and change of circumstances.

- We have a special chapter about confidential relations, including obligations not in conflict of interest. It applies to all such relations throughout the Code.

- In torts, we have opted for a mixed solution. There are only two main torts - negligence and

breach of statutory duty. Then there is a list of some ten civil wrongs (like trespass, nuisance, conversion), which are only examples of negligence. There is a special regime as to liability in torts of public officials. They will have immunity unless they acted maliciously. The state (as such and vicariously) is liable for any tort (including negligence) of its employees.

- A special chapter deals with the question of conflict between rights on the same subject matter, e.g., the owner promises to sell or to give as a gift the same right to A and to B. It deals with purchase in the open market.

- A new chapter was added about time limitation (four years).

The Code was prepared by a committee of experts, mainly professors from the Israeli universities and experts from the Ministry of Justice. The draft will now be circulated for remarks. We do have a problem, namely how to present it to our Parliament.

8. Judiciary

One of the main characteristics of the Israeli legal system is its judiciary generally, and its Supreme Court particularly.

We form a group of fewer than 500 judges adjudicating more than a million new cases every year. All of us were appointed by the same method. Formally, it is the President of the State of Israel who appoints the candidate, the name of whom is presented to him by an appointment committee. This committee consists of nine members: two ministers, appointed by the current executive branch, two Members of Parliament, appointed by the current Parliament - one from the coalition, and one from the opposition - two lawyers, appointed by the Israeli Bar Association, and three justices of the Supreme Court: its president (ex officio) and two additional judges elected by the justices of the Supreme Court. If you take a closer look at the committee, you will see that a 5 to 4 majority are nonpoliticians (the three judges and the two lawyers). Thus, all of our appointments are on merit; no politician serves as a judge. I do not know the political views of my fellow judges.

As in a common law system, the judges are appointed from among the lawyers. After law school, you become a practicing lawyer. At the age of 35 to 40, you will apply to become a trial court judge. Appointment to the Court of Appeal is usually done from the best trial court judges. At the Supreme Court - there are twelve justices - most of the judges come from the Courts of Appeal. Some come from 'outside': law professors (one or two, not more) or attorney generals. I myself was both a law professor and an attorney general. All judges are to serve until the age of 70, when we must retire.

We have a very good judiciary. The public places considerable trust in it. Our Supreme Court - which is the final court in all matters, e.g. constitutional, administrative, civil, and criminal matters, and also exercises reviewing authority over all special courts, e.g. labor courts, religious courts, and military courts - is very good Supreme Court. We are very active in making law. It is a nonformal court. Substance, not form is its message. Our tool is, of course, interpretation - teleological interpretation. We do not ask what the intention of Parliament was when drafting a statute; we ask what the purpose of the statute is. Both in interpreting and developing our common law, we often use the general principle of our legal system. We

created interpretive presumption, by which we presume that the purpose of every statute is to further the basic values of the Israel legal system. By these techniques, we have been able to create a whole range of human rights - such as free speech, freedom of religion, equality and other political and some social rights, even in the period before our Bill of Rights. Thus, we do have a very sophisticated network of common law human rights. Furthermore, we developed - within the Israeli common law - a very detailed network of legal norms by which we review administrative decisions both of the legislature (like the German Constitutional Court) and the decision of the executive branch (like the French *Conseil d'Etat*). We use concepts such as reasonableness (from the common law), proportionality (from the continental systems), and fairness (from both) as our tools for social engineering. We frequently use the concept of the 'basic values of our society.' In many cases, the basic values of our legal system clash with one another. We fail in balancing the competing values. Thus, balancing is one of our main tools. We developed a whole theory of balancing - ad hoc balancing and principled balancing, horizontal balancing and vertical balancing, etc. As balancing is connected with the problem of weighing the different values, we have developed theories of weighing values, and of balancing them at the point of conflict. We do it both in public law and in private law. As mentioned, judicial review of legislation is the product of case law, without a solid basis in the text of our Basic Laws. In our judicial work we rely heavily on comparative law. American and Commonwealth cases, as well as continental literature, are read and cited by our judges. At the Supreme Court, every year we have volunteer clerks from foreign countries - France, England, America, Germany, Canada, etc. - who prepare for us legal opinions analyzing foreign law.

The activism of the Supreme Court was manifested in its decision to review actions of the Military Commander in the territories occupied after the Six-Day War. The Supreme Court could have declined jurisdiction. It could have said that the actions of the Military Commander are Acts of State; that they are nonjusticiable; that they were committed outside Israel. We declined all such techniques. We decided to exercise full review of every activity of all Israel's officials in every part of the world. Our main tools were the international laws of belligerent military occupation.

In order to develop our common law of human rights and the rule of law in government, we decided to limit to a minimum the doctrine of nonjusticiability. We have case law about the legality of the Oslo agreement and about the obligations of our army in Lebanon. We also decided to accept the *actio popularis*. Thus, when an important question of the rule of law comes up, we do not require standing. Everyone can come to the Court. Such cases go straight to the Supreme Court.

We have developed many rules about honesty and decency in government. We obliged our Prime Minister to fire a minister who was indicted and refused to resign. We held that the Prime Minister must not appoint as a director general of a ministry a person who committed offenses, but was not tried because he was pardoned by the President. We *do* review decisions of our President about pardon; we *do* review decisions of the Attorney General to prosecute or not to prosecute; we *do* review the activities of our police and security services. Thus, a year ago we decided that some techniques of interrogation that they were using are illegal; we *do* review all decisions about administrative detention. Recently, we ordered the release of some Lebanese citizens who were held in Israel.

Our activism is not limited to public law. We are open-minded and active also in private law.

You can imagine that there is a great deal of tension between the Supreme Court and the other branches of government. We are accused of being a nondemocratic body, imposing our will on our people. Such a tension is inevitable. Criticism is inevitable. Let me finish my presentation to you by outlining my judicial philosophy as to how judges like myself should exercise their discretion in the face of this criticism.

They should not abandon their role as protectors of human rights in a free and democratic society. They should not defer to the other branches when it comes to the question of the proper balance between competing constitutional values. They should not be apologetic for their nonrepresentative character. Courts are not representative bodies, and it would be a tragedy if they were to become representative. Their role is to give effect to the deep values of their society as expressed in its basic documents, its traditions, and its history. Their role is not to express the mood of the day. What should a judge *do*? My main advice is a very simple one: Be truthful to yourself and to your judicial philosophy. Here are some observations based on my judicial philosophy.

(1) We should be neutral with respect to the parties. Neutrality does not mean apathy to the plight of the parties. Neutrality does not mean indifference with respect to democracy, separation of powers, judicial independence, or human rights. Neutrality means fairness and impartiality. It means the confidence of the parties and of the people in the judge's moral integrity, and their conviction that the judge's sole motive is the protection of the rule of law, not his own power or prestige. Neutrality means giving weight to the arguments presented before the judge regardless of the importance of the maker of those arguments. Everyone is equal before the judge.

(2) We should be objective. We should rely on normative requirements that are external to ourselves. A judge should not impose his own subjective values on the public. A judge should reflect the basic values of the democratic society in which he lives. Of course, the judge is a product of his era, shaped by the times and the society in which he lives. Objectivity is not to amputate the judge from his or her surroundings. The goal is to permit the judge to express the deep values of his or her nation. In doing so, the judge should reflect history, not hysteria. The judge should give effect to basic values, even when those values do not correspond to the 'shifting winds' of public opinion. Populism and judging are two contradictions. Thus, a judge should be sensitive to the need to maintain public confidence in the judiciary. 'Lack of confidence in the judiciary' - wrote De Balzac - 'is the beginning of the end of society.' The judge has neither sword nor purse. All he has is the public's confidence in him. However, the need to ensure confidence does not mean the need to guarantee popularity. We have tenure in office in order to be able to overcome populism, and to give effect to the basic values of our society. Of course, basic values may change. A delicate border exists between new basic values and shifting winds of public opinion; a delicate border exists between the new social climate and the new realities to which a judge should be sensitive, and public pressure to which a judge should be opposed.

(3) We should be sensitive to the weight of our office and to the constraints it imposes. We should be self-critical and open-minded. We should be open to new ideas. In a pluralistic society, there are many points of view, and there may not be one right solution. A judge should lack any traces of arrogance. He should show intellectual humility. He should admit errors. The strength of our judgments lies in our ability to be self-critical and to admit our errors in the appropriate instances. Law has not started with us; it will not end with us.

(4) A judge should be sensitive to tradition. Tradition means a sense of history. Tradition means an appreciation of precedent. Tradition means consensus. Tradition means a fusion of the horizons of the past and the present. It means a dialogue between generations. In this respect, every judgment is a link in a chain; a chapter in a book. We should always realize from where we came, and to where we are going. We should always look backward and forward. Our judgment must fit the existing web of law. It must be a solid basis on which the future can be built.

(5) A judge should be part of his people. It is said that we sit in an 'ivory tower.' But my tower is in the hills of Jerusalem, not on the Olympus. It is of the essence that a judge be fully conscious of his or her surroundings, of the events preoccupying the people. It is the judge's duty to study the country's problems, to read its literature, to listen to its music. The judge is part of his or her epoch, the son or daughter of his/her time, the product of his or her nation's history.

(6) A Supreme Court judge should not view his role as aimed to correct individual mistakes. The corrective function is vested in the appellate courts. A Supreme Court judge has a special role. It is to close the gap between life and law and strike a proper balance between the need for change and preservation of the status quo. 'Law must be stable' - Professor Roscoe Pound said - 'yet it cannot stand still.' Stability without change is decline; change without stability is anarchy. We must ensure stability through change. The law, like an eagle in the sky, is only stable when it moves. Our moves should usually be evolutionary rather than revolutionary. Continuity, rather than a series of jumps, is involved. But there are special moments when bold steps are required. We should not miss those moments. At those moments, the tensions between the Supreme Court and the other branches will reach their peak. This is natural. This should be anticipated. Yes, in many cases, the job of the Supreme Court is to reflect the deep public consensus, and not to create it, though not in all cases. There comes a moment when the court should lead; where the court is the crusader of a new consensus.

(7) Judges should be aware of the complexity of the human being. Our approach should be holistic. When we construe one statute, we construe all statutes. During our life in law, we will face many conflicting theories: naturalism, positivism, realism, feminism, and economics, law and literature, law and ... and many others. There is some truth in all of them. They reflect different aspects of the human experience. A judge will be faced with conflicting values, policies and interests. Alongside every thesis there is an antithesis. It is our job to have the proper synthesis. Our main tool is balancing and weighing. These are, of course, just metaphors. What they mean is the duty to identify the values, the interest, and the policies involved, and to realize their relative importance at the point of conflict. By doing so, the judge should give effect to the values and principles that reflect the deeply embedded convictions of his democratic society. This balancing process by no means requires that the judge to sacrifice the state on the altar of individual rights. A constitution is no prescription for national suicide. The judge's job is to achieve a delicate balance between community and individual, between the needs of the public and the rights of the individual. And when the scales are in a delicate balance, the judge should give special weight to one of the most important values - justice. The justice should do justice. The process of balancing should be a rational process. We must manifest reason, not fiat. The method by which the judge weighs and balances and the method by which the legislature weighs and balances the same values are two different methods. The legislative process is political; the judicial process is normative. The judicial weighing and balancing should, in Professor Dworkin's terms, 'fit'

within the normative scheme. It should draw itself out of the existing normative structure. The weighing and balancing in one area of the law should be affected by the weighing and balancing in other areas of the law. A judge is always faced with the problem of system.

But what should a judge do when all this advice fails? There is, of course, no one answer to this question. My answer is this: In that exceptional instance, the judge should refer to his or her subjective beliefs. At this point, subjectivity is allowed to enter.

I see my role as 'judge' as a mission. Judging is not merely a job. It is a way of life. An old Talmudic saying regarding judges is the following:

You would think that I am granting you power?
It is slavery that I am imposing upon you.

But it is slavery - the purpose of which is liberty, dignity, and justice. *Liberty* to the spirit of the human being; *dignity* and *equality* to everyone; *justice* to the individual and to the community.

This is the promise that accompanies me to the courtroom daily. As I sit *at* trial, I stand *on* trial.