

## Israel as a Mixed Jurisdiction

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[Aller au sommaire du numéro](#)

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Résumé de l'article

À l'image de la plupart des pays occidentaux, le droit israélien est en constante évolution. Israël est de juridiction mixte sous plusieurs aspects. Historiquement, à l'époque de l'empire Ottoman, les terres israéliennes étaient gouvernées par le droit turc. Celui-ci a été suivi par le droit britannique durant la période du mandat britannique. Aujourd'hui, le droit israélien reflète encore un mélange de droit civil et de common law. Ce mélange est évident, par exemple, dans la combinaison des lois codifiées et des lois basées sur les précédents. Plusieurs secteurs législatifs ont été codifiés, lors du mandat britannique, dans des ordonnances qui demeurent effectives de nos jours. Cependant, ces ordonnances ont été supplées et largement interprétées par la jurisprudence israélienne, ce qui a créé une « common law israélienne ». Aujourd'hui, des efforts sont faits afin de codifier cette nouvelle common law.

Une autre illustration du droit matériel mixte en Israël est son régime constitutionnel. Israël n'a pas de constitution formelle, mais a une déclaration des droits partielle (les lois fondamentales) adoptée par son parlement. En 1995, la Cour suprême israélienne a déclaré, en référence au droit constitutionnel américain, avoir l'autorité d'invalider toute « loi inconstitutionnelle ». Dans sa décision, la Cour suprême s'est basée sur une clause de limitation incluse dans les nouvelles lois fondamentales et inspirée par la *Charte canadienne des droits et libertés*. Depuis, la Cour suprême israélienne a développé un certain nombre de droits constitutionnels à partir de ces lois fondamentales, influencés à la fois par le concept américain de liberté et le concept européen de dignité humaine.

Finalement, le droit comparatif joue un rôle important dans la jurisprudence israélienne. Même si la common law britannique ne lie plus les cours israéliennes, les juges ont une large discrétion pour utiliser le droit comparatif dans leurs décisions. Lorsque pertinente, la référence au droit étranger peut être d'une grande assistance pour un juge, lui fournissant l'inspiration nécessaire dans un cas difficile. L'utilisation de plusieurs sources différentes peut créer une harmonie entre les différentes juridictions, particulièrement dans une époque de mondialisation grandissante.

## ISRAEL AS A MIXED JURISDICTION

*Eliezer Rivlin\**

Like in most Western countries, the legal system in Israel is constantly evolving. Israel is a mixed jurisdiction in many respects. Historically, during the time of the Ottoman Empire, the land of Israel was ruled by Turkish law, which was followed by British law during the time of the British Mandate. Today, Israel's legal system still reflects a mixture of civil law and common law. This mixture is evident, for example, in the combination of codified law and precedent-based law. Several areas of the law were codified, at the time of the British Mandate, in ordinances that remain binding today. However, these ordinances were supplemented and widely interpreted in Israel's case law, and an "Israeli common law" was created. Today, legislative efforts are being made to codify this new common law.

The mixed nature of substantive law in Israel is also illustrated by Israel's constitutional regime. While Israel has no formal constitution, it has a partial bill of rights (the basic laws) enacted by its parliament. In 1995, the Israeli Supreme Court decided, referring to American constitutional law, that it had the authority to invalidate "unconstitutional laws". In its decision, the Supreme Court relied on a limitation clause, included in the new basic laws and inspired by the *Canadian Charter of Rights and Freedoms*. Since then, the Israeli Supreme Court has developed a number of constitutional rights from these basic laws, influenced by both the American concept of liberty and the European concept of human dignity.

Finally, comparative law plays an important role in Israeli case law. While British common law no longer binds the Israeli judiciary, judges have wide discretion to use comparative law in their decisions. When relevant, referring to foreign law may be of great assistance to a judge by providing inspiration in a difficult case. Utilizing many different sources of law may help to create harmony between various jurisdictions, especially in times of increasing globalization.

À l'image de la plupart des pays occidentaux, le droit israélien est en constante évolution. Israël est de juridiction mixte sous plusieurs aspects. Historiquement, à l'époque de l'empire Ottoman, les terres israéliennes étaient gouvernées par le droit turc. Celui-ci a été suivi par le droit britannique durant la période du mandat britannique. Aujourd'hui, le droit israélien reflète encore un mélange de droit civil et de common law. Ce mélange est évident, par exemple, dans la combinaison des lois codifiées et des lois basées sur les précédents. Plusieurs secteurs législatifs ont été codifiés, lors du mandat britannique, dans des ordonnances qui demeurent effectives de nos jours. Cependant, ces ordonnances ont été supplées et largement interprétées par la jurisprudence israélienne, ce qui a créé une « common law israélienne ». Aujourd'hui, des efforts sont faits afin de codifier cette nouvelle common law.

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Finalement, le droit comparatif joue un rôle important dans la jurisprudence israélienne. Même si la common law britannique ne lie plus les cours israéliennes, les juges ont une large discrétion pour utiliser le droit comparatif dans leurs décisions. Lorsque pertinente, la référence au droit étranger peut être d'une grande assistance pour un juge, lui fournissant l'inspiration nécessaire dans un cas difficile. L'utilisation de plusieurs sources différentes peut créer une harmonie entre les différentes juridictions, particulièrement dans une époque de mondialisation grandissante.

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\* Deputy Chief Justice, Supreme Court of Israel. This article is based, in part, on a previous work: Eliezer Rivlin, "Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty" (2009) 21:1 Fla J Int'l L 1.

Israel can serve as a unique example of a multi-layered mixed legal system. Historically, the Israeli legal system was composed of several chronological “layers”. First, Turkish law, originating in the Ottoman era—the region that is now the state of Israel was part of the Ottoman Empire for four hundred years—was the law of the land.<sup>1</sup> Essentially, Ottoman law was Islamic religious law influenced by European (e.g., Austrian, Swiss, and French) law.<sup>2</sup> Then, British law became the law of the land. At the end of the First World War, the region was conquered by the British army and it became a part of the British Mandate under the League of Nations. For thirty years, the region was strongly influenced by the British legal system.<sup>3</sup> The rules of English common law and the principles of equity were imported into the region. It was only in 1980, more than thirty years after the British Mandate had ended, that these binding links to the English common law were disconnected.<sup>4</sup> After the establishment of the state of Israel in 1948, and since then, the Israeli Parliament—the Knesset—has enacted new statutes that have turned the Israeli legal system into a modern one—an original system in many senses.

Israel is still a mixed jurisdiction today. Its legal system reflects a mixture of English legal traditions and Continental European standards and principles. For years, Israel’s private law has been governed by one kind or another of civil code. The Ottoman civil code was the first code to be absorbed into the local system, though almost all of the Ottoman laws have since been abolished.<sup>5</sup> A unique kind of civil codification was also enacted by the British during their mandate. The *Tort Ordinance* is a good example: it is still in force in Israel and was, in fact, a codification summarizing the English common law in the field of torts.<sup>6</sup> In a way, it was a “restatement” of the law that was based on the English common law; but

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<sup>1</sup> Daniel Friedmann, “The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period” (1975) 10:2 Isr LR 192 at 196 [Friedmann, “Effect of Foreign Law”].

<sup>2</sup> Benjamin Akzin, “Codification in a New State: A Case Study of Israel” (1956) 5:1 Am J Comp L 44 at 45-47.

<sup>3</sup> See generally S Ginossar, “Israel Law: Components and Trends” (1966) 1:3 Isr LR 380 at 382-84; Norman Bentwich, “The Legal System of Israel” (1964) 13:1 ICLQ 236 at 236-42.

<sup>4</sup> *Law and Administration Ordinance No. 1 of 5708-1948*, 1 LSI 7, s 11 (Isr) [*Law and Administration Ordinance*].

<sup>5</sup> Friedmann, “Effect of Foreign Law”, *supra* note 1 at 201-206; *Repeal of “Mejelle” Law, 5744-1984*, 38 LSI 212 (1983-84) (Isr); Ruth Gavison, “Abolition of the *Mejelle* as a Source of Law” (1984) 14 *Mishpatim* 325 (in Hebrew).

<sup>6</sup> *Civil Wrongs Ordinance, No 36 of 1944*, Palestine Gazette 1944, vol 26, No 1380 (1st Supp), 129 [*Tort Ordinance*]; Izhak England, “The Law of Torts in Israel: The Problems of Common Law Codification in a Mixed Legal System” (1974) 22 Am J Comp L 302 at 303-17.

as opposed to the American *Restatement*,<sup>7</sup> the *Tort Ordinance* is binding. In the modern state of Israel, legislators have codified a system of private law in a series of statutes.<sup>8</sup> These statutes were influenced by both common law principles and Continental concepts. The German and Italian influences are easily discernible; the statutes were influenced by civil law ideas like good faith.<sup>9</sup> The system was supposed to be transformed, from a system in which the adjudicative process was the main resource for developing the law, into a codified system in which the code is the main resource for creating the law—a system typical of the civil law. Yet when this piecemeal code was implemented by the courts, it was exercised in a “non-Continental” way, by creatively interpreting the code and by filling the gaps left by general standards—typical of Continental statutes—with concrete instructions.<sup>10</sup> Substantial parts of Israel’s private law are now about to become a unified civil code, the purpose of which is to harmonize the case law resulting from the application of this piecemeal code.

In spite of its Continental influences, we should not characterize the Israeli legal system as a civil law system—though one of a kind in many ways, it should still be classified as a common law system for several reasons. First, judge-made law is still an important part of the law in Israel.<sup>11</sup> In fact, a rich body of Israeli common law has developed over the years, both in the sphere of public law and in the field of private law. Also, the rule of precedent is part of our system.<sup>12</sup> Furthermore, judgments are articulated in the way common law decisions are articulated, as opposed to the way judgments are articulated in Continental legal systems. Yet Isra-

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<sup>7</sup> *Restatement (Second) of Torts* (1965).

<sup>8</sup> See e.g. *Contracts (General Part) Law, 5733–1973*, 27 LSI 117 (1972-73) (Isr) [*Contracts (General Part) Law*]; *Contracts (Remedies for Breach of Contract) Law, 5731–1970*, 25 LSI 11 (1970-71) (Isr); *Sale Law, 5728–1968*, 22 LSI 107 (1967-68) (Isr); *Sale (Apartments) (Assurance of Investments of Persons Acquiring Apartments) Law, 5735–1974*, 29 LSI 18 (1974-75) (Isr); *Gift Law, 5728–1968*, 22 LSI 113 (1967-68) (Isr). See generally Daniel Friedmann, “Independent Development of Israeli Law” (1975) 10:4 Isr LR 515 [Friedmann, “Independent Development”].

<sup>9</sup> See e.g. *Contracts (General Part) Law*, *supra* note 8, ss 12, 39; *Companies Law 5759–1999*, 44 LSI 1, ss 192, 198, 254 (Isr). See also Friedmann, “Independent Development”, *supra* note 8 at 543-44.

<sup>10</sup> Meir Shamgar, “The Supreme Court of Israel: Present Trends and Concepts” (1985) 20:2-3 Isr LR 175 at 176-79; Aharon Barak, *Purposive Interpretation in Law*, translated by Sari Bashi (Princeton: Princeton University Press, 2005). See also Robert D Cooter & Tom Ginsburg, “Comparative Judicial Discretion: An Empirical Test of Economic Models” (1996) 16:3 Int’l Rev L & Econ 295.

<sup>11</sup> Shimon Shetreet, “Judicial Independence and Accountability in Israel” (1984) 33 ICLQ 979 at 979-90.

<sup>12</sup> *Basic Law: The Judiciary*, 1984, SH 78, s 20, online: <[www.knesset.gov.il/main/eng/home.asp](http://www.knesset.gov.il/main/eng/home.asp)>.

el is not a typical common law system that just develops from case to case. Rather, it is a combination of a “chain novel” (using Dworkin’s metaphor),<sup>13</sup> in which the judge is bound by legal history, and creative judicial innovation.

Israel is also a mixed legal system with regard to the content of its law, similar to Louisiana and Quebec, which combine legal concepts from both civil law and common law. For instance, Israel’s constitutional regime is a mixed one. Unlike the United States, Israel has never adopted a comprehensive written constitution.<sup>14</sup> The Knesset chose to create a constitutional regime in a piecemeal fashion by adopting basic laws—each serving as a chapter of the constitution. In 1992, the Knesset enacted two basic laws that awarded constitutional status to certain fundamental rights: *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty*. Together, they created our bill of rights, which includes the right to human dignity; the right to property, individual autonomy, and freedom; and the right to privacy.<sup>15</sup> It is, however, a partial bill of rights. Freedom of speech, freedom of religion, and the right to equality are not mentioned explicitly in our basic laws.

Prior to 1992, human rights were protected by the Israeli common law. Important human rights were developed by the Israeli Supreme Court using a liberal interpretation of legislation. Lacking the constitutional power of judicial review, the Israeli Supreme Court—when using its limited powers—was very much inspired by American constitutional case law. The “American” liberal approach to interpreting the US Constitution was adopted by the Israeli Supreme Court when interpreting our “regular” legislation. Then, when the Israeli bill of rights was adopted in 1992, the Israeli Supreme Court decided that the court had been granted the

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<sup>13</sup> Ronald A Dworkin, “Natural’ Law Revisited” (1982) 34:2 U Fla L Rev 165 at 168; Ronald Dworkin, *Law’s Empire* (Cambridge, Mass: Belknap Press, 1986) at 228-29. “Dworkin ... compared the judicial decision making to the writing of a ‘chain novel.’ ... The judge, as the chain-novel’s author, should be connected to the decisions of the past. He must consider past decisions as a part of a continuing story. ... Each deciding judge writes upon a background to which he must adhere” (Eliezer Rivlin, “Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty” (2009) 21:1 Fla J Int’l L 1 at 14 [footnote omitted]).

<sup>14</sup> Meir Shamgar, “On the Written Constitution” (1974) 9:4 Isr LR 467 at 469; The Honorable Dalia Dorner, “Does Israel Have a Constitution?” (1999) 43:4 Saint Louis ULJ 1325 at 1325.

<sup>15</sup> *Basic Law: Freedom of Occupation*, 1992, SH 114, online: <[www.knesset.gov.il/main/eng/home.asp](http://www.knesset.gov.il/main/eng/home.asp)>, as repealed by *Basic Law: Freedom of Occupation* (Isr), 1994, SH 90, online: <[www.knesset.gov.il/main/eng/home.asp](http://www.knesset.gov.il/main/eng/home.asp)>; *Basic Law: Human Dignity and Liberty* (Isr), 1992, SH 60, online: <[www.knesset.gov.il/main/eng/home.asp](http://www.knesset.gov.il/main/eng/home.asp)>, as amended by *Basic Law: Human Dignity and Liberty - Amendment*, 1994, SH 90, online: <[www.knesset.gov.il/main/eng/home.asp](http://www.knesset.gov.il/main/eng/home.asp)>.

authority to invalidate legislation that infringed upon the fundamental human rights enumerated in the two basic laws.

Once again, statute law and common law were intertwined: the Israeli Supreme Court had decided that the basic laws were “the supreme Law of the Land,”<sup>16</sup> though there is no supremacy clause in the basic laws. In 1995, the Israeli Supreme Court decided, referring to the American decision *Marbury v. Madison*, that it has the authority to invalidate “unconstitutional laws.”<sup>17</sup> The limitation clause of the bill of rights,<sup>18</sup> influenced by the Canadian *Charter*, was used by the court to gain the power of judicial review.<sup>19</sup> In fact, the court replaced the American case law’s concept of constitutional scrutiny with a written test for judicial review. Furthermore, the Israeli Supreme Court has decided that the constitutional protection of certain rights that are not enumerated in the basic laws can be derived from the fundamental rights mentioned in the Israeli partial bill of rights. The court has decided that equality<sup>20</sup> and freedom of speech<sup>21</sup> are well within the “penumbra” of the bill of rights—they are rights that are not explicitly mentioned in the constitutional document, but which can be derived from the basic right to liberty and human dignity—and are thus protected by the basic laws.

As you can see, our constitutional regime is a mixed one—a very mixed one—consisting of a partial bill of rights included in a written document, an Israeli constitutional common law, a *judge-made* supremacy clause,<sup>22</sup> a written limitation clause taken from the *Canadian Charter of Rights and Freedoms*, and some innovations taken from old American decisions from as early as the nineteenth century on the one hand and from the European notion of human dignity on the other hand. In fact, human dignity, as in European conceptual frameworks, stands at the core of our penumbra. In this manner, we departed from the American penumbra,

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<sup>16</sup> US Const art VI, cl 2.

<sup>17</sup> CA 6821/93 *Bank Mizrahi v Migdal Cooperative Village*, [1995] 2 Israel Law Reports 1 at 220-23, online: <<http://elyon1.court.gov.il/eng/home/index.html>> [*Bank Mizrahi*], citing *Marbury v Madison*, 5 US (1 Cranch) 137, 2 L Ed 60 (1803).

<sup>18</sup> *Basic Law: Human Dignity and Liberty*, *supra* note 15, s 8.

<sup>19</sup> *Bank Mizrahi*, *supra* note 17 at 215, citing *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>20</sup> HCJ 6427/02 *Movement for Quality Government v Knesset*, [2006] Tak-Al 2006(2) 1559, online: <<http://www.court.gov.il/heb/home.htm>> (in Hebrew).

<sup>21</sup> HCJ 10203/03 *HaMifkad HaLeumi Ltd v Attorney General et Al*, [2008] Tak-Al 2008(3) 3172, online: <<http://www.court.gov.il/heb/home.htm>> (in Hebrew).

<sup>22</sup> EA 92/03 *Shaul Mofaz v Chairman of the Central Elections Committee*, [2003] IsrSC 57(3) 793, online: <<http://elyon1.court.gov.il/eng/home/index.html>>.

which uses the right to liberty as a conceptual framework to award constitutional protection to fundamental rights not mentioned in the bill of rights. We departed from the American penumbra, at the core of which stood liberty. The notion of human dignity, protected by the Israeli basic laws—and which serves as a tool to protect additional rights—was inspired very much by the German *Basic Law*. Yet when “human dignity” was interpreted by the Israeli Supreme Court, it was flavoured with the American notions of liberty and equality.

And yet another mixture: the Israeli bill of rights provides that “[t]he 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.”<sup>23</sup> Is there a conflict between a “Jewish” and a “democratic” state? Is “Jewish” different from “democratic”? Is Israel a religious state? Is there a separation between church and state? These were the questions that stemmed from the declared goal of the *Basic Law: Human Dignity and Liberty*. There is, no doubt, a tension between the values of the state of Israel as a Jewish state and its values as a democratic state.<sup>24</sup> Furthermore, it was decided by the Israeli Supreme Court that the phrase “democratic state” means not only free elections and majority rule, but also protecting human rights and securing an independent judiciary.<sup>25</sup> In order to decrease the tension between “Jewish” and “democratic”, Jewish values were interpreted by the Israeli Supreme Court to reflect universal values, thus allowing the values of democracy and Jewish values to co-exist.<sup>26</sup> Indeed, Israel is a Jewish state, being the national home for Jews, but the state must treat Jews and non-Jews equally. Although there is no separation of church and state in the country, Israel is not a religious state and the Jewish religion is not a state religion. The legal system in Israel is liberal and secular; yet questions of personal status—mainly marriage and divorce—are adjudicated by religious courts, which apply religious law.<sup>27</sup>

An interesting example of the combination of various legal legacies can be found in the *Tort Ordinance*. As mentioned above, the Israeli *Tort Ordinance*, enacted during the British Mandate, reflected the British common law of the time by codifying the existing common law of torts in

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<sup>23</sup> *Basic Law: Human Dignity and Liberty*, *supra* note 15, s 1(a).

<sup>24</sup> Ruth Gavison, “Jewish and Democratic? A Rejoinder to the ‘Ethnic Democracy’ Debate” (1999) 4:1 *Israel Studies* 44 at 44.

<sup>25</sup> *Bank Mizrahi*, *supra* note 17 at 196-98, 230-32.

<sup>26</sup> CA 506/88 *Shefer v State of Israel* (1993), [1992-94] *Israel Law Reports* 170 at 281.

<sup>27</sup> See generally Izhak Englard, “Law and Religion in Israel” (1987) 35:1 *Am J Comp L* 185.

one coherent, legally binding text. Over the years, the Israeli courts developed, step by step, the Israeli common law doctrines, interpreting the language of the *Tort Ordinance* to suit the changing times and circumstances. For example, the courts' understanding of the statutory definition of negligence has evolved over the years to include, *inter alia*, the famous "Hand formula",<sup>28</sup> though the language of the *Tort Ordinance* still reflects the rule stated in *Donoghue v. Stevenson*.<sup>29</sup> The judicially updated definition of negligence was later adopted in the draft of the new Israeli codification project. Looking at the evolution of tort law in Israel, we can see somewhat of a pattern: first, the development of common law doctrines by the English courts; then, the collection of these doctrines into one binding ordinance—in fact, a codification; next, the progression and growth of the codified doctrines through Israeli case law; and at last, once again, the act of adopting notions from Israeli case law in a codifying statute. A similar process is occurring in other countries as well, including Commonwealth countries. Australia, for example, has recently begun the process of codifying each one of its states' common law doctrines into one unified statute. Similarly, the *Restatements* in the United States combine and unify the general body of the American common law. Although the *Restatements* are not formally binding, they are highly influential, and they represent the need that each legal system occasionally has to combine all the existing case law into one organized and harmonized document to be interpreted and further developed by case law.

Another aspect of the mixture of different legal legacies is the use of comparative research in Israeli case law. In light of the peculiar nature of the Israeli system, reference to foreign law in general—and to American law in particular—is not self-evident. As a system with many peculiarities, one might think that Israel could not benefit from comparative law. Yet the Israeli courts have always demonstrated a willingness to refer to foreign law. As I have illustrated, "foreign law" was historically part of the country's legal system. When the state of Israel was established, the Israeli legislature decided that, whenever there was a lacuna in domestic law, the court ought to refer to the English common law.<sup>30</sup> Since the abolishment of this mandatory reference in 1980, reference to foreign law has depended on the willingness and discretion of judges to use comparative

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<sup>28</sup> CA 5604/94 *Hemed v State of Israel*, [2004] IsrSC 58(2) 498, online: <<http://www.court.gov.il/heb/home.htm>> (in Hebrew). For the original "Hand formula", see e.g. *United States v Carroll Towing Co*, 159 F (2d) 169 at 173, 1947 US App LEXIS 3226 (2d Cir 1947).

<sup>29</sup> *Tort Ordinance*, *supra* note 6, s 50(1); *Donoghue v Stevenson*, [1932] AC 562 at 580, [1932] All ER Rep 1 HL (Eng).

<sup>30</sup> *Law and Administration Ordinance*, *supra* note 4, s 11.



law in their decisions.<sup>31</sup> The legal obligation to refer to foreign law has been replaced by an impressive willingness to use comparative law. The extensive use of foreign law has shaped both the sphere of public law and the framework of private law. Presumably, the willingness of our judges, throughout the years, to learn from their colleagues abroad is a result of our country's mixed legal history, but it is also a result of the "mixed" personal histories of the judges—many of whom were born and educated in European countries, the United States, or the Commonwealth countries—joining together to create a rich "global chain story".

Whatever the reason may be, the fact is that, in our judicial work, Israeli judges rely heavily on comparative law. American and Commonwealth cases are often cited in our decisions. In this respect, we differ from a commonly heard American insight: indeed, the most robust dispute regarding reference to foreign law is the one occurring in the US Supreme Court and the American academy. This controversy focuses on the issue of using foreign law in *constitutional* interpretation, yet American courts often rely on foreign law in other legal spheres. Justice Scalia and Professor Posner represent eloquently the belief that American judges should be very careful about citing foreign judicial decisions.<sup>32</sup> Similar ideas are also expressed by some legal scholars, such as Steven Calabresi, who believe that the American nation is "a shining city on a hill", capable only of teaching other nations and not of learning from them.<sup>33</sup> Justices Kennedy and Ginsburg, however, represent a different stance.

Judges in Israel do look outside. Despite the traditional Jewish belief that the people of Israel are a "light to all the nations", our legal system does *not* share the notion that we are the only ones who can shine and lead the way for other nations. We have never underestimated the values and principles that characterize the more mature jurisdictions, and we understand the benefits that result from exchanging views. There are many reasons for this openness to foreign law. Indeed, the English language serves as a bridge to the Anglo-American system. But language is not the only reason for referring to the American legal system or the Commonwealth legal systems—as discussed earlier, the fact that many Israeli justices were born or educated in foreign countries and the legal obligation to refer to foreign law in certain instances are additional rea-

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<sup>31</sup> *Foundations of Law, 5740–1980*, 34 LSI 181 (1979-80), s 1 (Isr).

<sup>32</sup> *Roper v Simmons*, 543 US 551 at 624-28, 125 S Ct 1183 (2005) (Scalia J, dissenting); *Lawrence v Texas*, 539 US 558 at 589, 598, 123 S Ct 2472 (2003) (Scalia J, dissenting), citing Richard A Posner, *Sex and Reason* (Cambridge, Mass: Harvard University Press, 1992) at 343.

<sup>33</sup> Steven G Calabresi, "A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law" (2006) 86:5 BUL Rev 1335 at 1338.

sons for referring to other legal systems. We are, of course, very careful when using comparative law. One must be quite rooted in the system that one refers to in order to be sure that its rules and ideas are interpreted properly. In order to leverage and use foreign law in a meaningful way, one must hold considerable knowledge and expertise in both foreign and local law. For one to have access to foreign law, one must possess both the technical tools to approach the law and an understanding of its normative substance.

Reference to foreign law is beneficial only when the law referred to is relevant and when judges can derive assistance from it. Indeed, it contributes to yet another *mixture of jurisdictions*. Global judicial cooperation can assist domestic courts to achieve progress and overcome irrational judicial conservatism by relying on the “global market” of innovations. At the same time, reliance on foreign law can also serve as a restraint imposed upon domestic courts, preventing them from exceeding the borders of the general consensus about what a legal system should look like.<sup>34</sup> It is usually more appropriate and helpful to look to foreign law for a way of thinking rather than for a specific decision—to look for certain analytical discussions rather than for a concrete outcome. This concept reflects the nature of mature and developed legal systems—which may correspond on the level of ideas, if not on the level of local outcomes.

Exchanging views is always beneficial; judges do so whenever they convene at international conferences. Yet a reference to foreign law is not necessarily a dialogue—at least not a conscious dialogue. Development of domestic law via reference to foreign law can be confined to only one party, the legal system making the reference, while the legal system being referenced is unaware of its involvement in the process. Such a reference can trigger efficient, though uncoordinated, co-operation between different legal systems. In this process, each system contributes its own innovations to the common pool of developing law.

To sum up, Israel is a mixed jurisdiction in many respects. First, from an historical perspective, current Israeli law has evolved from a mixture of common law—English and Israeli—and codification; second, at present, Israeli law uses well-developed comparative legal analysis in a careful and mature way.

Looking to the future of mixed jurisdictions and, in general, to the future of all legal systems, I am sure that the global village we live in will induce more mutual influence between legal systems. I believe that the mutual impact between legal traditions will be enhanced, not only by the

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<sup>34</sup> Rivlin, *supra* note 13 at 3. Reference to foreign law is first and foremost conditioned upon a willingness to turn to foreign legal systems.

ease of communication between legal scholars and judges around the world, but also by the fact that we are currently faced with common global challenges that will require various legal systems to work together. These challenges include cross-border internet business, the activity of global corporations and the complexities that these corporations present, world-wide environmental issues, and international refugee problems. Challenges like these will likely induce co-operation between countries and encourage the mixture of legal systems, so that our mixed history will be carried into the future.

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