# Justice Rubinstein Discusses the Israel Supreme Court

[What follows is an edited transcript of a roundtable discussion held at the Cardozo School of Law limited to the remarks by Justice Elyakim Rubinstein. The full transcript is published as *Judicial Review, A Comparative Perspective: Israel, Canada, and the United States*, 31 Cardozo L. Rev. 2393 (2010)]

## 1. Judicial Selection

Let me begin with a few words about our judicial system. The Israeli judicial system has three layers of courts: magistrate courts, district courts, and the Supreme Court. It is, in this respect, a unified system. There are six district courts in the various areas of the country, and there are numerous magistrate courts. The magistrate courts deal with criminal and civil matters up to a certain level stipulated by the law, and the family courts are part of them too. Matters beyond that fall under the jurisdiction of the district courts, which also serve as administrative courts (in certain types of cases against government authorities stipulated by the law), and as appellate courts on judgments of the magistrate courts. The Supreme Court serves as a Court of Appeal on judgments of the district courts, in criminal, civil, and administrative matters, and as a Court of original jurisdiction in general administrative matters (known as High Court of Justice cases), and also as a Constitutional Court, dealing with judicial review issues. Israel does not have a full-fledged constitution, but there are Basic Laws which have been recognized as constitutional texts, relying also on the Declaration of Independence of the State of Israel.

I should add that there are also labor courts, military courts, and religious courts of the various denominations (dealing mainly--but not exclusively--with marriage and divorce). All are, in different ways, subject to supervision of the Supreme Court, mainly as a High Court of Justice.

The committee for the appointment of judges, now called the "selection committee," was established in 1953 and has been generally commended--and, I think, even with some shortcomings, that it was rightly praised, and that it is almost as good a system as one could hope for. It consists of nine members-- five professionals and four politicians. There are two Knesset members (one traditionally comes from the opposition) and two ministers--the committee is chaired by the Minister of Justice, which is very important because he or she controls the convening of the meetings. The five professionals are three Justices of our Court (who include the President of the Supreme Court and two others who rotate on a three-year basis, and who are elected by seniority within the Court) and two Bar Association representatives. One should remember that when it was established it was perceived as a very important achievement compared to places where the Parliament or the political system is exclusively involved in the appointment of judges, such as in the United States. Indeed, the three Justices of the Supreme Court constitute an important part of the committee, but that doesn't mean they control the committee. I should add that there is a process of screening by sub-committees--each consists of one Justice, one Knesset member, and one Bar Association representative--who also interview the candidates for judicial appointments.

In my view, the best proof of the system's quality and reasonableness is the fact that, historically,

there has been a consensus that the judiciary has been a success story in terms of the quality of its members and decisions. Of course, some criticize it. But basically, it has been a good system. Now the question is, what are the alternatives? We have a good judiciary--professional and honest. It is not perfect. But it has been a success story. It would be a pity if it became politicized, by--for instance--changing the balance in the selection committee, as some suggest.

. . . . Since I will become kind of the defender of our system here, with my two colleagues having different views, let me just add as an informational point, that the candidates have been suggested either by the Minister of Justice or by the Chief Justice or by any three members of the committee.

This used to be a secret and also the names of the candidates. Now this has been amended. Now the names are made public thirty days before the committee convenes. So anybody who has anything to say can do so before the appointment. For instance, when I was appointed, there were people who wrote to the committee. The committee sent me the material and asked me to comment on it. The best proof, I think, that the system is not "controlled" by the Justices, although they do have a very important weight, is that Minister Friedmann has been able to appoint two practicing lawyers from the private sector to the Court, which was unprecedented, except for during the very beginning of the Court.

[I]n my book, *Judges of the Country*, which came out back in 1980, I praised our system for selecting judges (including Supreme Court Justices) through a selection committee, which had been introduced, as I mentioned before, via legislation in 1953 as an original Israeli contribution. It is a balanced system, giving the non-political people the majority within the nine-person committee, while the four political members are the minority. I do not think a change is necessary; I still believe that the system is fine.

**2. Scope of Review**

I envy the U.S. and the Canadian systems. Eighty cases a year is great. We in the Israeli Supreme Court are like latter day slaves. Except for not actually having a chain on my leg, my colleagues and I are basically in that situation. Last year we finished with over 11,000 cases. We are at this point twelve Justices. We could be up to fifteen, but there was haggling and controversy and then elections, so there were no appointments in the last year, year-and-a-half.[27] We sit basically in panels of three, which is the regular rule. That is in criminal, civil, or administrative law cases. In most of the cases we do not have the option of not taking them because they are appeals from the district courts on criminal or civil or administrative law cases which started there, and which we have to take. There are cases heard in a one-person panel, mainly detentions, injunctions, and leave requests. We have Justices on Call, two each month, and they take many cases which are detentions, injunctions, or stays, and a major part of their work is a one-person panel. Since legislation passed back in 1996, every detention case can be brought by right, not by leave, to the Supreme Court. Of course, not all of them are brought, but many are. So, for instance, I was Justice on Call in December 2008 and then in March 2009; for the two months together, I had to conduct over 150 hearings in detention cases. Many of them shouldn't be on the docket of the Supreme Court, but they are there by law. That is besides the regular workload done in the panels of three. We sit in bigger panels in matters of special importance, usually the three

original Justices and whoever has been added. The composition of the larger panel is decided by the President of the Court or her deputy. So in such cases, the panel could be enlarged to five, seven, nine, or even eleven or thirteen if it's a constitutional case. Constitutional cases, in the last fourteen years, have always been decided by large panels. I will come to them later.

We do have partial discretion in deciding whether to take certain cases--it is very limited. That is in the request for leave if a case has already gone through the two levels of law courts--magistrate and district courts. But if it began in the district court, we don't have the option to deny a hearing. And, unlike the American tradition, for instance, where the Supreme Court writes "cert denied" without further explanation, in our system the tradition is that you explain why you do not grant leave. This decision is not a precedent, but many lawyers use it in later cases as if it were.

The leave request is dealt with by one Justice. If the Justice thinks it is worth bringing to a hearing, he will refer it to a panel. I myself deal with many leave requests as a third layer in civil cases, and most of them are rejected but with an explanation.

The most prominent issues in the public eye are of the Supreme Court sitting as the High Court of Justice, known as Bagatz (Beit Mishpat Gavo'ha Le'Tzedek). These are administrative law issues of original jurisdiction coming to the Supreme Court. Over the years, the request for standing or locus standi was abolished by judicial decisions. When I was in law school, in the late 1960s--ancient history--we were taught that you are supposed to show standing when you want to bring a case to the High Court of Justice. Over the years, for various reasons, including the wish to give the public better access to the Court in administrative matters, and also to provide access to Palestinians from the territories administered by Israel, the Court has basically abolished the "standing" requirement.

The High Court of Justice cases come first to the Justice on Call. He or she will decide whether to request--and usually does request--a response from the relevant government agency, and they respond. Sometimes it's urgent, certainly in human rights issues. Urgent cases could be heard even on the same day or the next day. Sometimes I'm called by the Court registrar, asking if I can sit at six in the afternoon that very day on a panel. In some cases, though, we would decide that there is no justification for a hearing and we would dismiss the case by a three Justices panel written decision. The "regular" cases are brought to a hearing.

The Court has been criticized for judicial activism. Let me say that having served, inter alia, as attorney general, government secretary, and legal adviser to two ministries, that in having been for many years in government positions, I expressed my views on it in former incarnations and I can say it now also as a Justice of the Court. From the public point of view of better government, if you balance between the huge volume of cases which the Court took and decided on one hand, and the controversial issues for which it is criticized on the other hand, I have no doubt that the benefit to the public over the years by the Court is by far greater than the controversy on some issues which sometimes I myself would have thought could be approached otherwise. To sum up: The Court's work is indeed very heavy, and it could be reduced by legislation. But it is not the "judicial activism" which creates the problem. And indeed, many of the Court's critics are themselves submitting High Court petitions to it time and again. Finally, . . . I have been a

supporter--in fact, an enthusiast--for many years of the existing appointments system. In fact, as I mentioned before, I was one of the first to write on it in 1980 in Judges of the Country, the first book written--I believe--on the history of our Court.

**3. Direct Review by the High Court: Israel's Unique Process**

The High Court of Justice cases are original jurisdiction and they're brought right to the Supreme Court. There are some administrative law cases which go first to the district courts in their administrative capacity. But the basic High Court of Justice original jurisdiction is widely used. One of the Justices once wrote that a new custom has emerged--somebody reads a newspaper article and says "oh, come on, let's go up to Zion and I'll put in a petition." But many cases are of importance, and render a great service to the public, to which I can attest--as I mentioned before--as a former government civil servant. I should add, though, that some of the High Court petitions concern decisions of religious courts or labor courts, where there is no appeal to the Supreme Court. The judicial policy of intervention in these cases is very restrained. . . .

I will just give you an example. Recently, during the Gaza operation (in December 2008-January 2009), there were four petitions to the Court relating to the military operations. By chance I sat on all four of them (the panel is randomly decided). Like in other cases, there was a dialogue in the courtroom between the government and the Court about whether some of the government modes of behavior on a certain issue would be modified or improved. Those petitions related to humanitarian supplies, medical assistance, access to the media, and even the conduct of elections in one of the Israeli towns adjacent to the Gaza area. So it's common practice. …

**4. The Legitimacy of Judicial Review in Israel**

Whoever reads the text of the two Basic Laws that have been the basis of the Israeli equivalent of *Marbury v. Madison*, called *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, decided in 1995, can identify that they include a constitutional power of judicial review, even if it is not stated explicitly, just as happened with the U.S. Constitution. The text, in my view, is clear. You just have to read the limitation clause. On June 13, 1950, two years after our independence, the Knesset decided that instead of promulgating a full-fledged constitution, we should enact Basic Laws, that would finally be incorporated into a constitution. The first nine Basic Laws were mainly on government branches--legislative, executive, judicial--as well as on Jerusalem as our capital. The last two, enacted in 1992, are Human Dignity and Liberty and the Freedom of Occupation. The limitation clause says, "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." What does that mean in simple words for any jurist, with all due respect to the Knesset? It means that laws could be examined through the lenses of the limitation clause. I would have definitely preferred that . . . the constitutional laws should be accepted in a ceremonial way. . . . But this is not what happened, and the two Basic Laws on human and civil rights were accepted. What do you do? Obviously, they must be applied and interpreted. Who interprets any law? This is the role of the Court. And if a law affects rights and is not in conformity with the Basic Laws, it cannot stand. Here is the foundation of judicial review. The Knesset wrote it into a legal text, a constitutional law, a Basic Law. Who is going to interpret it? It's the court of law. While I can argue with this or that decision of President Barak,

a great jurist, I would never agree [that there has been judicial] usurpation. Judicial review was accepted in the [*Bank Mizrahi*] case by a nine-Justice panel, including retiring President Shamgar, who is not known necessarily as an "activist," and President Barak, who was just coming in as President.

My bottom line is simple: The Knesset may not have thought of it in constitutional terms the way it should have, but what it gave us, what it produced, is a constitutional text. And when it produced a constitutional text, which clearly refers to the examination of laws per their content, judicial review, which has had origins even before, was definitely proclaimed--not by the Court, but by the Knesset.

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**5. Criticisms of the Court**

Unlike the United States or Canada, our country is still coping with existential problems, and this is besides the internal problems between Jews and Arabs, religious and non-religious Jews, and left and right. And the complexity of all of that must be borne in mind when you come to review the work of the Court.

Israel is a Jewish and democratic State. It is so defined in the two Basic Laws on human rights promulgated in 1992, the Basic Law of Human Dignity and Liberty and the Basic Law of Freedom of Occupation. In the Declaration of Independence of 1948 it was proclaimed as a Jewish State, but it was democratic from the beginning. Indeed, the Jewish population in the pre-state period had democratic institutions, sometimes named "state-on-the-way" or "state-in-the-making." And the democratic principles are explicitly embedded in the Declaration of Independence, which serves in the Basic Laws of 1992 as a statutory-constitutional source of interpretation. Beyond that, a democratic state is relatively easy to define. What is a Jewish State is of course very complex, very difficult from many aspects.

The Supreme Court was established in the beginning of the State of Israel and it had to cope for its status in those days. The gap that existed between the first generation of the Justices and the government was great. For the first fifteen years of independence, David Ben-Gurion, the founding father, was at the helm while the Court had to establish its place, being composed of important lawyers and scholars, but not at all publicly recognized or well-known. But it did a marvelous job, as even in those days it dealt with cases concerning human and civil rights, including the freedom of expression, the situation of Israeli Arabs, etc., and had the courage to face the government and insist on those rights. The Court became the guardian of human rights before any legislation. In 1992, the two Basic Laws dealing with civil rights were promulgated--raising rights proclaimed by the Court to a constitutional level. Based on these, the Court in 1995 established its power of judicial review, in *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*. I believe it was a very proper decision, even if the Knesset made a mistake from its point of view, or did not pay attention to the meaning of its legislative act. It is too late to change today, and the Knesset will not do it, in my view. But the application of judicial review has been very meager, in a few cases, most of them really matters which are not at the center of public interest. The Court has shown great restraint in constitutional judicial review, and I do not think

anybody could argue about that.

Other than constitutional questions, we constantly look at humanitarian problems, which are within the regular work of the Court. Civil and human rights are high up on our docket. The Court has tried to balance between the need for erecting the security fence between Israel and the Palestinian Authority territories to protect our population from murderous terrorism, and the difficulties that it created to non-combatant Palestinians, passage to their fields, and the like. So what the Court did was to insert changes in the route of the fence that would enable easier movement for Palestinians. There is no Guantanamo in Israel, but cases of the Guantanamo type would have come to our Court in a matter of days, and would be decided quickly.

Indeed, you could argue that this or that case should or should not have been taken by the Court. I would like to repeat, and this is something which is said responsibly, and I myself have been a student of the Court for many years--at the end of the day, the involvement of the Court has had a very positive effect on our government and its quality. The Court has decided many times on questions of inequality of Israeli Arabs, on improper government appointments, budgeting inequality, and inequality in general. Personally, I support these decisions.

I support, for instance, going into appointments issues because in such cases, you help the government to avoid appointing people whose backgrounds demonstrate that they could not serve the public. It usually has to be not just unreasonable, but extremely unreasonable, for the Court to interfere. “Extremely unreasonable” means that no honest government could appoint this person to that particular job. All such decisions are transparent and available for any criticism.

Two last words, one about President Barak. Barak has been attacked here. He is not here. Barak is a great jurist; in my view, he’s in a league by himself. He is not only that. He was a great judge. He could make mistakes. All of us can make mistakes. I think that demonizing his work in a way is unfair to him. I was in a minority against his view in certain cases when we sat together. Barak has been a judicial leader, but he has also been part of a group. He has contributed a lot to the State of Israel. He is one of the most respected and recognized jurists in the world. He has earned his proper place in history.

Criticism of the Court is legitimate. It is an integral part of the democratic discourse and the democratic discussion. The dialogue between branches of government is vital; so is the media debate. The problem lies elsewhere--it lies with the effort to delegitimize the Court by certain circles. By portraying the Court--a hard-working professional institution which renders an important service to the country and to the public--sometimes as a power-mongering group of people, sometimes as a corrupt body, the confidence of various segments of the Israeli society is being eroded. That is highly unfortunate. The Court will in any way continue its work to the best of its abilities and carry the load. It may make mistakes--who doesn’t--but definitely its existence is vital for the State and its citizens, for human rights, and for civil rights. I am proud to be part of it.

Finally, the institution of the Attorney General of Israel was mentioned. Having served in this position for almost seven years, let me add that the convention according to which the

government and all its agencies on all levels are bound by the legal opinions of the Attorney General (subject to judicial scrutiny) has proven itself in preventing irresponsible and illegal decisions and actions, not to mention (not too often, of course) corruption.