

The Israeli Criminal Justice System – Comparisons and Contrasts

by Adv. A. Amos Fried

After 2,000 years of national exile, the founders of modern Zionism sought to restore the Jewish people to normalcy by establishing a Jewish state, i.e. a state of the Jews. Once the Jews have their own national homeland, these forefathers reasoned, they'll be just like all the other nations of the world. Whereas there's an Italian state, a Russian state, a Japanese state and plenty of Arabs states, so too the Jews will have a national polity and thus be recognized as a people in the full sense of the word. Israel's national anthem, "HaTikvah" (the Hope) aspires towards the day the Jews will attain the status of "*being a free people in our land.*" Not a "holy nation" (Exodus, 19:6) nor a "light unto nations" (Isiah, 49:6), but simply "a free people" – no more no less.

With a free and normal state of their own, the Jews would certainly be in need of a well-defined criminal justice system, protecting society from all the free and normal criminals roaming about within its borders. In 1936, during the British Mandate period over Palestine, the Criminal Law Ordinance was decreed, annulling the hitherto prevalent Ottoman Penal Code. Though the State of Israel was founded in 1948, it took until 1977 for the indigenous Penal Code to be enacted by the Israeli Knesset. Prior to that, the 1973 Dangerous Drugs Ordinance had already come into legislation. Only in 1982 was the entire Criminal Procedure Law revamped and as late as 1996 the Criminal Procedure Law (Powers of Enforcement – Arrest) had a full make-over. The Prohibition of Money Laundering Law was enacted in 2000, the year 2008 saw the Law Prohibiting Violence in Sports, in May 2020 the Prohibition of Prostitution Consumption Law came into effect, whereas the Nazis and Nazi Collaborators - Punishment Law was legislated back in 1950.

Even a cursory review of the Israeli criminal justice system reveals a number of stark and significant differences from American practice. Firstly, there is no trial by jury in Israel but rather, all cases are tried before judges – a sole magistrate for indictments with a potential sentence under 10 years incarceration and a panel of three judges for more serious crimes.

Second, the hallowed 5th Amendment constitutional protection against self-incrimination and the equally enshrined right to remain silent, have no practical application in Israel. In fact, quite the opposite pertains. Section 47 of the 1971 Evidence Ordinance maintains that "A person is not bound to give evidence involving the admission of a fact constituting an element of an offense with which he is, or is likely to be, charged." However, section 162 of the Criminal Procedure Law stipulates that "The accused's refraining from testifying may serve to add weight to the prosecution's evidence, as well to corroborate such evidence that requires corroboration." In almost total contradiction to the exalted Miranda rights, the Israeli system asserts that not only "anything you say can and will be used against you in court," but anything you *don't say* as well. In other words, in Israel you *theoretically* also "have the right to remain silent," but opting to do so will eventually be brought to bear against you.

Similarly, an individual interrogated on suspicion of having committed a crime is expected to provide an explanation for his actions at the very first opportunity. The Criminal Procedure Law aims to thwart any surprises in the accused's defense, hence under Section 152 therein, the court is obliged to "explain to the accused that if he wishes to claim an alibi (*e.g.* 'I was elsewhere') – whether as a sole plea or in addition to others – he must do so at once," or thereafter be prevented from proving such a claim except with official leave from the judge.

Third, for the most part Israeli case law does not prohibit the prosecution from submitting illegally obtained evidence, which is to say – there are no concrete exclusionary rules forbidding "fruit of the poison tree." Notwithstanding the above, Section 12 of the Evidence Ordinance requires that "Evidence of a confession by the accused that he has committed an offense is admissible only when the prosecution has produced evidence as to the circumstances in which it was made and the court is satisfied that it was free and voluntary." To be sure, the courts at times express uneasiness when presented with admissions achieved by less than scrupulous means, yet the prevailing practice is typically to minimize the effective weight of such evidence as opposed to omitting it altogether.

In a landmark 2006 case (*Yissacharov v. Chief Military Prosecutor*), Israel's Supreme Court found that a soldier's admission of having committed certain drug offenses was inadmissible on account of it having been procured without properly informing him that he was under arrest, and had to the right to consult with an attorney. As a matter of fact, he was deliberately denied such fundamental information. That said, it should be noted that in Israel, a suspect's right to counsel ends the minute the interrogation officially begins. From that point onwards, no one is permitted to be present during the questioning period besides the suspect and the detectives investigating the case.

While the Supreme Court's *Yissacharov* ruling may have seemed revolutionary, in essence the court established quite definitively the absence of any overriding doctrine obliging automatic disqualification of unlawfully procured evidence. Indeed, the court's disposition indicates that only in patently extreme instances, undermining a suspect's fundamental rights under Israel's Basic Law: Human Dignity and Liberty of 1992, is it viable to consider such an unusual measure as disqualifying relevant, yet improperly obtained confessions and evidence. Hence almost invariably, even the most egregious violations of a suspect's right to counsel prior to his interrogation are disregarded and the incriminating admission is thus upheld as admissible.

The *Yissacharov* doctrine was recently revisited extensively in a major controversy arising out of the ongoing legal affairs of Israel's Prime Minister, Binyamin Netanyahu. Two of his top advisors were suspected of harassing a state's witness in the bribery cases being brought against him. During the interrogation, the investigators extracted information from the two aides' cellphones without informing them of their right to refuse such a procedure.

The suspects' petition to have the evidence disqualified was denied and they appealed to the Supreme Court. In their defense, the police admitted they initially had no valid warrant to undertake this step; however, they did receive retroactive sanction from a judge when they presented to him the evidence they unlawfully accessed. In effect, the police argued that even if their conduct was originally in contravention of the law, the results more than justified their actions, as demonstrated by the evidence they accessed from the cellphones, albeit without authorization. Furthermore, they alleged additional grounds for hacking the cellphones, unrelated to the information they eventually revealed, on the strength of which the judge in any case would have granted the search warrant.

In a 2-1 split decision, the Supreme Court ruled the evidence admissible. The majority justices acknowledged that after the fact, it had become virtually impossible to distinguish between evidence obtained illegally and that which the police claimed already to have discovered. Accordingly, it remains unclear as to just what extent the presiding judge would have consented or refused to issue the search warrant solely on the basis of the additional evidence the police alleged to have in their possession previously. Under circumstances such as these, the warrant was deemed valid, and the initially illegally seized evidence – permissible.

In light of the above, it should come as no surprise that the conviction rate in Israel is astonishingly high. Over 95% of criminal indictments result in a conviction of one sort or another, and most of the remaining 5% conclude by the prosecution retracting the charges as opposed to a full acquittal.

Faced with this rather draconian legal reality, defense attorneys rarely believe they can achieve a comprehensive exoneration for their clients. More often than not, the objective is to negotiate a plea bargain ideally comprised of both a crime of lesser severity and a reduced sentence.

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