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## REMARKS

### THE JUDICIAL SYSTEM IN ISRAEL\*

The Honorable Amnon Straschnov<sup>†</sup>

#### I. INTRODUCTION

The legal system of the State of Israel is quite different from that of the United States. This paper will discuss the basic legal system of Israel while emphasizing the security problems as well as the problems that the Israeli Supreme Court faces as a result of being without a written constitution. Both the American and Israeli systems derive from the Anglo-Saxon legal system of the United Kingdom; however, they each have unique deviations. For example, Israel, like the United Kingdom, does not have a written constitution, whereas the United States does. The three main differences between the American and Israeli systems that this paper will discuss are the following: (1) Israel does not have a jury system; (2) Israel does not have capital punishment; and (3) Israel does not have a written constitution. Recognition of these differences will aid in illustrating the interworkings of the Israeli justice system.

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\* These remarks were delivered at the Luncheon for the Jewish Federation of Tulsa on February 10, 1999. They are published here substantially as delivered. To aid the reader, footnotes have been added. At the time these remarks were delivered the author was on sabbatical as a visiting scholar at New York University Law School.

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### A. No Jury System in Israel

First Israel does not have jury system.<sup>1</sup> Professionally trained judges handle all aspects regarding the administration of justice.<sup>2</sup> Israeli judges are not elected, but appointed by a special judicial appointment committee which eliminates politically motivated appointments. Unlike the judiciary in the United States, Israeli judges not only make decisions on legal issues, but operate as finders of facts as well.<sup>3</sup> Additionally, serious criminal cases are tried by a qualified three judge panel. Israeli judges are responsible not only for giving the verdict, but also for providing extremely detailed opinions which are fit to proceed to the upper courts.<sup>4</sup> Thus, the State of Israel does not have a jury system.

Generally, laymen would not take part in a judicial decision in Israel; two reasons have been offered for this. Initially it is believed impossible to find twelve people who do not know each other, or the grandmother of the prosecutor, or the son-in-law of one of the witnesses. Such familiarity among potential jurors makes the creation of an unbiased jury equally impossible. Additionally, and most importantly, one would be hard pressed to find twelve Israelis who agree unanimously on a certain fact or point, let alone an entire case. Therefore, this author believes that a system without a jury best serves the Israeli people and Israeli justice.

### B. No Capital Punishment

A second distinction between the American versus the Israeli systems lies in the fact that Israel does not apply the death penalty. Even though the laws of Israel, the West Bank, and the Gaza Strip all permit capital punishment in special circumstances, it is never applied.<sup>5</sup> For example, offenses performed by the Nazis and their aids during World War II, crimes against humanity, and high treason in times of war, are all punishable by death.<sup>6</sup> Since the establishment of Israel fifty-one years ago, only one person has been executed.<sup>7</sup> Infamous Nazi Adolf Eichmann was sentenced to death and executed in 1962, after he was captured and brought from Argentina to Israel.<sup>8</sup> Eichmann played an important role in the Nazi regime. He was personally responsible for the extermination of millions of Jews in concentration camps, and was in charge of the "final solution" of the Jewish people. However, in America, the death penalty is currently utilized in thirty-eight states, including Oklahoma and

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1. See Shlomo Levin, *The State of the Courts in Israel*, 45-OCT FED. LAW. 33 (1998); see also INTRODUCTION TO THE LAW OF ISRAEL 286 (Keren C. DeWitt-Arar & Amos Shapira, eds., Kluwer Law International 1995).

2. See Levin, *supra* note 1, at 34.

3. See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 1, at 282.

4. See *id.*

5. See *id.* at 263.

6. See *id.*

7. See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 1, at 263.

8. See Susan Taylor Martin, *Now is the Time for Statesman Assad*, ST. PETERSBURG TIMES, Jan. 9, 1998, at 2A.

Texas.<sup>9</sup> In addition, some states do not have a minimum age limitation for enforcing this severe punishment.<sup>10</sup> American courts are permitted to even impose the death penalty on juveniles who are above the age of sixteen.<sup>11</sup> In Israel, as well as under international law, the imposition of the death penalty upon a person under the age of eighteen is completely prohibited.<sup>12</sup>

An extremely devastating case occurred in 1978 which required my participation as the military prosecutor.<sup>13</sup> The case involved nine terrorists who arrived in Israel by boat not far from Kibbutz Ma'Agan Michael. The terrorists encountered a Jewish-American photographer and asked her where they had landed, expecting to be in Tel Aviv. After she told them where they had actually landed they killed her. Making their way up the beach road, they captured a bus and ordered the driver to take them towards Tel Aviv. They then seized a second bus and held all aboard hostage. Upon their arrival in Tel Aviv there was a shooting fight between these terrorists and the security services. Thirty-four people were killed, including women and children. Out of the nine terrorists, two were captured and brought to trial before a military court in the city of Lydia.

A pressuring outcry existed in Israel to invoke the death penalty because of the mass killing of innocent people. This case was slightly problematic because one of the terrorists captured was under the age of eighteen.<sup>14</sup> By Israeli law, he could never be given a death sentence. The second defendant, on the other hand, was in his early twenties, and was eligible for the death penalty. Political and legal debate transpired between the Prime Minister, the Minister of Defense, the Minister of Justice, and the military prosecutor regarding the imposition of the death penalty in this specific case. To execute one young man and not the other, simply because of a few years, was not consistent with the Israeli sense of justice. In the end, despite the severe tragedy that occurred as a result of brutality against innocent people, the death penalty was still not invoked. It has been over fifty-one years since the independence of the State of Israel, and except for the case of Adolf Eichman, the death penalty has never been

9. States permitting capital punishment are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. See Thomas J. Walsh, *On the Abolition of Man: A Discussion of the Moral and Legal Issues Surrounding the Death Penalty*, 44 CLEV. ST. L. REV. 23, 26 n.25 (1996).

10. See Elisabeth Gasparini, *Juvenile Capital Punishment: A Spectacle of a Child's Injustice*, 49 S.C. L. REV. 1073, 1084 n.98 (1998) (The fifteen states that have no minimum age limitation are: Arizona, Arkansas, Delaware, Florida, Idaho, Mississippi, Montana, New Hampshire, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, and Washington.). *But see* Thompson v. Oklahoma, 47 U.S. 815, 830 (1989) (holding that the death penalty could not be invoked against any person under the age of sixteen).

11. See Thompson, 47 U.S. 815 (1989).

12. See Convention on the Rights of the Child, G.A. Res. 44/25, 1 U.N. GOAR, 44th Sess., Supp. No. 49, at 166, U.N. DOC. AJ44/449 (1989), reprinted in 3 INTERNATIONAL LAW & WORLD ORDER: BASIC DOCUMENTS III.D.3 (B. Weston ed., 1998); see also Capital Punishment and the Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary General, U.N. ESCOR, at 12, U.N. DOC. E/1995/78 (1995).

13. Judge Straschnov served as Chief Military Prosecutor of the Israeli Army from 1976-80 and 1981-82.

14. See generally THE LAW OF ISRAEL: GENERAL SURVEYS 189-90 (Itzhak Zamir & Syliane Colombo eds., 1995).

imposed.<sup>15</sup> This policy of not invoking the death penalty in Israel is unlikely to change. Despite the constant struggle against terrorist activity, human rights still prevails over security. The result of this case, and others like it, should be commended and praised.

Another case in which I took part as a judge was the case of Yigal Amir, the murderer of the late Prime Minister, Mr. Yitzhak Rabin. His murder trial was not tried by my panel.<sup>16</sup> For that murder he was given life imprisonment.<sup>17</sup> My panel of three judges heard the trial of Yigal Amir, his brother, Hagai Amir, and their friend, Dror Adani, for conspiracy to murder Prime Minister Yitzhak Rabin.<sup>18</sup> For the conspiracy charge they received sentences of five, twelve, and seven years of imprisonment, respectively.<sup>19</sup> However, at that time the public was demanding the imposition of the death penalty for Yigal Amir for the assassination of the late Prime Minister. Regardless of public outcry, this murder could never be punished by death under Israeli law.<sup>20</sup> A single murder, even the murder of the Prime Minister, does not fall within the list of crimes punishable by death. By written law, the death penalty could not have been invoked in this case.

The security problems in Israel come from the both external and internal threats. On the one hand these problems are apparent by the threats from the Palestinians in the West Bank and the Gaza Strip. Unfortunately the internal security problems, on the other hand, which are not as obvious, resulted into the tragic death of the beloved Prime Minister. He was not assassinated by terrorists, by Arabs, or a lunatic, but by a Jewish-Israeli man who served in the army and attended law school.<sup>21</sup> Nobody anticipated the possibility of such an occurrence, and since then Israel has taken stringent measures to create greater security within the State of Israel.<sup>22</sup>

### C. No Written Constitution

The third difference between the Israeli and American systems is that Israel does not have a written constitution.<sup>23</sup> However, this does not mean that Israeli courts do not have the powers to adjudicate constitutional or quasi-constitutional rights. The

15. See Martin, *supra* note 8 ("Israel's one and only execution came in 1962 when it hanged Nazi war criminal Adolph Eichmann for his role in killing 6 million Jews."); see also Calev Ben-David, *The Quality of Mercy*, THE JERUSALEM POST, Feb. 13, 1998, at 4.

16. See *Conviction Affirmed in Killing of Rabin*, WASH. POST, Aug. 5, 1996, at A15. The murder trial was heard by a three judge panel headed by Judge Edmond Levy.

17. See *id.*

18. See Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161 n.1 (1997).

19. See *Additional Sentence Given Rabin's Killer*, WASH. POST, Oct. 4, 1996, at A26.

20. See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 1, at 29, 263. The death penalty was abolished for a single murder by law in 1954. *Id.* at 29 n.38.

21. See Alexander, *supra* note 18, at 1163.

22. See, e.g., Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Israel-Palestine, arts. XII, XIII, reprinted in THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES 271-85 (Eugene Cotran & Chibli Mallat eds., Kluwer Law International 1996).

23. See THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES, *supra* note 22, at 239.

Supreme Court of Israel frequently and skillfully arbitrates these rights.<sup>24</sup>

The Supreme Court of Israel has two basic functions. First, it hears civil and criminal appeals from the lower courts, called the district courts.<sup>25</sup> Unlike the American system, appeals in Israel may be brought by the prosecution as well as the defense.<sup>26</sup> The American tradition of “double jeopardy” in such a case, is not preserved in Israel. The prosecution can appeal both the factual and/or legal issues to the Supreme Court of Israel. Not surprisingly, both the prosecution and the defense appealed the case of Yigal Amir.<sup>27</sup> The prosecution argues the punishment is too lenient, while the defense argues that the punishment is too severe.

Second, the law in Israel says that the Supreme Court of Israel, sitting as the high court of justice, can render a remedy “for the sake of justice.”<sup>28</sup> This relief is based on justice, and not on the written law. We call this an “equitable remedy” because it is based in equity. So if a certain person in the State of Israel claims or feels her rights were abridged by the government, its officials, or a municipality, she can turn directly to the Supreme Court. She can ask the Court for remedies based on justice, and her petition must be heard by the Court.<sup>29</sup> Such is not the situation in the United States. Unlike the United States Supreme Court, the Israeli Supreme Court has no discretion in deciding which cases to take, and every case must be heard.<sup>30</sup> Of course, the Court can uphold or deny the petition rather quickly, but the Court must look into every matter and make its decision.

One example of a constitutional issue that arose before the Supreme Court of Israel involved television transmission.<sup>31</sup> In 1969, when Israel began broadcasting television, there was only one channel, the public channel. This channel was under the direction of the Minister of Education, who happened to be a religious orthodox Jew. He decided that Israeli television would broadcast only six days a week. He ordered to cease broadcasting from Friday evenings through Saturday evenings because of the Sabbath, a religious day of the week in which orthodox Jews are not permitted to watch television. However, the orthodox sector of Judaism in Israel only encompassed approximately twenty to twenty-five percent of the population.

Non-observant secular Jews made up about seventy-five percent of the population in Israel at that time. One of the secular Jews, who was also an attorney, made a legal challenge to the Minister’s refusal to broadcast on the Sabbath. He

24. See Levin, *supra* note 1, at 34 (The judiciary was responsible for developing constitutional rights as well as human rights, including freedom of expression, the right to demonstrate, and the right to property).

25. See INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 1, at 34.

26. See, e.g., Lee Hockstader, *Jew v. Jew: Court Case Underlines Cultural Schism in Israeli Society*, WASH. POST, March 17, 1999, at A21.

27. See, e.g., *id.*

28. Basic Law (the Judiciary), § 15(c), S.H. 78 (1984-5744). “The Supreme Court *shall* sit also as a High Court of Justice . . . it shall hear matters which it deems it necessary to grant relief for the sake of justice.” *Id.* (emphasis added).

29. See *id.*; see also Levin, *supra* note 1, at 34 (Israeli courts have “extended the scope of standing by allowing . . . every citizen [to apply to the Supreme Court] whenever a constitutional question or matter concerned with corruption arises”).

30. See *id.* at §15(b). “The Supreme Court *shall* hear appeals against judgments and other decisions of the District Courts.” *Id.* (emphasis added).

31. H.C. 704/69 Kaplan v. the Prime Minister of Israel, 23(2) P.D. 394.

pleaded to the Supreme Court on a Friday afternoon at four o'clock immediately before the beginning of the holy day. He took his complaint directly to the home of Justice Zvi Berenson of the Supreme Court who lived in Jerusalem. The attorney requested an Order of Stay against the Minister of Education claiming that his rights were violated. He argued that since he was a loyal citizen of the State of Israel, who paid his taxes, as well the fees for watching television, that no justification existed to compel the minority opinion on the majority. Therefore, the court should uphold his right to watch television during the Sabbath, the holy day. Justice Berenson upheld the petition and gave an Order of Stay to the Minister of Education prohibiting him from stopping television transmission on Saturdays.<sup>32</sup> Ever since, television has been broadcast seven days a week in Israel. It appears that natural law and remedies are substituted for written constitutional law in Israel and the Court serves to balance the rights for the sake of justice.<sup>33</sup> The consensus is that neither the majority nor the minority can be deprived of their basic rights. This solution was logical because if watching television on the Sabbath is against orthodox Jewish beliefs, then the orthodox Jews must personally refrain from watching television instead of compelling their beliefs on the majority of the population.

#### *D. The Rule of Law in the Administered Areas*

The powers of the Supreme Court of Israel are extensive both within and outside of the State of Israel. The Palestinians in the West Bank and the Gaza Strip have the right to petition to the Supreme Court of Israel.<sup>34</sup> That a person from a Palestinian-occupied land can petition to the Supreme Court of Israel seeking a remedy based on justice is unprecedented in International law. The integrity of the Israeli Supreme Court is reflected by its decisions, some of which have ruled in favor of the Palestinian inhabitants.

A recent case decided in favor of the Palestinians was in 1991 during the Gulf War.<sup>35</sup> Saddam Hussein of Iraq had decided to launch missiles over the State of Israel. At the time the Israeli government did not know whether the warheads were biological or chemical; therefore, the government provided the people in Israel and the Jewish settlements of the West Bank with gas masks and protection kits. The Arab local population was not provided with such protection and thus petitioned to the Supreme Court of Israel asking for redress. The argument was that the military government has the obligation to defend and protect them as well from violence or war actions taken by those outside the state including Saddam Hussein. The decision was difficult to resolve and controversial, because at the time the Palestinians supported Saddam Hussein. Nevertheless, the Supreme Court panel, led by Chief

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32. The decision was rendered on November 7, 1969. *See id.*

33. *See THE LAW OF ISRAEL: GENERAL SURVEYS, supra* note 14, at 25.

34. *See MEIR SHAMGAR, 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL* 109 (1982).

35. H.C. 168/91, *Morcus v. Minister of Defense*, 45(1) P.D. 467.

Justice Aharon Barak, unanimously upheld the petition.<sup>36</sup> The Court theorized that even during times of war, the rule of law must raise its voice.<sup>37</sup> The Supreme Court determined it was the constant duty of the military government to protect the whole population and not just the Jewish population. In this landmark decision the Court stated:

Indeed, the military commander is bound to operate on the basis of equality. He may not discriminate between different groups of inhabitants. When the military commander reaches the conclusion that Protective kits should be issued to the Jewish inhabitants of the region, then they must be issued to the Arab inhabitants as well. We are going through a difficult time, and when the cannons thunder the muses are silent. But even when the cannons thunder, the military commander must observe the law. The ability of any society to stand up against its enemies is based on the recognition that it is fighting for values which deserve to be protected. The rule of law is one of such values. The duty of the military commander to treat all inhabitants of the region equally does not cease when tension rises for security reasons. This is a continuing duty, which prevails at all times.<sup>38</sup>

As expected this decision was extremely unpopular, but nonetheless was accepted and followed. The executive branch of Israel has never violated, but instead has always accepted and implemented every decision of the Israeli Supreme Court. Like in the United States, the government in Israel is separated into the executive, legislative, and judicial branches and consequently adheres to the concept of separation of powers,<sup>39</sup> which is well known in America. Additionally, similar to the American system, the legislative branch can undue the future effect of judicial decisions by changing the law. The Israeli Supreme Court however, serves as the foremost protector of human rights.<sup>40</sup> The Court relies on ideals of equity and justice for all to create unbiased decisions.

### *E. Freedom of Religion*

The broadening gap between orthodox and non-orthodox Jews is an issue at the forefront of Israeli judicial dockets. American Jews are also experiencing internal confrontation between the different extremes of Judaism. Israel is divided into secular Jews and the religious orthodox Jews. Additionally, the religious orthodox establishment does not recognize the validity of the reform and conservative

36. *See id.*

37. *See id.* at 470.

38. *See id.* at 470-71.

39. *See generally* INTRODUCTION TO THE LAW OF ISRAEL, *supra* note 1, at 15-36.

40. *See* THE LAW OF ISRAEL: GENERAL SURVEYS, *supra* note 14, at 25. ("The judiciary acts as Israel's watchdog over . . . individual rights. While this is indeed the reality in many other countries, the task of the Israeli judiciary is considerably more important and delicate [because of the] lack of a constitution or bill of rights.")

movements in the United States.

Historically, political and legal problems have been a result of the division in Judaism. Initially the division involved the ultra-orthodox sect, including the "Yeshiva Students." The first Prime Minister of Israel, as well as its founding father, David Ben-Gurion,<sup>41</sup> made compromises with the ultra-orthodox Jews by exempting the yeshiva students from serving in the Army. Because of the compromises Israel's laws have evolved with strong consideration of the orthodox religious beliefs. The initial compromise had permitted the yeshiva students to avoid military service by going to study in the Yeshiva. Not surprisingly, this created unrest and dissatisfaction among the secular population. Many petitions opposing such policy went before the Supreme Court, but it always decided this issue was a "political question," to use the American terminology.<sup>42</sup> The Court encouraged the people to lobby the legislature to reform the situation, however, they did not succeed and the law was not amended.

Finally, the issue went to the Supreme Court.<sup>43</sup> The petition noted that the exemption of the yeshiva students amounted to about 29,000 people, more than a brigade.<sup>44</sup> Additionally, Israeli soldiers complained that their mandatory service of three years would be reduced if the yeshiva students were not exempted from service. The Supreme Court sat as the High Court of Justice, in a special panel of eleven justices. The Court finally spoke and upheld the petition finding that the yeshiva student exemption was "unconstitutional," unjust and unfair to the entire population.<sup>45</sup> The Court further ordered the Israeli parliament, the Knesset, to amend the situation within a year.<sup>46</sup> The Knesset must enact a law that enumerates and details exactly who may be exempted and its rationale behind each exemption.<sup>47</sup> The legislature, according to the Court, had not gone far enough to ensure fairness, and the Court as its overseer demanded the legislature create equitable laws.

## II. CONCLUSION

A year ago, I lectured in Indianapolis, Indiana, before the mid-year convention of the chief justices of the different state supreme courts. One of the Justices asked me how Israel can have such an effective system and handle constitutional issues

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41. See generally AVRAHAM AVI-HAI, BEN GURION: STATE BUILDER PRINCIPLES AND PRAGMATISM 1948-1963 (Halsted Press 1974).

42. See Evelyn Gordon, *A Threat to Democracy*, JERUSALEM POST, Dec. 15, 1998, at 8, available in 1998 WL 6539240.

43. H.C. 3267/97; 715/98 Rubinstein v. Minister of Defense; see also Jonathan Rosenblum, *Confessions of a Haredi Dad*, JERUSALEM POST, Dec. 11, 1998, at 9, available in 1998 WL 6538881.

44. See Arthur Gruder, *Arbitrary and Unreasonable*, JERUSALEM POST, Mar. 10, 1999, at 8, available in 1999 WL 9000384.

45. See *id.*; see Rosenblum, *supra* note 43, at 9.

46. See Yosef Goell, *A Difficult but Winnable Battle*, JERUSALEM POST, Dec. 14, 1998, at 8, available in 1998 WL 6538962.

47. See Hillel Sommer, *A Landmark Decision*, JERUSALEM POST, Dec. 10, 1998, at 1, available in 1998 WL 6538794. If the Knesset fails to pass a law detailing who may be exempted by the deadline, then the yeshiva students would have to be drafted. See *id.*

without having an actual written constitution. I told him that it is difficult, more difficult than in the United States. But you always have to remember that what counts is not the written words of the constitution, but the spirit and independence of the Justices of the Supreme Court. Based on the American Constitution, which was enacted 220 years ago, for example segregation of races was in effect until 1954. Women were not allowed to vote until 1920, when they had to *amend* the Constitution. So what is more important is not what the written constitution says, but how and in which way the Justices of the Supreme Court interpret the constitution. When asked once what does the Constitution of the United States mean, Chief Justice Charles E. Hughes replied that the U.S. Constitution means what the judges say it means.<sup>48</sup> We would like very much to have a written constitution in the State of Israel. It is quite difficult because of the many segments of society, the factions of the people. We have Arabs, and other minorities; we have ultra-orthodox Jews who do not serve in the army; we have religious Jews and the secular Jews, all with different kinds of views and beliefs. These problems have prevented and may continue to prevent us from having a written constitution. But even without a written constitution, it seems to me that the Supreme Court of the State of Israel is a very strong and powerful court, which succeeds in maintaining and preserving human rights in general, especially in balancing human rights and the needs of security in the State of Israel.

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48. See JOHN BARTLETT, *FAMILIAR QUOTATIONS*, 864 (Emily Morison Beck ed., Little Brown & Company 1968) ("We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.").

