

ENGLISH ABSTRACTS

CHIEF JUSTICE BEINISCH AS A FEMALE JUDGE

RUTH HALPERIN-KADDARI AND REVITAL SHAVIT BARSHESHET

This paper examines the judicial work of Dorit Beinisch, former Chief Justice of Israel's Supreme Court, as a female judge. Discussing Justice Beinisch's track record, we wish to add to existing literature on female judges and feminists, and to promote the discourse on the importance of appointing women (and other judges from minority groups) as members of the judiciary.

We start by mapping feminist writings on gender, feminism, and judging, and discuss three analytical questions that emerge from them: (1) The methodological dilemma of choosing between quantitative comparison of judicial decisions and qualitative analysis of individual female judges; (2) the feminist dilemma of whether the focus should be on female judges or on feminist judges; and the obvious question on regarding the nature of feminist judging and the parameters of its examination: (3) What makes a feminist judge?

The second part of the paper presents our qualitative analysis of decisions by Justice Beinisch. We show that even though Justice Beinisch refrained from identifying herself as a feminist in her judicial work, she did make use of feminist methods, promoted gender justice and gender equality, and practically contributed to the advancement of women's status in Israeli society.

RULES, EXCEPTIONS AND DISCRETION IN THE LAW

DAPHNE BARAK-EREZ

What is the relationship between rules and the exceptions to them? This question concerns the conceptual tension that underlies every legal system. A legal system needs perspicuous rules in order to secure legal certainty, equality, and the simple implementation of the law. However, these advantages come with a price. Simple rules are ill equipped to deal with the full complexity of the human reality, which the law is supposed to govern. An analysis of the role of exceptions vis-à-vis the general rule in law raises similar questions to those concerning the recognition of exceptions to rules in other areas of study. Yet, it also raises questions unique to the legal arena. Traditionally, scholarship dealing with exceptions in law has only focused on one of their roles: the pursuit of a just result in a concrete case. Instead, this article presents a

English Abstracts

broad spectrum of typical cases in which exceptions are used. In addition to recognizing the use of exceptions to achieve a just result in a specific case, this article evaluates the use of exceptions to legitimize the rule itself or as a tool for advancing its gradual development and reform. As a result, this article also assesses the importance of adopting norms which provide for discretion (rather than norms which are based on rules and exceptions), as well as the legitimization of judicial discretion by stating that it will only be used in exceptional cases. This article also evaluates the disadvantages of using exceptions to legal rules, including concerns regarding arbitrariness, a lack of legal certainty, and inequality. Based on this foundation, this article presents a separate analysis of the institutional aspect of using exceptions. Pre-determined exceptions set by the legislature are different from exceptions set by the courts, and they are both different from exceptions set by administrative agencies. This general analysis concerning the normative and institutional roles of exceptions to legal rules is then applied and assessed in the context of the judicial decisions of the former President of the Supreme Court of Israel, Justice Dorit Beinisch, which exemplify them in an illuminating manner. The study of her approach to exceptions sheds light on the leading characteristics of her decisions – awareness of institutional considerations, attachment to real life, and recourse to humanistic considerations.

ON THE INDEPENDENT SPIRIT OF THE JUDGES IN ISRAEL

MORDECHAI KREMNITZER AND GUY LURIE

In light of Dorit Beinisch's exemplary independent attitude in her various offices, we ask in this article: how can one repeat her example of independence and solid persistence on the rule of law even before counter pressures? We ask two separate questions in this context. What is this independent attitude and how could we ensure that this independent attitude would guide the way of judges also in the future? In the article we describe the independent spirit of the judge, and point to psychological and institutional biases that may hinder it. We give examples of the tradition of the independent spirit of the justices in the Israeli Supreme Court since its establishment. We show that one cannot rely on institutional measures of judicial non-dependence to make sure that an independent attitude would guide the way of the judges also in the future. We conclude the article with some thoughts on how to promote the independent spirit of the judges in Israel.

THE PUBLIC LAWYER AS THE SERVANT OF TWO MASTERS

YOAV DOTAN

Lawyering for the state involves professional and ethical dilemmas between lawyers' duties to their client agencies and their commitment to larger concept of public interest. In this article, I discuss these dilemmas by looking at the practices and policies as developed by the High Court of Justice Department (HCJD) of the Israeli Ministry of Justice, which represents the Israeli Government before the Supreme Court in all public law cases. I begin with a theoretical overview, and then provide an historic account of the development of a model that I call "lawyering for the rule of law" – as developed at the HCJD since the 1980s. I examine this model from a normative point of view by contrasting it with four potential critiques: democratic accountability; the duty of adversarial representation; administrative consistency; and the separation of powers. I conclude by suggesting that the development of the model was an inevitable consequence of the changes in the judicial review policies of the Supreme Court during the relevant period.

BASIC LAW: THE JUDICIARY (ARTICLE 18): "FURTHER HEARING" OF FINAL SUPREME COURT CASES

YIGAL MERSEL

Article 18 of Basic Law: The Judiciary sets an exception to the finality of Israeli Supreme Court rulings. This provision permits re-hearing cases that had been decided by three Supreme Court Judges through a unique procedure – the Further Hearing by a larger panel of five or more judges. The paper analyzes the Further Hearing mechanism, focusing not only on its constitutional aspects (being a part of the Israeli Constitution in the making), but also on the rationale of this exception to the rule due to which final judgments of the Israeli Supreme Court and precedents that are binding for all other courts are usually decided by a random panel of three judges (and not en-banc). The paper further analyzes the causes of a Further Hearing, the special procedure for such motions and decisions, and the limits and results of the Further Hearing itself, if ordered.

PRISON PRIVATIZATION

GIDEON SAPIR

This paper analyzes a Supreme Court majority ruling that rejected the prisons ordinance amendment that intended to regulate the operation of a new, privately-managed prison. There may be two basic reasons for such a ruling: the institutional foundation and the human-rights foundation. The Court rejected the amendment citing human rights and disregarded the institutional aspect. This paper attempts to determine why the Court chose not to apply the institutional foundation; and examines the two central claims made in support of the human rights foundation, outlining their inherent problems. In light of that discussion, the paper concludes that the majority stance is not sufficiently founded.

THE CONSTITUTIONALITY OF STATUTES AND JUDICIAL REVIEW: INSTITUTIONAL AND GOVERNANCE PRINCIPLES V HUMAN RIGHTS

ALON HAREL

In HCJ 2605/05 concerning the privatization of prisons, the petitioners raised several considerations – including institutional issues, government prerogatives, and basic human rights. In this article, I examine the relations between the courts' duty to impose basic institutional and constitutional governance requirements and their constitutional duty to enforce human rights. I maintain that courts should use human rights claims first and foremost because it is not enough for human rights to be simply protected. They ought to be protected by the courts (and not only by the legislators, for example). Hence, when judges are required to address two parallel arguments – one based on institutional-governance concerns and the other on human rights – they ought to choose the latter over the former.

PROCEDURAL JUDICIAL REVIEW AND SUBSTANTIVE JUDICIAL REVIEW: CAN THE TWO BE COMBINED? TOWARDS A SEMIPROCEDURAL MODEL IN ISRAEL

ITTAI BAR-SIMAN-TOV

This article argues for the adoption of a semi-procedural model of judicial review in Israel. The semi-procedural model merges substantive judicial review, in which courts examine the constitutionality of the law's content, and procedural judicial review, in which courts examine the law's enactment process.

The article makes five main contributions to the study of judicial review models. First, the article develops the conceptual and theoretical understanding of the semi-procedural model and its differences from the two other models of judicial review. Second, the article analyzes the development of the semi-procedural model around the world. Third, the article reveals the ambivalent attitude toward this model in the Israeli case-law. Fourth, the article develops the normative argument for the semi-procedural model in Israel and its proper relationship with the two other models. Finally, the article develops the semi-procedural model, charting guidelines for its design (including developing a procedural proportionality doctrine) as well as principles for its proper employment.

COLLATERAL REVIEW OF ADMINISTRATIVE DECISIONS

ITZHAK ZAMIR

Any judicial tribunal can exercise collateral review of administrative decisions, in civil or criminal proceedings, whenever this is required to decide the case before the tribunal. Yet, though collateral review is actually a common way to challenge administrative decisions, it has not been seriously researched, nor is it widely known. It is important to be acquainted with the advantages and disadvantages of collateral review, especially since claimants and courts may often choose between direct review and collateral review. This article presents the characteristics of collateral review, compares collateral review with direct review, and examines instances in which collateral review is the better choice.

VALIDITY OF PRIOR LAWS

AHARON BARAK

Article 10 of Basic-Law: Human Dignity and Liberty provides that the Basic-Law shall not affect the validity of any law in force prior to the commencement of the Basic-Law. This article does not prevent the interpretation of the prior law in the spirit of the provisions of the Basic-Law. It also does not affect the duty of all governmental authorities to respect the rights under the Basic-Law (Article 11). This duty cannot be enforced against the legislature. The courts must enforce it by developing the common law and overruling prior precedents that are in conflict with the Basic-Law.

EMERGENCIES

ARIEL L. BENDOR

In times of emergency, such as in wartime, essential interests of the State sometimes require granting exceptional powers to the executive branch. A common way to deal with such needs is to declare a “state of emergency” in which the executive branch has special powers to deal with the difficulties that the State has encountered. In light of the emergency laws in the United States and the United Kingdom, the article analyzes the Israeli laws on declaration of a state of emergency, the laws which apply to the declaration of a state of emergency, and a series of statutes and regulations that govern special emergency situations. The article also proposes a practical outline for legislative reform, which will deal with the difficulties raised by the existing laws.

THE CRIMINAL PROCESS AS A CHESS GAME: THE VICTIM’S PLACE IN THE EXCLUSIONARY RULE

MICHAL TAMIR AND DANA PUGACH

Much has been said and written about the exclusion of evidence due to prosecutorial or investigatory faults. Yet, not enough has been said about the possible effect of the victims’ changing status on this issue in the criminal justice system.

Under Israeli law, the court has long refused to exclude evidence, arguing that “the criminal process is not a game of chess” and preferring to discover the truth over competing values,

including due process. Despite the introduction of Basic Law: Human Dignity and Liberty in 1992, it was only in the Issacarov case of 2006 that Israel's Supreme Court went the extra mile and stated that illegally-obtained evidence may be excluded. The Court has thus created a discretionary rule that considers various factors such as the severity of misconduct by law-enforcement authorities, the nature of the evidence, and other circumstances. Presently, defense attorneys often contest the admissibility of evidence, pointing to faulty obtainment process and violations of the defendants' rights. While the test case in which the doctrine was developed was an easy and victimless one, post-Issacarov cases are sometimes more complicated and may involve victims. In this new criminal justice system – the victim is a silent player.

This article describes the evolution of case law, emphasizing considerations that may be relevant to the inclusion of victims' interests. A theoretical basis for recognizing victims' relevance for the exclusionary rule is presented. This argument is based on the victims' right to be heard (a derivative of their right to justice) and the state's duty to minimize secondary victimization. We also propose a mechanism for victims' inclusion. On the substantive level, we suggest that the test applied by the court should consider the nature of the offense (victimless or not) and the impact of victims' exclusion. On the procedural level, we suggest that the victim be given a stand on evidence exclusion. The theoretical discussion is accompanied by an analysis of cases to show that courts have considered the victims' stand on this issue only in the context of the "severity of the crime" which, according to the Supreme Court, is no longer part of the discretionary rule.

DEVIATION FROM THE COMMENSURATE SENTENCING RANGE

OREN GAZAL AYAL

In 2012, the Knesset approved a new sentencing law. For the first time in Israel, Amendment No. 113 of the Penal Law introduced statutory sentencing instructions for courts. The law instructs that sentencing should be commensurate with the severity of the offenses and the degree of the offenders' culpability. As a general rule, the final punishment must fall within the commensurate sentencing range so determined. Yet, the law authorizes judges to deviate from that range for either rehabilitation purposes or for the protection of public safety.

The first part of the essay is an in-depth examination of the aforementioned considerations that allow deviations from the commensurate sentencing range. In the second part of the essay, the case is made that two additional considerations allow the court to deviate from that range, even though they are not explicitly stated in the Penal Law: (1) the need to follow the parties' recommendation in a plea-bargain agreement and (2) when deviation is required in the interest of justice. The essay discusses the justifications for recognizing these two additional exceptions

English Abstracts

to the sentencing range rule and the way they are implemented de facto. These proposals were adopted by the Supreme Court following the publication of an earlier draft of this paper. The essay also analyzes the court decisions that adopted them.

CHILDREN IN THE EYES OF THE LAW

EDNA ARBEL

When Chief Justice Beinisch ruled on issues pertaining to children's rights and welfare she sought ways to erect a protecting wall around them and intended to implement the principles of the Convention on the Rights of the Child. Her rulings on corporal punishment issues are an excellent case in point.

Dedicated to Chief Justice Beinisch, this lecture examines the variety of issues Israeli Courts address when dealing with children – mainly in criminal proceedings and the unique challenges they pose in this respect.

The Israeli State and society has placed its children at the center of attention – focusing on their welfare, education, and safety – and introduced diverse legislation aimed at protecting children and ensuring that their needs are met. A significant milestone was introduced in 1991 when Israel ratified the UN Convention on the Rights of the Child, which gave crucial consideration to the “best interests of the child” principle and recognized the child's status as an autonomous person who is entitled to every human right. The Convention, along with Basic Law: Human Dignity and Liberty that was enacted in the same year, contributed to the development of children status in Israeli law, entitling them to rights that are independent of and separate from their parents' rights. Presently, provisions concerning children's welfare and rights are scattered and found in numerous acts and laws. It seems that the time has come to consider the merger of those provisions under a single coherent statute.

Children feature in three major areas of criminal procedure, acting as victims-plaintiffs, perpetrators, and/or witnesses. The basic assumption in any discussion regarding minor offence victims is that they belong to a vulnerable group. The legislator enacted various laws to deal with the challenge of conducting criminal procedures concerning offences against minor victims while trying to protect defendants' rights. In this respect, this lecture will distinguish between minors who were victims of domestic violence and minors who were victims of offences committed against them outside their homes. Referring to minors who were victims of domestic violence, the lecture describes the laws and rulings that are meant to sensitize the criminal procedure to the fact that victims are minors, all the while observing defendants' rights. This includes the requirement of extensive material evidence, the extension of the statute of limitations on sex offences perpetrated by family members, and recognizing the phenomenon

of repressed memory. Combatting domestic violence against minors further involves the implementation of the duty to report any suspicion that minors are victims of offences – a duty that is both legal and moral.

Another challenge pertains to viewing the Internet as a scene of crimes against minors perpetrated even while they are at home. Tackling this challenge requires the establishment of cyber-crime police units, international cooperation of police forces, imposing strict punishments, and appropriately training parents and education officials.

When children are victims of offences committed outside their homes, the legal system plays a role after the offence was committed. Its main tool is sentencing that could keep offenders away from society for an appropriate period of time, while sending a deterring message to potential offenders and helping actual offenders obtain treatment and rehabilitation. In this context, the means of enforcement that is meant to improve the protection of children from sex offenders have been enriched in the past decade. This lecture elaborates on such new relevant legislation.

The phenomenon of minors offending other minors has become increasingly common recently. Every discussion regarding juvenile crime should take into account that juvenile delinquency is a mirror image of society. Tackling it should be a joint mission for the legal system, the police, the education system, and parents.

Rehabilitation considerations are at the center of sentencing minor offenders. Minority considerations do not prevent proper punishment, particularly when offenders commit grave offences. The adequate sentencing of minors contributes to the victims' healing process. They should also promote the offenders' rehabilitation as part of their repentance, while serving as deterrent. In this context, a significant difficulty emerges as there are currently no vacant beds in young offenders' locked institutions in Israel for both Jewish and Arab offenders. This reality presents courts with a serious dilemma as it makes it hard to implement the legislator's instruction to view the rehabilitation process as crucial. The rehabilitation of minor offenders is one of the reasons for the increasing use of restorative justice procedures in which delinquency is treated with alternative means outside the criminal procedure. The advantages of the alternative procedures should be weighed alongside rehabilitative considerations, the public's interest, and the victims' own interests.

In summary, the situation as seen in the courts daily is troubling due to courts inability to struggle with this difficult phenomenon, particularly with respect to the future of our society. Effective coping necessitates the cooperation of all parties involved. The courts have an important role to play, but it is vital that the clear messages in the Court's rulings are introduced into the education system, the welfare system, and to parents. Such cooperation is the key to the ability of every boy or girl in Israel to enjoy their constitutional right to human dignity.