LEGAL PHILOSOPHY
5 QUESTIONS

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Why were you initially drawn to the philosophy of law?

My initial attraction to the philosophy of law was quick, strong and came very naturally. Unlike some of my friends in legal philosophy, I have always liked the law both as an academic discipline and as a professional calling. I enjoyed its intellectual challenges and the fact that it could be a tool for changing society for the better. Philosophy on the other hand was the way to make sense of things, to explore their meaning and presuppositions. Straight thinking is not a guarantee of quality and truth, but it helps. In addition, the broader conception of philosophy as a guide to the good and meaningful life was very enticing. I grew up in a tradition in which analytical philosophy and grander visions of the discipline had an uneasy coexistence. I was initiated into a great respect for logic, truth, and analysis, tempered by the understanding that what really mattered were the good life and our contribution to it.

So the inclination was natural. I got the last push in that direction by a course in legal philosophy offered by Joseph Raz who had just returned to the Hebrew University after completing his doctoral thesis on "The Concept of a Legal System" under the supervision of H.L.A. Hart in Oxford. I have found the way Raz taught us to think about law, its nature and its functions, truly transformative. I had a feeling I finally discovered the attitude and the tools needed to think about the law. Defining my field as that of legal philosophy seemed an obvious choice. When I acquired a degree in philosophy my feeling of homecoming was complete.

However, I soon realized that the philosophy of law proper – thinking hard about the nature of law – was not the exclusive center of my interest. I retained my sense that clarity of thought

and attention to arguments and the avoidance of muddles were critical. I kept teaching legal theory and I still believe that it is a course of great importance to all lawyers. But I moved towards thinking and writing about issues in which law and its nature always featured, but never exhausted the thrust of the work. As time passed, it became harder for me to see myself as a philosopher of law (or to see myself as a clear player in any other field of legal academics).

In fact, the doubt started with my DPhil dissertation. My plan was to write about the relationships between validity and existence of legal norms (an issue which I still find intriguing, at the heart of legal philosophy). I recall coming to H.L.A. Hart's messy room in University College for the first of many meetings. He listened carefully to my presentation, and said this was indeed an important subject; he himself had written a bit about it; but did I really think it could capture my interest and imagination for the length of time it would take to write a dissertation? I was slightly puzzled, but (too quickly) replied in the affirmative. I went off happily to read Austin and Kelsen and Hart and Raz on validity and existence, writing short papers and trying to structure a decent thesis. At the same time I was taking courses. Oxford was unbelievably exciting, and I enjoyed sampling the very rich diet of courses in philosophy which was offered there. In addition to Hart and Dworkin and Raz and Finnis and MacCormick on philosophy of law, there was a lot to listen to. Among other things I attended an eye-opening seminar by John Plamenatz on political philosophy. Towards the end of the term he was talking about the idea of privacy and the private-public distinction. Only then I finally understood what Hart had been trying to tell me. I was totally captivated by the richness and the depth of the subject. It intrigued me in many ways. I liked the fact that it raised issues from politics, philosophy, social theory, law and psychology all at once; that privacy was challenging at the level of conceptual analysis, but that it also had a relevant history and diverse functions.

I went back to Hart and asked to change my subject. Hart was very gracious. He in fact encouraged me and agreed that the new subject sounded richer and more satisfying. But, he said, he could not really supervise me on that one, because he knew nothing about it. I do not remember how I persuaded him to take the road with me, but he did. I will remain forever grateful for the model supervision he gave me, and for the generous way in

which he introduced me to thinking about the law within broader perspectives.

In addition, while struggling to define my 'field' in academics, I have always invested a lot of time, energy, and thought to activities in the public sphere. I have been a human rights activist (spent 25 years helping to found and build Israel's Association for Civil Rights in Israel (ACRI)), and was engaged in various initiatives in Israel's civil society.

For which of your contribution(s) to legal philosophy so far would you like to be remembered, and why?

I like my work on various aspects of the idea of privacy and its justification, the private-public distinction and the legal protection of privacy. I am glad these works are cited and hope they will be read in the future as well. I believe privacy is a rich, complex and important idea(l), which is misunderstood and under-rated in some western democracies. These works do raise some very central questions of legal philosophy, such as the limits of law and the need to distinguish the question whether some conduct or value is desirable and the very different question whether the conduct should be regulated, or the value be promoted, by law; and if so – should legislatures or courts be the ones making the primary decisions. The answer to these last questions does presuppose familiarity with the nature of law and its special features.

Closer to classic legal philosophy is my work on theories of adjudication, the role of courts, constitutionalism and the relationships of law and 'other things that matter', like morals, religion, politics and social change. I have been teaching these subjects and writing about them throughout my working life, with changing emphases. All of these presuppose some understanding of law, its nature and functions and unique characteristics, as compared to other social forces or normative systems. They further require a good grasp of the distinctions between law as a social practice characterized by a claimed normativity and a monopoly over the justified use of force in society on the one hand, and reflecting and theorizing about law as theoretical pursuits on the other.

But another sense of importance comes into the picture here. In my own country the contribution of these writings is on a different level. Israel (like some other countries) has been going in the last three decades through a process of 'legalization'. Law and the courts have become the remedies to all social ills and the last

arbiters of all controversies. They, through an expansive reading of the ideal of the 'rule of law', are seen as the last hope of enlightenment and decency. All issues of public importance end up in the courts. Many controversial issues are couched in terms of rights discourse and consequently are brought to the court so they can be decided by the 'forum of principle'.

The fascinating story of Israel's constitutional journey is too long to be told here. It must be read against the background of the tormented history of Israel and the challenges it has to face. What is relevant to our concerns here is that the struggle for the constitution and judicial review came to be seen as a struggle for liberalism and human rights against religion, Jewish particularism, and corrupt government. Some have even claimed that arguing against the necessity of a constitution and judicial review, or against judicial activism, was an attack on the very independence and the legitimacy of the court, the notions of democracy, and human rights.

Many of my works on these subjects have been written in the general context of these debates. I took a position against judicial activism, but in particular against the view that such activism was an inevitable consequence of an adequate analysis of law and adjudication. I sought to explain the central importance of human rights and judicial independence while at the same time stressing the dangers of expanding human rights and the role of courts and thereby impoverishing politics and threatening a central element of democracy. I insisted that we discuss the issues of Israel's constitutionalism on the merits, and not through slogans.

I do not expect a knock-out in these debates. They are eternal and immanent. I do hope that in Israel we can have a serious discussion of these issues that will go beyond claims that the very idea(l) of democracy, human rights and the rule of law either require or prohibit an entrenched constitution with judicial review.

Of special importance to me are the competing claims of law and religion(s). I have written extensively on the subject, in many contexts. Here, too, there is a tendency to argue that the only possible relationship between law and religion in a liberal democracy is that of American-type separation. I am pleased this view is losing some of its hegemony. I am even more pleased that the subjects connect with the distinction between 'private' and 'public'. Strong separation is in fact a claim that religion should be 'privatized'. I do not believe that religion (or ethnic affiliations) can or should be privatized, even if liberal democracies should indeed

stress the difference between the civic commitment to the constitution shared by all citizens, and the various affiliations that give individuals and communities their richer sense of identity. Both elements are essential for a stable liberal democracy. It must have a strong sense of a civic nation, one whose cementing 'public religion' is a civic solidarity. But a nation exhausted by its civic bonds will not last if all non-civic nature are privatized, in part because its members will be forced to come into the public sphere in an impoverished form. A civic constitution is critical precisely because we expect our society to recognize a public aspect to all aspects of our identities, including the ones in which we differ from each other. The public recognition of the differences – together with some basic culture and values shared by all citizens, including a commitment to democracy and human rights – is what gives strength and meaning to the shared civic framework which we all accept and within which we live.

Last, and related—my work on various aspects of the legal protection of human rights. I share the belief that the broad recognition of the idea(l) of human rights is one of the great achievements of the 20th century. However, in both my academic writings and in my public involvements I have insisted on distinguishing the promotion of human rights from partisan politics, and on the implication of this view—stressing the importance of giving human rights a 'thin' interpretation. I helped ACRI start an extensive litigation program, which has secured impressive achievements from Israel's Supreme Court. At the same time I have fought against the tendency of human rights groups to endorse one set of rights, or the rights of one group, and seek to promote them while ignoring the way this struggle affected conflicting rights, or the rights of others. My concern with this issue started with the conflict between privacy and free speech, went through the willingness of feminist activists to ignore rights of due process of men accused of abuse, and is now centered on the tragic conflict between Jews and Palestinians in which many on both sides claim their own right to national self-determination, while denying it to the other party. These stands resulted from a combination of my political commitments and my academic research. I developed them both in my academic writings and in my non-academic public statements. Working on both levels at the same time limited my contribution to each of them, but I hope it also made it more integrated. For me personally the constant feed back between academic work and public involvement was both challenging and enriching.

In sum, I hope these works will be read as contributions to the particular subjects with which they deal. I also hope that there will be a more general message that comes out of their totality: Law is an important public institution. A commitment to academic writing about the philosophy of law need not come with total detachment from one's society and its issues; one's commitment to academics, and to philosophy, should inspire both one's academic work and one's other pursuits. In one's public work, the academic virtues of knowledge, care, clear thinking and fair and valid reasoning should not be left aside. 'Politics' in the broad sense is a different vocation from 'science' in the same sense. But politics is better and deeper when it is inspired by the fruits and virtues of science. Philosophy is of course on the 'science' side of this divide. Less obvious but as important to me: Involvement with public issues is not only a burden in an academic commitment to thinking about law. It may inspire academic work and make it not only more relevant but also deeper and richer.

What are the most important issues in legal philosophy, and why are they distinctively issues of legal philosophy rather than some other discipline?

Let me put the question on its head, and start with the core of the philosophy of law in the strict sense. The basic question of the *nature of law* is the starting point of legal philosophy (I in fact prefer labeling the discipline 'philosophy of law', as in 'philosophy of science' or 'philosophy of history'. We would not call these fields 'historical' or 'scientific philosophy'?) I take it all will agree that this is a paradigmatic question for the philosophy of law, but some may argue that it is not in fact a very *important* issue in the field. They may say that dealing with definitions or conceptual analyses of law is just the kind of hairsplitting that gives analytical philosophy a bad name. I beg to differ.

True, I do not think any immediate theoretical or practical question depends on one's understanding of the nature of law. I also share Kelsen's view that there will never be a knock-out between positivism and natural law theories of law. Law is indeed both a social institution, with a strong factual element of power, and a system that claims authority and has a normative import built into it. Law is thus a complex phenomenon and any attempt to reduce conceptions of law in a way that will base it on just one of these tenets will fail. Which of these features we should emphasize in a given context is not something we can 'prove'. It has to

do with context, temperament and general outlook more than it has to do with the 'truth' of one's conception of law. It may also change for any one person with the context of her enquiry.

Nonetheless, here we return to one of the basic claims of both analytical and political philosophy: The very fact of the plurality of language, systems of meaning and conceptualizations, as well as of interests and deep visions of the good life mean that we must share both a conceptual framework and a political framework in order to advance our ability to discuss, understand, and act together without just talking and being past each other as strangers in the dark. This is true for law as well: understanding the debate about the nature of law and appreciating the different perspectives, their strengths and their deficiencies, is critical to our ability to form a community that shares some understandings and presuppositions and can thus discuss central issues while creating a shared basis of understanding from which we can negotiate our differences. This ability is also critical to a useful construction of the central ideal of the rule of law. The history of the philosophy of law is full of instances of debates in which people use different conceptions of law and thus cannot make progress in any serious conversation. Familiarity with the debates about the nature of law therefore permits moving beyond them to meaningful discussions about the law, its functions and its evaluation.

The closer an issue is to that basic question of the nature of law – the closer it is to the core of the *philosophy of law*. However, most of the questions discussed by people in the philosophy of law are not 'pure'. They tend to be related to other branches of philosophy (in fact, insights of all other branches have been used in works within the philosophy of law), and to look at the law and at legal practices from disciplinary perspectives other than that of philosophy (such as sociology, history or psychology), or both. Since law is a complex social institution, which is designed to affect human behavior and perform social functions, the richness of perspectives is anything but surprising. It is necessary to give us a better understanding of law, which is the purpose of the philosophy of law itself.

Take the question of political obligation or the moral authority of law: To know if there is an obligation to obey the law we do need to know what laws are and how we identify the law. But we need to know a lot more about societies, and what keeps them cohesive and stable, and about the functions of law as an institution, irrespective of its content. It is trivial to say that we should

obey good laws. The question of political obligation is meaningful if the obligation holds concerning all laws, as such. We just should know whether, and in what ways, law is, other things being equal, better than anarchy. Assuming we want to inculcate in people a healthy balance between an attitude of respect to law and an attitude of critical evaluation of its desirability that might alert one to the fact that there may be a liberty – or even a duty – to disobey some laws under certain circumstances, a lot may depend on our assessment of the natural tendencies of most people. If we believe that most people tend to obey authority, as Milgram's experiments have suggested, we may want to stress more the need to evaluate laws before obeying them. If we think people tend to be anarchists – we may emphasize the elements justifying a general *prima facie* obligation to obey in a well-ordered society. Philosophy of law itself thus cannot provide us with tools and knowledge necessary to respond to all these concerns. But its insights are critical if we want to think about them well.

Many may complain that the account I just gave of political obligation presupposes an approach identifying legal obligations by social facts and institutional procedures, without 'assuming' that all laws have moral value or that immoral 'laws' are not laws. Thus, I am not using the philosophy of law to advance clear thinking. Rather, I choose one theory of law over another. The account presupposes positivism and thus its validity and appeal depend on the endorsement of a controversial legal theory. A Natural Law approach – it may be argued – gives a better account of the law, it reflects the deep connections between law and morality, and thus connects law with a duty to obey and deals with immoral commands by the powerful theoretical and practical tool of denying them the status of law.

There is truth in this claim. It illustrates that the debate about the relative merits of these theories of law is itself a complex matter. Theories (not only about the law) may be evaluated by their theoretical coherence, elegance, adequacy or fruitfulness. But the nature of law as a *social* institution means that an important element in the evaluation of theories of law is the effect that these theories may have on the thinking and the behavior of individuals and groups when faced with situations which may call for a decision not to obey laws. And most of the factors relevant to this possible impact of theories on behavior are not, themselves, matters of legal philosophy at all. Yet we cannot think straight about issues like this without presupposing a conception of law.

Some argue for positivism because it alerts people to the fact that laws are a matter of power, so that moral evaluation of laws is necessary. They further point out that it is easier for judges to reach just results in unjust regimes because often general laws may support just results against the wishes of a bad ruler, and the judges can 'hide' behind the rule of law. Others criticize positivism because it induces obedience when it is wrong to obey. This only shows that the debate about obedience relates to moral and social facts about individuals and state orders called 'laws', and not to theories about the law. Often, both natural lawyers and positivists want people to obey commands that should be obeyed and not obey those that should not. The question is how to distinguish between the two. It is not clear that rules about identifying a command as 'law' will do the trick. This is the fact we need to understand to think straight about political obligation. It requires understanding the nature and the history of the enterprise of elucidating the nature of law. It requires seeing the philosophy of law itself in context. The natural lawyers' critique of positivism is based on their belief that the pre-theoretical understanding of law is a natural-law conception. People believe *law* should be obeyed. Therefore, describing something as law suggests a duty to obey. But positivists deny just that. For them, describing something as 'law' is a matter of fact, and the question of obedience is left distinct and separate... The only way to make progress here is to transcend the debate about what should be called 'law'. We can only do that effectively if we know why the meaning game is so important.

Legal philosophy should prepare the tools – conceptual and theoretical – to conduct important debates about law in the best way. Players in legal philosophy should each seek to either make a contribution to the tools, to use them well in contexts which will often go beyond legal philosophy itself, or to do both. Most people do the latter.

What is the relationship between legal philosophy and legal practice? Should legal philosophers be more concerned about the effects of their scholarship on legal practice?

I do not think most legal practitioners – be they lawyers or judges – are usually familiar with the literature of legal philosophy or legal theory, or affected by it. It is curious and illuminating to

see that the latter is also true at some level even for practitioners who have themselves been legal philosophers. To take one obvious example: when Jerome Frank became a judge it was not easy to see how his legal philosophy background was reflected in his judicial decisions. Same with Richard Posner. The relationship is easier to see with scholars-cum-judges such as Holmes.

One might conclude that people doing legal philosophy should not be overly concerned with their impact on legal practice. I do not share this view.

Let me start with a story. One of the most gratifying experiences in my teaching career has been a National Endowment for the Humanities (NEH) seminar to (mostly lower courts) American judges on theories of adjudication. They started with great skepticism concerning the relevance of all these high theories to their practice. They did not see a serious theoretical depth to the task of hearing disputes and deciding them. Issues such as tensions between application of the law and adjudication that goes beyond the law, with the resulting issues of legitimacy and legality, seemed of no practical import. They felt the same way about the endless debates about the implications to adjudication of the indeterminacy of legal language or intent. Yet at the end most of them acknowledged that gaining insight into theories of adjudication helped them in understanding what they were doing and being better at it. True, they said, awareness of these theories mostly would not change the decision they would make. But it made it possible for them to think about what they were doing and should be doing in a more integrated way. They had acquired a better sense of what kinds of decisions and skills good adjudication required. They could now give a name, and a theoretical context, to what they have been struggling with. The distinction between what judges can do, tend to do, and should do, helped them think of their role differently. It structured their activity for them. They felt it made them better practitioners.

This is the kind of beneficial effect legal theory should have to legal practice, in all its various genres. Familiarity with legal theories and clear thinking about the law, its strengths and its limits, will make people better practitioners, because it means that they know their tools better and may therefore use them more effectively.

I am more ambitious than the interviewers, however. I do not think the only – or even primary – relevant audiences for the insights of legal philosophy are legal practitioners, be they advo-

cates, state lawyers, or judges. Law is a social institution of critical functions. It seeks to affect and guide the lives and the activities of all those living in its 'jurisdiction'. Law, and especially the constitution and the expressive parts of the law, should be known to all. People should be initiated into the basic legal norms just as they are raised to internalize the basic moral norms in their society or sub-society. The ideal of the rule of law and its meaning, as well as the strengths and limits of law and its relations to other social and normative systems, are important elements in the kit of tools of individuals in modern democracies.

I return to the cluster of questions surrounding the (alleged) obligation to obey the law. Legal philosophy clarifies important issues such as the relevant differences between revolution, civil disobedience and conscientious objection. It helps us identify the law, understand reasons for obeying it, but alert us to the need to evaluate it critically. This knowledge alone will not make people decide well. But if it is available to them, they are likely to be less confused, and act in ways that are more effective. It is not an accident that interest in legal theory grows when societies face urgent debates concerning the legitimacy of government. We saw it around the Nuremberg Trials, then again in the US around Vietnam, and in Israel when issues of serving in the territories, participating in targeted killings or in the disengagement from Gaza were central.

To which problem, issue or broad area of legal philosophy would you most like to see more attention paid in the future?

My 'favorite' subject concerns the nature of rights, and includes such questions as the relationships between rights and other claims and interests, the special nature of legal rights, their relations with human rights, and the institutional implications of all of these. This subject is of the greatest theoretical and practical importance in our time. This is because it sets the discourse and the framework of thinking within which much of political philosophy and international relations are couched; and in it the special force of law is used to structure the very borders of the political.

Some legal philosophers hoped that the social, positive, element in law might make the analysis of legal rights and duties more straightforward than that of moral ones. Indeed, the fact that legal norms are often anchored in texts that are relatively easy

to identify, and which can be further identified by reference to the actual practices of final and authoritative legal organs, and that often they may be vindicated by courts, yielded attempts to grant legal duties and rights a more solid basis than that of moral rights. Indeed, the institutional nature of law and the fact that it has sources often mean that claims of legal rights are made in courts of law. If successful, they may be enforced in a way different than claims of moral rights. Nonetheless, the normative strength of legal rights does not stem from these features. It is shared by moral rights. It stems from the fact that rights indicate that someone else is under a duty to act. Respecting rights – be they moral or legal – is not discretionary. The right-holder is entitled to it. Legal rights may be more enforceable than moral rights. They are not logically or normatively different from them.

This analysis makes it critical to identify the rights people have, because this may indicate the scope of the duties people (and governments) have. What I can claim as a matter of rights is removed from the world of politics, mercy, generosity, or love. In some sense, the broader the realm of rights – the narrower the world of striving to do the good or the meaningful becomes. When the rights are legal rights, constraining the work of the state and the political order, rights and rights discourse may impoverish the world of politics.

Human rights discourse has reached a critical stage. On the one hand, it is a very powerful agent of promoting justice and human rights in the world, within countries and in international relations. Bills of rights and independent courts or bodies have been very central in this important process. On the other hand, expansive readings of the discourse, in both contexts, often seek to promote political goals through the special preemptive power of rights discourse. These processes may weaken the rights discourse. They may also weaken the ability of courts – when they are perceived to be imposing their own political vision of the good – to protect core rights.

This is a serious and complex political and social issue of far-reaching importance. Today, the classical issues of politics are often discussed within the (human) rights discourse. The passage from a claim that there is such a right to the claim that it should be recognized by courts is quick. Social struggles are often fought primarily through litigation in national courts or through declarations of human rights by international NGOs, who then proceed to promote these alleged rights within international arenas.

Despite the enormous literature on these subjects, legal philosophy has not yet contributed its full share. Although we do not have a single ruling theory of law, and are unlikely to have one in the future, the range of the debate and its meaning have been clarified. We know the pros and cons of the available theories. It will be good if we can be in the same place when we are thinking and talking about the distinctive nature of claims of rights, the relationships between law and legal rights, the role of courts in developing rights and enforcing them, and the relationships between legal, constitutional, moral and human rights. Having good conceptual and theoretical tools to deal with these questions is critical for a good understanding of the idea of law itself. They are critical for understanding the way political and legal systems work and should work. They are critical for seeing the ways in which thinking about legal philosophy may help us understand the world and act effectively within it.

This is so because the special nature of right-talk has important structural theoretical and practical manifestations. If rights are indeed 'trumps', it becomes critical to identify the scope of rights and the identity of those who have the power to authoritatively decide it. In moral theory, powers to decide and interpret are not that central, because the discussion is based on persuasion, not power. Moral ideas and ideals have great importance in our lives, as they should. But the processes through which such idea(l)s affect us are indirect. All societies, especially societies with deep rifts, require an agreed-upon power-structure to legitimate political decisions. These structures are constitutional and legal. Human rights have the special power of being an element that is supposed to be shared by all, irrespective of opinion or group affiliation. They should form a part of the constitutional framework that is shared and gives groups the power to pursue, within it, their distinctive visions of the good. But if human rights are read expansively, they may fail to function in this way.

Thus the debate over rights has turned in part to a debate over who decides. With the rise of international human rights law, this is not only a question within states but also a question affecting relationships among them, and imposing on the less powerful states a set of external constraints not effective on stronger nations.

This in turn has far reaching implications for all of political theory, because it structures the relationships between *visions of the good* and the *rules of the political game*. If human rights are the final arbiters of political decisions, and if courts are the fi-

nal and authoritative interpreters of human rights, and if courts
tend to expand their power and jurisdiction so that they regu-
larly decide ideological and political questions as matters of law
and rights—this may indeed result in a serious weakening of the
political branches of government and of the structures of political
legitimacy which underlie all stable governments.

Legal philosophy can and should give us the conceptual, theo-
retical and normative tools to think well about these issues. This
in itself is a very worthy cause. In addition, if we think well – this
may increase the chance that we shall act well.

The knowledge that my academic work can do such things, even
if indirectly, makes my work an integral part of my life. It is al-
ways a great joy when this happens. With law, the pleasure of
integrating thinking and doing is central, natural and inevitable.
I am grateful that it has been that way for me.

Bibliography

1. R. Gavison (ed.), *Issues in Contemporary Legal Philosophy:
   The Influence of H.L.A. Hart*, Oxford 1986.

2. 'Privacy and the Limits of Law', (1980) 89 *Yale L.J.* 421–
   471.

3. 'Natural Law, Positivism and the Limits of Jurisprudence:
   A Modern Round', 91 *Yale L.J.* 1250–1285 (1982).

4. 'Information Control: Availability and Exclusion', ch. 5 in
   Public and Private in *Social Life* (eds S.I. Benn and G.F.
   Gaus) Croom Helm 1983, 113–134.

5. 'The Controversy over Israel's Bill of Rights', 15 *I.Y.H.R.*
   113–154 (1985)

6. 'The Implications of Jurisprudential Theories For Judicial
   Election, Selection and Accountability', 61 *U.S.C.L.Rev.* 2701–
   2746 (1988).

7. 'Too Early for a Requiem: Warren and Brandeis Were Right
   About Privacy vs. Free Speech', 43 S. *Carolina L.Rev.* 437–
   471, 1992.

8. 'Feminism and the Private-Public Distinction', 45 *Stan.L.Rev.*
   1–45 (1992).

9. '(Public) Law and (Private?) Religion', in John Tasioulas
   (ed.), *Laws, Values and Social Practices*, Dartmouth, 165–
   190 1997.

10. 'The Role of Courts in Rifted Democracies', 33 *Isr. L.Rev.*
    216–258, 1999.

11. 'Can Separate Be Equal: A Case Study', *Democratic Cul-
    ture*, 3 (2000) 37.

12. 'A Constitution For Israel? Lessons from the American Ex-
    periment', 12 *Azure* (2002), 133–192.

13. 'The Jews' Right to Statehood – A defense', *Azure* 15, 2003,
    70–108

14. 'The Relationships between Civil and Political and Social
    and Economic Rights', in Coicaud et al (eds.), *Globalization
    of Human Rights*, UNU Press 2003, 23–55.

15. 'Legislatures and the Quest for a Constitution: The Case
    of Israel', 11:2 *Review of Constitutional Studies*, 345–400
    (2006).