THE RELATIONSHIP IN CONTEMPORARY LEGAL SYSTEMS BETWEEN WRITTEN AND UNWRITTEN SOURCES OF LAW (Sect. I. B. 1.) / RUTH GAVISON*

1. Introduction. 2. The Israeli Legal System. 3. The Hierarchy of the Various Sources of Law. 4. The Quantitative Relationship between the Various Sources of Law. 5. Conclusion.

I. INTRODUCTION

As the purpose of this essay is to emphasize the special elements of the Israeli legal system, the jurisprudential questions which are liable to arise incidental to any attempt to define the borderline between legal sources and other sources of law (e.g., historical, literary) or between written and unwritten sources will not be dealt with. In this essay, only legal sources will be considered and it will be assumed that written sources and legislative sources of law are one and the same thing. The problem which will be discussed is, therefore, the relationship between legislative and non-legislative sources of law in the Israeli legal system.

The criterion which will be used in differentiating between the various sources of law is that the norm will be classified in accordance with the way in which it was created. Consequently, a norm is a written or legislated norm if created by the legislative body, which was acting with the intention of creating a law and in accordance with those procedures which, by law, result in the creation of a law. All other norms which are binding upon the courts but were not created in this way are unwritten legal sources. It appears that this criterion is the only one which will allow the proper discussion of the relationship between legal sources, for were the sources upon which the Judge bases his judgment to be examined formally, the conclusion would be that all of the legal sources in Israel are written laws. The absorption of contract law, the relevance of custom to the
extent that it is recognized, and even the binding power of precedent, all stem from provisions of statute law as to their scope and application.

In a new system of law, the question of the relationship between the various sources of law is of special interest. In such a system, it is possible that there is a difference between the static situation - the relationship between the various sources of law at a particular moment in terms of the system's normative content, and between the dynamic situation - the comparison of the contribution of the various legal sources to the development of the system. It is also interesting in a new legal system to examine the influence of the structure of the system at the moment of its creation on the means which it adopts in order to develop.

It must also be noted that the examination of the relationship between the various sources of law is not the examination of content but the examination of a framework. Noting the various legal sources and the hierarchical structure as between them says nothing of the contents of the rules or of the relative weight of each source in terms of its content. Moreover, because the application of one legal source is bound up with certain accompanying effects which are special to it, an examination must be made of the influence on the relationship between the various sources of the wish to reach certain solutions, particularly in the constitutional field, but also as regards the contents of the Law itself.

According to the formulation of the central topic, each of the unwritten sources will not be dealt with separately. The entire group of enacted laws will be examined as a unit, and opposed to unlegislated laws. The type of unlegislated law will be considered to the extent that problems special to that type of legal source will be under discussion.

2. THE ISRAELI LEGAL SYSTEM

(a) The structure of the legal system upon the creation of the State

Section 11 of the Law and Administration Ordinance 5708-1948, which was the first law enacted by the new State of Israel, provides:
"11. The law which existed in Palestine on the 5th 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."

This was the way in which the State of Israel, upon its creation, solved the problem of a legal vacuum. There was a general absorption of the legal system which existed in the area immediately prior to the creation of the State, with those exceptions arising naturally from the differences which of necessity occurred in the legal structure consequent upon the new State's creation. Therefore, in order to examine the structure of the Israeli legal system, its two main constituent elements must be examined:

(a) The law which existed in Palestine on May 14, 1948.
(b) The law which has since accumulated, as formed by the authorities of the State of Israel.

The legal sources of the period preceding the creation of the State were determined by the provisions of the Palestine Order-in-Council, 1922. The Order-in-Council differentiates between courts applying territorial law—Civil Courts, and Religious Courts. As to the Civil Courts, the relevant provision is Article 46 of the Order-in-Council, which provides that the Civil Courts will exercise their jurisdiction in conformity with the Ottoman Law which was in force in the area on November 1, 1914, in accordance with the various Mandatory laws, and, where none of these is applicable, in conformity with the substance of the common law and the doctrines of equity in force in England, to the extent that such rules are suitable to the circumstances of the country. As to religious courts, the Order-in-Council provided a number of subjects which were defined as matters of personal status, and as to which it granted jurisdiction to religious courts. Unless specifically provided otherwise, it is clear that the religious courts apply the law of their own religion.

Even at this stage, the legal sources include a considerable mixture of types. There are enacted laws, such as Mandatory ordinances and the civil Ottoman Laws; there is the codification of religious Moslem law in the form of the Mejelle - the Civil Code; there is
recognition of the binding force of custom, at least in the civil field, as specifically provided in the Mejelle; there is the absorption of English precedent law, within the limits of Article 46; and there are the religious rules that were absorbed in toto in matters of personal status, which also comprise a source demanding special examination. The present author is not familiar with Moslem and Christian law; however, as to Jewish religious law, the written sources, the Bible with the authoritative commentaries thereon, the Mishna and Talmud, are inseparably bound to a great many explanatory collections of precedents, in the form of questions and answers, as well as hundreds of codifications, with rules for deciding between them. The question of categorizing religious law as to source is a question worthy of independent research, and will not be dealt with here. In addition to these sources, during the mandatory period the accepted view was that the doctrine of stare decisis applied in Palestine, and that the Supreme Court was bound by its own decisions, which were binding as well on the lower courts.

(b) The forces working in creating law subsequent to establishment of the State

Section 11 of the Law and Administration Ordinance was a temporary solution, providing for the existence of some legal system during the first months subsequent to the creation of the State. However, there was no doubt that the creation of the State was a substantive change which needed to be reflected in the legal structure of the new State. The situation demanded swift legislation. In the first stage, it was natural that the legislation concentrated mainly on matters of the constitutional structure of the State, the organization of taxation, the army, and so on; only later was it possible to devote time to the amendment and updating of existing Laws. Among the Laws passed by the Israeli legislator, it is important for our purposes to differentiate between Laws which replaced Mandatory laws or ordinances, and Laws adopted for the purpose of filling gaps in the law. In the latter case, the legislator either encroaches upon the principles of English common law and equity, narrows the area in which religious law applies within the legal system, or changes laws which were based upon custom to laws based upon written law. Even with all the legislative activity that has taken place during the years since the creation of the State, none of the non-legislative sources originally absorbed by way of
Article 46 of the Order-in-Council has as yet been eliminated, although part of them (custom, in particular) have been, for the most part, placed within the framework of such written Laws.

It has already been noted that during the period of the Mandate, it was generally held that the doctrine of stare decisis applied in the country, even though precedent was not listed among the sources of law set out in Article 46 of the Order-in-Council. It was argued that consequently stare decisis ought not to apply. However the tradition of the English legal system, brought over by the English judges who presided here, overpowered that academic criticism. Subsequent to the creation of the State, these critics continued to argue that precedent was not one of the sources of law in the country. Nevertheless, the judges continued to consider themselves bound by their precedents until the enactment of the Courts Law, 5717-1957, which provided explicitly, in section 33, that lower courts are to be guided by decisions of all superior courts, and that decisions of the Supreme Court are binding upon all lower courts, but not upon the Supreme Court itself. This section 33 was an attempt to find a compromise between the classical English approach, under which precedents are binding, and the Continental principle which emphasizes written law and does not recognize precedent as being of any binding force. The rule of stare decisis was adopted, therefore, but limited in its application by allowing the Supreme Court to alter rules or doctrines, even if they were previously laid down by that same Court. When examining this compromise for the purpose of determining what are the legal sources in Israel, the problem arises that, prima facie, precedent in Israel subsequent to the Courts Law, is only a partial source—it is an obligatory norm as regards all lower courts, but has no effect as law in relation to the Supreme Court. When speaking of "precedent" as a source, only decisions of the Supreme Court are intended, for only they have mandatory effect on lower tribunals. Despite this theoretical difficulty, section 33 in its present form serves to prevent cases such as those in which the English House of Lords has been forced to admit that a previous rule laid down by it, though incorrect or no longer correct, cannot be changed by the Courts. The Court was therefore forced to hand down an incorrect decision coupled with a request to the legislator to correct the situation. This is to say that section 33 allows the Supreme Court more flexibility in the creation of rules—a flexibility which, in those areas which have not yet been regulated by
binding written law, brings the Court closer to the function of legislator, who can change law in accordance with the circumstances. To this last point must be added the fact that there are whole areas of law which are not yet regulated by any written Law in the Israel legal system, and which therefore served as a fruitful field of action for the Courts. As they have created therein a massive body of consistent legal decisions which constitute the law in those fields, it is apparent that precedent is an active and important force in the creation of law in the State of Israel.

Before entering into the discussion of the dynamics of the written and unwritten sources, the question of the character of the relationship between Israeli and English Laws should be dwelt upon. If, with the absorption of English law, written English Laws were also absorbed, the place and power of written legal sources in Israeli law would be considerably enhanced.

In examining this point, a distinction must be made between two types of sources of the absorption of English law into the Israeli system. The first is Article 46, the effect of which was described above, which provides that, where there is a lacuna in the law, the courts will judge according to the provisions of the common law and principles of equity to the extent that these are suitable to the circumstances of the country and its inhabitants.

The second source is through reference sections, found mainly in Mandatory Ordinances but sometimes applying to Israeli amendments of Mandatory Ordinances as well, which refer to the English law, both for the interpretation of terms and principles in the Ordinance, and for the absorption of substantive law in the area.

In examining the relationship between written and unwritten sources of law, the most interesting question is whether the attachment to English law is only to English law as it existed on a particular day, be it the day of publication of the Order-in-Council or the day of the declaration of the State, or if the connection is a continuing one, with the result that Article 46 binds the Israeli courts to follow even current innovations in English common law.

As to the first question, the language of the section left little room for any variety in interpretation, for it referred specifically to "the substance of the common law and the doctrines of equity". This was interpreted to exclude written laws, an interpretation which
has given rise to a great number of problems. As the attachment to English law under Article 46 is an attachment only to English precedent law, the Israeli Courts cannot rely on legislated improvements in the English law. In other words, where the English law reached an impasse to which the legislator provided a more modern or more appropriate solution, the Israeli Court is unable to adopt that solution, but, being bound by Article 46, will be obliged to apply instead the now outdated provision of the English case law. The solution to this problem may be in having the Israeli Courts apply the exception to Article 46, and decide that the outdated rule is not suitable to the circumstances of the country and its inhabitants. It such a case, Article 46 does not provide any additional sources with which the gap may be filled, and the Courts will be obliged to provide an independent solution to the problem brought before them. To return to the original point, all English law absorbed by means of Article 46 is precedent law or unwritten law. (In those cases where the relevant law had been codified in England, it appears that, to the extent that the codification did not bring about a change in the common law or equity rule, the Courts in Israel may rely on the new law and its wording on the assumption that the law properly interpreted the rule as laid down by precedent. The absorption of codifications in this way, however, has no independent application but is based upon the absorption of the rules of common law and equity.)

As to the time at or during which this absorption was to take place, the language of the section was open to various interpretations. There were those who advanced the interpretation that the article was intended to bring in the legal materials as at the particular moment of time at which the Order-in-Council was published—September 1, 1922. Others felt that the Order-in-Council itself was intended to establish the continuous absorption of English law, including those changes which occurred from time to time. But, as section 11 of the Law and Administration Ordinance provides that the law which had applied before the creation of the State would continue to apply, with those changes necessitated by the creation of the State, this group feels that this possibility of linking domestic case law to the foreign English cases of today no longer exists. It appears that this is the view accepted by the Supreme Court of Israel, although there is not yet any clear and agreed upon doctrine on the point. Yet a third group is of the opinion that any logic behind a provision such as Article 46 would be to enable the continuous reference
from one legal system to another, in which case the attachment of Israeli law to innovations in English legal development subsequent to the creation of the State would be a continuing one.

An additional type of attachment to English law was created by a considerable number of Mandatory Ordinances containing provisions referring to English law. Even among such reference sections, a distinction must be made between two main types. One type is an interpretation section, which refers the Court, in interpreting the relevant mandatory Ordinance, to the principles of interpretation which exist in England, as well as to those interpretations given in England of the terms included in the Ordinance. The second type of reference section provides that the sections of that Ordinance are to be interpreted in accordance with the English law on the same subject.

As to reference sections of the second type, the Supreme Court has decided in several cases that these must be interpreted as providing that the Court sitting in Israel must decide as if it were sitting in England. However, the same judges recently have apparently withdrawn somewhat from that sweeping interpretation, and it now appears that even in the case of that second type of section, the reference is seen as being only for the purpose of interpreting the specific Ordinance. Moreover, even this is only to the extent that there is nothing in the context of Israeli law which would negate this reference to English law. In any case, the references by way of both types of interpretation clauses are continuous references to English law, including not only common law and principles of equity, but also English law as embodied in statutes. However, it appears that English precedents and laws made subsequent to the creation of the State, are not of binding effect, but are merely influential.

Israeli legislation subsequent to the creation of the State has taken two steps in order to free itself from continued reference to the English law. In Israeli Laws there are, of course, no references to any foreign law; and in two recent Laws there are even specific provisions negating the application of Article 46 of the Palestine Order-in-Council. (As to these provisions, there is a difference of opinion among lawyers as to whether they can be effective, for despite the considerable amount of Israeli legislation, there remain entire areas of law which have been absorbed from English law. In many situations it appears
that the blocking off of the channel to English law provided by Article 46 will create lacunae, which cannot adequately be filled by the existing sources.)

3. THE HIERARCHY OF THE VARIOUS SOURCES OF LAW

During the Mandatory period, there was a relationship of subjugation between the various types of primary legislation in that Mandatory Ordinances were subordinate to the provisions of the Palestine Order-in-Council. This subjugation was repealed with the creation of the State, for all the sources were absorbed together by the provisions of an ordinary law. In Israel the Knesset is sovereign, and Laws of the Knesset are superior to any prior law, to any doctrine laid down by the Courts, to any customs, and to any other legal source (subject, of course, to rules of interpretation such as the rule that a later general Law does not repeal a specific previous Law, and so on). In the State of Israel there is no entrenched constitution, with the result that the Courts cannot examine the constitutionality of the Laws of the Knesset. Recently there was an attempt by the Courts to examine the legality of a Knesset Law in the light of the provisions of the Basic Law: The Knesset, which requires a special majority for changing certain provisions of the Election Law. The Supreme Court ruled that the Law in question was not adopted by a special majority and therefore was not valid. However, it appears that it cannot be concluded from this judgment that the Court has the power to review legislative instruments, for the Court was explicit in stressing that it was not dealing with the question of principle, but was giving a temporary solution only, and with the agreement of the parties.

The Court can, of course, examine the constitutionality of secondary legislation, according to criteria which have crystallized in Israeli case law, based upon English administrative law cases. The Court is also the body which, in practice, gives official approval to the existence of a custom in a particular field, thereby creating law. In this respect it can be said that custom is not an independent source, but that it is part of the power of the Court to update doctrine, and to convert questions of fact, through the process of judicial activity, to questions of law no longer requiring evidence.
4. THE QUANTITATIVE RELATIONSHIP BETWEEN THE VARIOUS SOURCES OF LAW

We have seen, therefore, that where a particular matter is dealt with in a Law, the Court is bound to apply that Law and cannot make its own rule. Where there is no provision in an Israeli Law or a Mandatory Ordinance, the Judge is required to refer to the principles of English common law and equity, which is to say, precedent law. Where neither of these sources apply, the Court can create law either by a widening interpretation of an existing Law, by learning from other systems of law, or in any other way. Before attempting to describe the quantitative relationship between written and unwritten sources of law in the Israeli legal system today, a few words must be added about rules of interpretation.

Sources of law other than statute law come into operation only when there is no statute law applicable to the specific case. The determination that no such Law does apply can be a simple one, as in the case where the entire field is unregulated by law. It can, on the other hand, be a question of pure interpretation when there is statutory law governing the area, but it is not clear whether the specific situation falls within the statute. In such a case, the determination as to whether the Law applies to the case is made by the Court. From this it is clear that, in certain circumstances, the Court itself defines the limits within which it can act. This is in contradiction of the principle that the Court can act independently only where the legislator has not provided an answer to the specific case before it. This relationship between the application of the Law and the activating of judicial discretion is governed by the rules of statutory interpretation included in that particular system. If we use the term "interpretation" in its widest possible sense, the question of relationship between various sources of law will be seen as a question of interpretation. In the Israeli legal system the area of interpretation law is representative of the situation in the entire legal system. There is an Interpretation Ordinance, which is a new Hebrew version of the Mandatory Interpretation Ordinance. This Ordinance includes a number of basic rules of statutory interpretation, and a number of definitions of terms. In order to interpret a domestic Law, subject to any contrary provision in the Law itself, it must be read in accordance with the provisions of the Interpretation Ordinance. However, the Ordinance is not exhaustive in its enumeration of
rules of interpretation. When a question arises, therefore, which is not provided for in the Interpretation Ordinance, the Courts have referred to English rules of interpretation, relying either upon the reference sections of the specific Ordinance being interpreted, or upon Article 46. Cases have arisen, however, where the Courts have found that they could not absorb English rules of interpretation because of the limitations of Article 46, because of a basic lack of suitability between the specific English law and the domestic law, or because of a previous Israeli ruling. In such cases, the Courts developed independent rules of interpretation. An examination of the provisions of the Interpretation Ordinance, which is the only written source of rules of interpretation in the Israeli legal system, other than those enacted rules of interpretation absorbed through reference sections (which are very few in number because of the structure of rules of interpretation of English law), shows that the majority of principles of interpretation binding upon the Israeli courts are still in unwritten form. It is possible that the existence of at least part of the principles of interpretation of the system as unwritten rules is an inherent and continuous result of the place of interpretation rules in a system in which the Courts apply general provisions of Laws created by the legislator.

As there is a different relationship between written and unwritten sources of law in the various branches of law, both because of the different character of the various branches of law and because of accidental differences in the development of the system, the quantitative relationship between the various sources will be discussed according to the main branches of the law.

(a) Criminal Law

The general principle of the criminal law that null/urn crimen sine lege is the essential basis for the fact that most of the criminal law in Israel is based upon a written Law. The basic Law in the field of substantive criminal law is the Mandatory Criminal Law Ordinance, 1936, which sets out the general principles of criminal responsibility (defences. definitions, limitations on liability. accessories. etc.), as well as a large number of specific offences. With the creation of the State, a considerable number of Israeli Laws were enacted which replaced some of the provisions of the Criminal Law Ordinance.
However, it is specifically provided that the general principles of the Ordinance will apply to other criminal Laws as well. In addition to Laws amending the criminal law, criminal offences have been created by Laws dealing with various other fields in which the legislator saw fit to defend the provisions of the Law through imposing criminal liability for their violation.

In the Criminal Law Ordinance, 1936, there is also a section referring to English principles of interpretation, in connection with which there are a considerable number of decisions of the Supreme Court of Israel. From these decisions it is clear that the Court considers itself bound only by developments of English law which evolved prior to the creation of the State. The judgments also show the Court's perplexity as to the degree to which it is bound in interpreting the terms appearing in the Ordinance by that reference section.

Despite the fact that, prima facie, there was no possibility for the Court to play a creative role as a result of the above principle and as a result of the interpretation principle of criminal law prohibiting the creation of offences by way of analogy, or a fortiori inference parallel to the provisions of the Law, the Courts did develop a number of rules through interpretative development, which make a considerable contribution to the content of the criminal law. I will here mention only the rule, which does not necessarily flow from the written law, that, in addition to the defence of insanity, the Israeli criminal law recognizes as well the defence of "irresistible impulse" resulting from mental illness. It must be noted that the rules which have been added through case law are often of central importance and attribute a more specific meaning to the general provisions.

The field of criminal procedure is, for the most part, governed by the provisions of a relatively new law, the Criminal Procedure Law, 5725-1965, which consolidated several Mandatory and Ottoman laws and codified case law in the area. The process of judicial interpretation of this Law is in its early stages, and the number of new doctrines handed down concerning it is not sufficient to justify special comment. However, there are a number of important decisions concerning the old law which, although not incorporated
in the new legislation, are not excluded by its wording. It can be assumed that the Courts will continue to follow these previous rules, notwithstanding the new statute.

The area of penal law is governed for the most part by Israeli Laws (Probation Law, 5729-1969, which replaced the Probation of Offenders Ordinance, 1944, and the Modes of Punishment Law, 5714-1954.) The Courts had created certain practices regarding sentence where, in the majority of cases, the law provided only a maximum. Recent decisions of the Supreme Court, however, deny the binding nature of precedent in the matter of the fixing of sentence.

(b) Administrative law

In contrast to the field of criminal law, in the field of administrative law there are almost no statute law provisions. Section 7 of the Courts Law, 5717-1957, in which the authority of the Supreme Court sitting as the High Court of Justice was established, in fact sets out the types of orders which the Court can give and against whom they can be given, however it does not enumerate at all the causes for intervention in administrative activities. A number of additional directives are scattered throughout various other laws.

One important such enactment is the Statement of Reasons Law, 5719-1958, which requires all public servants to answer all applications made to them, giving reasons for the decisions.

As a result, Israeli administrative law must be sought in the twenty-yearold Israeli case law. While originally general principles and even specific rules were absorbed from English law through the import channel of Article 46 of the Order-in-Council, during the course of time independent and farreaching Judge-made law has developed, the result being that today there are fields of administrative law in which the rules are exceedingly clear and wellbased despite the fact that they are built upon local precedent only. In this respect it will suffice to note the fields of labour-relations in the public sectors, the causes for invalidating subordinate legislation, the problem of public tenders and, of course, the rules surrounding the scope of the jurisdiction of the High Court of Justice.
Apparently, the fact that Israeli law of 1948 did not include legislation in the field of administrative law, was the result of two main causes. Firstly, the Mandatory regime, particularly in its later stages, did not wish to enact legislation in such a sensitive area. Secondly, in England there was in fact no recognition, until very recently, of the independent status of administrative law as a distinct branch of the law.

(c) Contract law

The field of contract law was one of the fields which particularly suffered from the total adoption of the law which occurred in 1948. This was a case in which in a single field there were rules from many and varied sources, and where, in the majority of cases, it was impossible to reconcile the differences resulting from their respective starting points. On the one hand, there was the Mejelle, a codification of Moslem law, which recognized a number of types of possible contracts and regulated each one of them. Alongside it was section 46 of the Ottoman Code of Civil Procedure which brought in a general consensual principle without, however, any other provisions accompanying it. In accordance with this general consensual principle, it was possible, of course, to circumvent the specific provisions of the Mejelle. In order to give section 64 meaning, the domestic courts, by way of article 46, absorbed English contract law in its entirety as to all those contracts which did not fall within the scope of the Mejelle. As English contract law was both more modern and closer to the thinking of the Judges than were the sources of the Mejelle, the Court preferred the English common law to the statutory provisions of the Mejelle. In this way, a most significant amount of English case law relating to contracts was absorbed into Israeli law.

During the last five years, the Israeli legislature has been attempting to improve this situation. It is clear that, in the circumstances, these changes must be made through legislation, for no case law could reconcile the various written sources which the Courts are obliged to follow. For our purposes, only those Israeli Laws which are intended, at least to some extent, to replace the English law which has been absorbed, are of importance. In this respect the following laws should be mentioned: Agency Law, 5725-1955; Guarantees Law, 5726-1967; Sales Law, 5728-1968; Gifts Law, 5728-1968; the
Assignment of Debts Law, 5729-1969, and the Pledges Law, 5728-1968. The Supreme Court has already ruled that, in these new Laws, the legislator was giving expression to his intention that, in these fields, there should no longer be any need to refer to English law, even if there is a reference section thereto. In spite of the vast amount of new Israeli legislation in the field of contract law, however, the Courts are continuing to absorb a great deal of English contract law in the form of case law. This absorption continues in areas such as remedies for breach of contract and general principles of contract law, and is made necessary by the system of law, in which there is a general consensual principle, but where the field has not yet been regulated by domestic statute law. As stated above, even if partial answers to such problems can be found in the Mejelle, Israeli Courts continue to prefer to apply English precedent law.

(d) Tort law

The basic law in the field of torts is the Civil Wrongs Ordinance, 1947, which has recently been re-enacted in a new Hebrew version. The cases have ruled that those tort actions enumerated in the Ordinance constitute an exhaustive list, and that new causes of action cannot be added other than by way of legislation. In the Civil Wrongs Ordinance there is also a section referring to English principles of interpretation, as well as requiring the interpretation of terms appearing in the Ordinance in accordance with the interpretations given these terms in England. The Mandatory Civil Wrongs Ordinance is, in effect, a codification of English torts law as it existed when the Ordinance was enacted. While the codified nature of the Ordinance may be distinguishable, it must nevertheless be classified as written law.

However, the written provisions of the Civil Wrongs Ordinance are only a framework within which the Courts have provided the content. The Ordinance was drafted in such a way as to allow flexible interpretation and development; included in it are many undefined and inexact terms such as "negligence", "reasonable", and "reasonable and probable cause". The Supreme Court has used the discretion granted to it by the legislator and has given new content to some causes of action, particularly the tort of negligence, in keeping with the requirements of an increasingly active society's
changing conditions and the need for an increased duty of care. It must be noted that the Israeli case law has been influenced, of course, by developments in English case law in the field of torts as necessitated by the reference section. However, Israeli Courts did not hesitate to decide in contradiction of the existing English rule where it was the opinion of the Court that the English rule was outdated or unsuitable to the particular case before it.

(e) The law of personal status

In this field a distinction must be made between those provisions granting authority-the question of which court has jurisdiction in a particular matter, and those provisions which lay down the substantive law. As to those provisions concerning authority, all, without exception, are set out in written Laws. It is not a matter for precedent or custom. Even here, however, interpretations of the Law have endowed its provisions with such specific content that it could be said that the cases have created exceptions to the language of the Law. This has occurred here, but not to an extent which would justify listing case law as a source of law in this field.

With regard to the substantive law, a distinction must be made between areas of status law to which the norms applicable are the norms of the national (religious) law, and between those areas in which the legislator chose to prescribe a uniform territorial law. As to the first, it has already been mentioned that in this study the question of the type of sources comprising it will not be discussed. As to the second, since all matters of personal status are, unless otherwise provided, within the jurisdiction of special Courts to which national law applies, the source of all provisions for the application of territorial law to such matters is written statute law. Among these Laws, the Succession Law, 5725-1965, the Adoption of Children Law, 5720-1960, the Capacity and Guardianship Law, 5722-1962 and the Family Law Amendment (Maintenance) Law, 5719-1959, must be specially noted.

(f) Commercial law
This field has been characterized by a relative lack of activity by the Courts, and by a close adherence to the wording of the Laws. Perhaps this is the result of the existence of extremely comprehensive Laws in the two fields of company law and negotiable instruments, as well as the Laws governing other associations. On the other hand, these laws include mostly technical provisions and not principles. As a result the Court was obliged, particularly in the field of company law, to draw these principles from other fields of law (contract law, agency, torts), from which they are in fact drawn in English law, or from English company law itself. It was in this way that the doctrines developed by the Court in the matters of lifting the corporate veil, ultra vires acts of companies, the indoor-management rule and so on, were adopted into Israeli law.

(g) Constitutional law

In this field the solution provided by section 11 of the Law and Administration Ordinance could not be applied, for clearly the constitutional arrangements prior to the creation of the State were not suitable to the sovereign State of Israel. It was, therefore, essential to fill this vacuum in another manner. After it was decided that there would not be, at least in the first stage, an entrenched constitution for the State of Israel, Laws were enacted providing for all matters connected with elections, central public bodies, the relations between them, and their powers. As with all hasty legislation, these Laws had their faults, which have been corrected by the legislator from time to time. The contributions of case law in Israel were in respect of the protection of the basic rights of the citizen. This was done by giving a narrow interpretation to Laws which appeared to infringe upon these rights, and by interpreting the constitutional Laws in the way in which they could be reconciled most easily, in the opinion of the Court, with the Declaration on Human Rights and other such documents which are not part of Israeli positive law, and with those basic principles which the new State set for itself at its creation, as expressed in its Declaration of Independence.

(h) Civil procedure and evidence
Civil procedure is fully set out in the Courts Law, 5717-1957, and in the Civil Procedure Rules, 5723-1963. While there are proceedings to which these regulations do not apply, the procedures in these proceedings are also governed by applicable subordinate legislation. It appears that, by the very nature of the field, there should not be too much room for elasticity and discretion, as it is a field dealing with the procedures which the Court has provided for itself, which derive from the desire not to prejudice either of the opposing sides, to bring the maximum efficiency and speed to the clarification of the dispute between the parties and to do justice.

Prima facie, exactly the same arguments apply to the law of evidence, which should be clear and known. However, strangely enough, in this field the statutory provisions are scattered throughout many Laws (if the considerable number of evidentiary presumptions are taken into account), and a considerable number of the doctrines which the Court actually follows are not based upon written law at all, but rather on case law, both English, through Article 46, and domestic, where such case law has already been formed.

(i) Land and property laws

Until recently property laws were made up of two main groups of laws: Ottoman laws governing the types of land and rights in land, and Tenant Protection Laws, based on the English and Mandatory tradition. The Tenant Protection Laws took on an Israeli character in 1954 and 1955 through amendments, and have been much discussed in the cases. Independent doctrines were developed, particularly as to those sections of the Law which allowed greatest judicial activity, having been drafted with a number of wide terms. One example is section 37 of the Tenant Protection Law, 5715-1955, which authorized the Court to grant relief "in equity" against an order of eviction, even where sufficient causes for eviction as provided in the Law did in fact exist. As to the second group, the situation has recently been changed by the Land Law, 5729-1969, which repealed the Ottoman legislation and which has been in effect only since January 1, 1970. In the field of property law, English rules have also been absorbed, particularly in the area of the differentiation between tenancy and licence, and in the field of equitable rights in land. These rules are based on precedent law both in England and in Israel.
As to property rights in intangibles, patent laws and laws concerning the rights of inventors exist in Israel, and cover most of the problem areas in these fields.

(j) Others

I will make mention only of the field of private international law, in which most Israeli law is based upon English case law doctrines (except for the domestic law as to the enforcement of foreign judgments), and Israeli doctrines to the extent that they have developed. However, there are special Laws which have special provisions as to choice of law. In the field of tax law, the law is based on provisions of the Income Tax Ordinance and on provisions of the appropriate Laws as regards other taxes. In that field, the wording of the Law is closely followed, a practice which is necessitated by the rule that a tax cannot be imposed except by a specific Law. In the field of Labour Law, there is a noticeable movement of the centre of balance from customary precedent law in the early years of the State, to statute law. Today, most aspects special to labour law (without including provisions as to contracts of work and so on), are controlled by Laws, which are in fact a codification of the customs which developed among the local population. A field of pure precedent law is that of unjust enrichment, which was absorbed from English law, but somewhat modified as to the rules regarding restitution because of a mistake of fact or of law.

5. CONCLUSION

It is not intended to dwell upon the exact procedures by which judicial activities alter the provisions of Laws through interpretation, for in the present view there is nothing unique about this process in the Israeli legal system. The assumption is, as well, that in every application of a written provision of a general law, there is room for interpretation by the Court, either through the Court deciding whether the law applies to the case before it or by way of creating a rule where the Law does not apply. In other words, if all fields of law were fully covered by written Laws, there would still be room for the creation of
law by way of precedent (within a system which accepts stare decisis). This room will be greater to the degree that the wording of the Law is wider and allows more discretion, for where the Law is unambiguous, there will be no room for interpretation by the organ applying it.

Subject to the above, it can well be said that the State of Israel was in fact obliged, as a result of the legal situation in which it found itself upon its creation, to insert a number of changes in the legal system which could be implemented only by way of legislation, at least in the long run. In order to bring an end to the application of English precedent law in Israel, it would be necessary to put an end to the application of Article 46, either by way of creating law, which would prevent the existence of lacunae or by way of specifically blocking the absorption channel. The Court can, and in fact has in several instances, freed itself from the application of Article 46 through judicial interpretation. This was done, however, in circumstances in which, properly speaking, a change in the law by the legislature was called for. Changes by way of legislation are required in particular in those fields which are governed by written law, but where the applicable rules are from different legal sources-the English, Moslem and Ottoman legal systems. This is also the case where the existing written law is unsuitable to present conditions.

On the other hand, when the law is not set out in a written Law, an interim period is required in order to allow sufficient case law to develop from which a codification can be made up or at least from which lessons might be learned and the required changes made. In the meantime, the Courts have been active in such fields and have begun to create a basis for the concentration of such laws, which could be by way of legislation.

The two law-creating factors do not always work together harmoniously; there are cases in which the Courts repeatedly called the legislator's attention to a mischief in a law needing correction, but the legislator failed to respond. On the other hand, there are instances in which the Courts have handed down a decision which was inconsistent with the feelings of the legislator, who, in turn, responded immediately by changing the Law, either by way of a validation Law, or by readopting Laws subsequently with a special majority. As a result of the difference in principle between changing substantive law, which does not apply retroactively, and between the application of law by way of judicial
decision to the matter before the Court at that particular moment, there are cases in which the Court gives an interpretation of a particular Law which is unreasonable, only in order to arrive at a just conclusion in the particular case, and hopes that the legislator will correct the distortion for following cases. These are cases in which precedent law is created in fields which, by their very nature, cannot have unwritten law as a source such as, for example, criminal law.

It appears that the trend is to return as much as possible to the principle of the division of powers, and to slowly achieve a situation in which the judicial authority will be less and less of a legislator. The intention is not to withdraw the discretion of the Judge, which is always involved in the application of the general law to the specific instance, but rather to narrow down the scope of this discretion by provisions of the written law, which can, of course, be worded widely and flexibly if it appears necessary to allow the Court a wider discretion. However, amendments to the law are made where they are most needed, and if there is a field which is regulated by precedent or well-developed by case law, the over-busy legislator will not feel obligated to deal with it, but will prefer to change old laws which are unsuitable rather than to codify the appropriate precedent law.

Notes

• Teaching Assistant, Faculty of Law, Hebrew University of Jerusalem.