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## SOURCES AND TENDENCIES OF ISRAEL LAW

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### I.

It has been said that Israel is the land of discrepancies. It might equally be said that present Israel law is the law of discrepancies. And if the essential object of the state of Israel is *kibbutz galuiot*—the ingathering of the dispersed—the very same object also forms the goal of Israel law.

This analogy between the state and its law appears justified not only by the similarity of facts as they present themselves to the empirical observer, but also on general principle: the law of a country is rightly looked upon as one of the aspects of the state as a whole, and is supposed to reflect its character and its social, cultural and political trends. Some knowledge of time, country and people is, therefore, indispensable even to a superficial review of any given system of law and to a first understanding of its tendencies. It is for this reason that I may be allowed to make a few remarks on Israel before dealing with Israel law.

### II.

Israel is a people. It is an old people, one of the oldest on earth. And although its history is long and complex, its memory of the past is vivid and long ago events, such as the Exodus from Egypt or the giving of the Law on Mount Sinai, are still vivid in the Jewish mind. The fight of David and Goliath is to this day a living memory in a people which did not cease to re-tell it during the centuries of dispersal and has just now been fighting the battle of national liberation on the very slopes on which their ancestors faced the Philistines.

This people was endowed with the strange faculty to preserve its ethnical entity during almost 2000 years of dispersal all over the world.

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When, some 50 years ago, it started to return to its original homeland, it was still one people, having one god and one bible and common notions of good and evil. But it had come to share an almost infinite variety of languages, habits, social conceptions, types of education, standards of living and also of physical outlook and mental capacity. The discrepancies between Jewish immigrants from America, Yemen, Poland, Tripolitania, South Africa, Turkey, Italy, etc., are as great as they are diversified.

Against this loss in uniformity and homogeneity stands the gain in experience and knowledge. Every group of immigrants bring with them the best which they acquired from the culture, art and science, from technical, economic and political learning of the various countries in which they had been living. It is the old people that returns, but it is a people enriched by the mental wealth of twenty centuries and of sixty countries. Of the promise given to Abraham (*Genesis* 15; 13-14) “. . . thy seed shall be a stranger in a land that is not theirs, and shall serve them; and they shall afflict them four hundred years; . . . and afterwards shall they come out with great substance”, not only the first but also the second part has come true.

This is the People of Israel. The other aspect of Israel is the country: the Land of Israel, that small stretch of land on the shore of the Mediterranean, so tiny and insignificant if looked at from Pennsylvania, so great and mysterious if looked at from within. Like the people, it is old. It reminds you of its long and variegated history wherever you stay or go. And like the people of Israel it is, at present, full of discrepancies: from the abundant water resources at the foot of Mt. Hermon to the rigid, moistless desert in the South; from the ancient wooden plough to the motorized combine; from the bedouin's tent to the luxurious running water-central heating-radio-television flat; from the mule to the De Soto Super de luxe; from the shepherds flute to the philharmonic symphony orchestra; from the traditional Talmud-Thora school to the Weizmann Institute of Science.

The re-constitution of the people of Israel in the land of Israel is the process called *kibbutz galuiot*, i.e., ingathering of the dispersed. It means many things of which the outstanding are these: (1) concentration within the territory of Israel of the greatest possible number of Jews from wherever they may be ready and able to come; (2) the integration of the various immigrants, together with the Arab inhabitants of the country, into a homogenous, progressive nation; (3) the revival of the land and its development into a modern, democratic, prosperous country.

The *kibbutz galuioi* began when the country was part of the Ottoman empire. It continued during the period when Palestine was a mandated territory with great Britain as the mandatory power (until 1948). Now, since people and land have become an independent state, it progresses with a speed and a volume manyfold increased.

Such in short is both the background and the outlook of Israel law.

### III.

Is there such a thing as Israel law? What a strange question! Who would think of asking whether there is an English, an American, a Dutch, a Russian law? The above remarks should, however, be enough to show that with regard to Israel the question may well be asked. In fact, it must be put most earnestly, and the answer is not at all an easy one.

If by "Israel law" an autonomous, unified law of the state of Israel is meant, the answer must be in the negative. The law applied in the Israel courts is a conglomeration of most heterogenous pieces.

If, on the other hand, "Israel law" is intended to mean the national law of the Jewish people, irrespective of its present applicability in the civil courts, well, there is such a law, and a very comprehensive and elaborate system of law it is. It dates back from before the times of the bible, and its basic rules are embodied in that eternal book. It had its natural growth as a body of a living nation's law during the centuries when the nation led its normal, political life. Shortly after that period (150-200 A.D.), the fundamental code called *Mishna* came into existence on Palestinian soil. Jewish law further developed during the first centuries of the diaspora when large Jewish communities were still able to maintain considerable autonomy. It was then that the painstaking discussions on the provisions of the *Mishna* and their further elaboration by leading scholars took place and were laid down, both in Palestine (350-400 A.D.) and at Babylon (400-500 A.D.), in the voluminous compilation known as the Talmud.

When further restrictions were imposed on Jewish life and thought, stifling the dispersed nation's breath, the law became rigid and stagnant; it almost lost its vitality, and the great Maimonides, in his systematic exposition of the law, the *Mishne Torah* (circa 1180 A.D.), was recapitulating and rearranging rather than developing or modernizing the law. The same is true of Joseph Karo's *Shulchan Aruch*, composed circa 1560 A.D. at Safad (Palestine), which is the leading source of Jewish law right down to the present day. Since then, *i.e.*, during the last four centuries, a considerable volume of commentaries,

remarks, questions and answers and the like have been written on the rules laid down in the *Schulchan Aruch*, but new provisions, let alone amendments or reforms, have been few and limited.

It is for these reasons—directly connected with the general history of the Jewish people—that the Jewish law is today to a certain extent antiquated. Although based on the great moral conceptions of legislators and prophets, such as Moses and Yesaiah, and containing a wealth of rules second in justice and equity to no other body of law and in many respects strikingly similar to modern ideas and systems, it is fraught with particulars that have long lost their practical meaning, and there are a number of rules, some of them relevant enough, which are unacceptable to modern thought and unfit to meet the exigencies of a progressive community in the middle of the 20th century.

Today this Jewish law is prevailing in Israel only with regard to matters of personal status, such as marriage, divorce, alimony, wills, and succession, and only insofar as Palestinian Jews are concerned. In all other matters and for all other persons, the Jewish law does not at present belong to the body of law applied by the courts of Israel.

#### IV.

What body of law do the courts apply, and what are its sources? It is strangely patterned and drawn from most different and divergent sources.

One part is made up of Ottoman laws which had been in force in 1914, *i. e.* before the country was occupied by the English during World War I. The Ottoman legislator based his enactments partly on Moslem law (originally laid down in the *Koran*), partly on Arab feudal custom and partly on modern codes of the West, especially the French, occasionally also the German. These Ottoman laws are still in force in Israel with regard to many subjects of civil law, most matters of land law, the execution of judgments and various sundry topics.

The second layer of law is that which the mandatory (English) government introduced. It includes a great number of Ordinances, mostly based upon English law and many of them almost identical with the corresponding Acts of Parliament. Besides a bulk of administrative law, these Ordinances cover the whole ground of commercial law, criminal law, criminal and civil procedure, the law of torts, some labour legislation and many special subjects such as municipal corporations, land settlement, arbitration, etc.

In addition to this local statute law, the mandatory constitution brought to Palestine "the substance of the common law, and the doc-

trines of equity in force in England" which were to apply wherever the statutory (Ottoman or Palestinian) law was lacking or incomplete.

These various segments would represent a complete, though haphazard, body of law, were it not for the matters of personal status (comprising roughly what may be classified as family law and law of succession). In these matters there is a total absence of local civil law; they are governed by religious or foreign law according to the religious community to which the parties belong (if they are not foreigners) or to the foreign country of which they are nationals.

## V.

This was, broadly speaking, the position when the Jewish state came into being. It is, on the whole, still the position today. The only provisions which were immediately and specifically repealed were those directed against Jewish immigration and against the transfer of land to Jews. Except for these few—though politically most important—provisions, the Israel legislature took over *hobus hobus* what the law was in Palestine on the eve of the Mandate. Section 11 of the Law and Administration Ordinance, No. 1 of 1948 (the first enactment of the Israel legislation) accordingly provides:

"The law which existed in Palestine on the 5th day of Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."

The laws enacted in Israel during these 2½ years since Independence Day very little affect the civil, criminal or procedural law. They are mostly concerned with matters of constitutional, administrative and fiscal law. First of all, the central democratic organism of the new state (which hitherto had been a colonial territory under foreign, bureaucratic rule) had to be established and its powers and functions defined. The next step was to create the legal framework for the Israel army, including navy and air force. Shortly thereafter, both in time and importance, came the law of compulsory free education. Urgent financial and economic problems which had to be dealt with by the legislator were the new currency; public loans; treasury bills; the administration of the derelict Arab property; luxury, succession and other taxes; the encouragement of industrial and other investments by foreign and local capital; the establishment of special courts for fighting black market and profiteering, and so on.

It is not the purpose of this paper to give a complete review of this new legislation, nor to summarize its contents or to describe the technical process of law-making in Israel. It is, however, intended to give some indications of the basic trends and the general tendencies of this legislation.

## VI.

Such indications must necessarily be of a tentative character and so much so for two reasons: the first is that Israel has as yet no constitution. The question whether or not it should have one, is controversial, and after lengthy debates both in the committee and the plenary of the Knesset (the Israel one-chamber Parliament) a compromise resolution was passed some months ago on this preliminary issue. Whatever may be said about the desirability of having a written constitution (in the continental and American sense of the word), the fact is that at present—and probably for some time to come—there is no such constitution, and there is, therefore, in Israel no basic enactment containing general principles by which existing legislation could be scrutinized or the trend of the future predicted.

The second reason for making difficult any generalization of present or future law, is the fact that Israel's social, economic and cultural conceptions are still far from being consolidated. Indeed, this lack of consolidation is one of the main arguments against the enactment, at this juncture, of any, even a flexible, constitution. At the same time it may be said to be one of the typical features of the present legislation. The provisions concerning the Knesset may serve as an illustration. Not only are they contained in laws of the same constitutional degree as all other laws, and are open to amendment or derogation at any time by further laws passed in the ordinary way by simple majority, but they are confined to those very few matters which it was inevitable to lay down at the time of their enactment. Such important questions as the term of the Knesset's office or the right, if any, of the President or the Prime Minister to dissolve it, are as yet not settled at all. In the recent government crisis, the absence of provisions on these matters was strongly felt.

Not by chance are these and other important things still in a somewhat incomplete and temporary state. There is a clear tendency to postpone the permanent legislative settlement of political and cultural issues; there is a marked reluctance to pass laws which might prove prejudicial to the free play of convictions and ideas during this initial stage of the Jewish state.

Other states, newly emerged out of the struggle for national independence, have acted otherwise. They hurried solemnly to declare their ideas on government, public finance, national economy and the like, and endeavored, at the earliest moment, definitely to lay down these matters in a comprehensive constitution and in detailed laws. Israel could not go this way. In a country whose population is increasing so rapidly (790,000 inhabitants on November 30th, 1948—1,300,000 on September 30th, 1950) and whose very essence lies in its future rather than in its present composition, it would be premature and might easily become detrimental if legislative decisions on vital matters were taken too early. In spite of the deficiencies actually connected with this intentional absence of determination and the potential dangers involved in it for constitutional stability and the rule of law, no other policy is, at this period, feasible. Indeed, the pursuit of such a policy seems an almost logical necessity in view of the overriding principle of *kibbutz galuiot*.

Another instance of this trend of postponement may be found in the question of nationality. Israel nationality is still undefined by law. Elections to the Knesset have to be held on the basis of residence instead of citizenship, and inhabitants of Israel who would be eligible for Israel nationality under whatever nationality law might be adopted, have still to travel abroad on *laissez-passers* instead of national passports. No intrinsic obstacle appears to exist for defining the status of Israel nationality and the ways in which it may be acquired or lost. If the submission of the draft law to the Knesset was nevertheless time and again postponed (the draft was laid before the house some months ago and is now in the committee stage), the main reason was the desire to delay the decision on this fundamental issue lest it might prejudicially affect the influx of immigrants or their legal position either here or in their countries of origin.

In this respect *kibbutz galuiot* may be said to have a negative, at least a delaying effect, on Israel law. But its positive, stimulating effect is, of course, by far the greater.

## VII.

Here first of all the Law of Return has to be mentioned. This law which was passed by the Knesset at this year's anniversary of Theodor Herzl's death, provides: "Every Jew has the right to enter the country as an *Oleh*" (*oleh* is the Hebrew word for a Jew immigrating to Palestine, its meaning being similar to that of "re-patriate"). Short as this section is, it implies, in a nut-shell, why this state had to be established

and what it stands for. It is the legal expression of the idea that the State of Israel is not an affair of those who live in it at any given moment, but of the Jewish people as a whole. It signifies the tie by which those Jews who are still in the diaspora are presently connected with Israel. It confers upon every one of them the legal right—deniable only in a few exactly specified cases and enforceable against the Israel authorities in the Israel courts of law—to come to this country and to settle there.

This fundamental idea has its corollary in the central provision of the above mentioned draft nationality law. It reads: "Every *Oleh* under the Law of Return shall become an Israel national". This clause, if enacted as proposed, will confer Israel nationality upon every Jewish immigrant the moment he enters the country. No application or declaration will be needed, nor will the acquisition of nationality be dependent upon the fulfilment of any conditions or the lapse of any period of residence. Here again the Ingathering of the Dispersed and the assimilation, at the earliest possible moment, of the newcomer with the settler of long standing was the guiding principle for the Israel legislator. At the same time, the process of ingathering is not a compulsory one: just as no Jew living abroad is compelled to make use of his right under the Law of Return, thus the immigrant is not forceably made an Israel national; the draft gives the *Oleh* who is a foreign national a right of option to bring himself outside the scope of the provision for automatic acquisition of Israel nationality.

The next task after extending, so to say, a legal invitation to the Jews abroad and turning those who come to Israel into citizens of the state, is the installation of melting processes for the amalgamation of the different elements of Jewish immigration. Two main institutions, among others, serve this purpose: elementary education and military service. Accordingly, the Israel legislator gave his attention to these matters at a very early moment, and it is not at least owing to this "melting pot policy" that compulsory, free education was fixed from the outset at so large a range as the ages from 5 to 14, and that the military training imposed by law is compulsory, applies to men and women alike and extends over a full period of two years.

The *immediate* objectives then are education, defense and security, but in a country which has the task of welding settlers from all over the world into a uniform, unitary nation, these mean more and their aim is wider. American readers will easily appreciate this particular aspect of *kibbutz galvot*. Indeed so pressing is the need for developing these processes of social unification that the economic revival and de-

velopment of the country, dominant as it is in the state's political and budgetary activities, has thus far but little occupied the legislature. The above mentioned law for the Encouragement of Investments belongs to this category, as does the recent Development Authority (Transfer of Property) Law. But these deal with investments and development from the fiscal and administrative point of view. Substantive economic legislation on matters such as agriculture, water sources and the like, is still outstanding.

### VIII.

The elimination of backward rules and their replacement by modern provisions forms the ultimate object of those few enactments as have so far been initiated in the realms of criminal and of civil law.

With regard to penology, the first step of the Israel legislator was the abolition of whipping which had been provided for in some regulations of the mandatory period. Jewish thought and public opinion revolted against this way of enforcing the criminal law and considered it a relic of the past unworthy of being maintained in modern society. It may be noted that this reform is in line with the recent resolution of the United Nations' trusteeship council calling for the abolition of corporal punishment.

Then there is the problem of capital punishment. A government bill is now before the Knesset providing for the abolition of the death penalty in all cases except treason committed in times of emergency. Here, issues are complicated. On the one hand, modern criminology and practice is divided and oscillating; on the other hand, traditional Jewish ideas are conflicting on the justification of the supreme penalty and on the safeguards which the law ought to provide against imposing it. Moreover, different groups of immigrants look at a problem like this from different angles, and factors such as that of deterrence weigh differently with people of different education, habits and social traditions. The fate of the bill is, accordingly, uncertain, and the final vote on it will possibly, for reasons indicated above, not be taken for some time to come.

In the sphere of civil law there is again one law already enacted and another in a preliminary stage. Both are concerned with matters of personal status in which the state has a vital, immediate interest. The first is the Marriage Age Law. It fixes the minimum age at which a woman may marry at 17. Marriages at an earlier age have been, and still are, customary in some quarters of the population, and in particular among the local Arabs (who are either Christian or Moslem) and

among the odd 50,000 Yemenite Jews who came to the country during the last year. Thus, ancient custom, both among inhabitants of long standing and recently arrived immigrants, collided with modern conceptions, and the latter had the day.

This law is the first direct interference by the new legislation in a matter which until then had been exclusively within the jurisdiction of the several religious communities. A more important step in this direction will be the enactment of what is at present the proposal for a Law of Equal Rights of Women. It tends to remove such discriminations against women in general and against wives, daughters and mothers in particular, as are contained with regard to alimony, succession, etc. in some of the religious laws which are applied in these matters by the Israel courts.

If enacted, this law will help to unify some important matters which, being governed by religious law, are up to now dealt with differently in accordance to the religious belief of the parties concerned. Instead of rules rooted in ancient, religious convictions, it will introduce secular rules of a modern character, providing, *inter alia*, for father and mother to be equally liable for maintaining, and to be the joint guardians of, their children. With regard to Jewish law in particular, this law will dispose of some of the main deficiencies (such as the exclusion of daughters from succession whenever there are sons) which are incompatible with modern legal and social views; it will, therefore, smooth the path for the revival of Jewish law and its introduction into the law, especially the civil law, of Israel.

## IX.

The re-vitalisation of Jewish law is closely connected with the re-constitution of the Jewish nation as a whole; the problems and aims of both are similar, and similar also are the two ways in which they are proceeding: renewal and modernisation of the nation's own assets and their improvement by the spiritual wealth of others. This double process which an old Hebrew saying describes as "the bringing of Japhet's splendour into the tent of Sam" has been indicated in the above remarks with regard to the people of Israel. It is the same with the law of Israel. In form as well as in substance, in language as well as in contents, the Israel law will—where ancient tradition is adaptable to modern legal and social thought—be a continuation of the old Jewish law, amplified and enriched by the reception of whatever will prove suitable for Israel from among the ideas, models and experience of other countries.

For the Jews, this process of law-making will not be an artificial method of election and compilation—as it might be if undertaken by

others—but an organic outcome of their particular fate. The future Israel law will reflect the impact of the ages of dispersal on original Jewish thought. Thus it will be one of the expressions of the Ingathering of the Dispersed. And as the future becomes past, it will in turn be an important contributing factor to unification, integration and development and thereby play its part in carrying forward the great aim of "*kibbutz galuot*."