“The High Court of Justice is Important for all the People in the Country”

Conversation with Justice Meir Shamgar

JUSTICE - First, we wish to congratulate you on the new Supreme Court building, credit for which is mainly due to your efforts. How do you see the Supreme Court’s role in the Israeli judicial system?

Justice Shamgar - There is a significant aesthetic importance to having a Court house which is functional and beautiful and open to visitors, but our main intention was to make it clear that the judicial branch has its own home at the same level and near to the site where the other governmental authorities are seated. We owe thanks to the Rothschild Family and in particular to the late Dorothy de Rothschild, who enthusiastically adopted the idea of building a home for the Supreme Court, which previously sat at the Russian Monastery Hostel, in the Russian Compound, in a building not adapted to serve as a site for the Supreme Court. Many thanks are due to Jacob Rothschild, who succeeded Dorothy de Rothschild as head of the Rothschild Foundation (known as Yad Ha’nadiv) and the two most talented architects who were extremely effective and dedicated to creating this house of justice. The importance of this building lies not in the influence it will have on the written creations of the judges - one can write a just judgment even when sitting in a cellar - but in educating people to respect the law and to regard it as one of the main elements of a democratic society. We have a liberal democracy which is based on respect for the rule of law, for government of man by law, and therefore this building should be like the Statue of Liberty in New York - this should be the Statue of Law, of Justice. This creates a very important didactic effect which is conducive to creating belief in law, confidence in law. So this building has an educational aspect from the point of view of society in general. From the beginning, we intended to adapt this building for visits by citizens of all ages, soldiers and tourists, in order to allow them to become acquainted with our system of law. But interest has exceeded our expectations and we have more than 25,000 visitors a month. We have become a central point in Jerusalem. It is the most modern building in Jerusalem but, in terms of the place of the building in our society, it is its meaning which radiates out to the surrounding environment.

I had a certain part in the construction of the building. I approached the late Mrs. De Rothschild for the donation of the money. It took about a year, there was a commission, deliberations, negotiations and some difficulties with the Ministry of Finance, but finally we came to an agreement and the Rothschild Foundation covered everything including the furnishings. There was a certain criticism among some judges, especially my predecessor, President Agranat, who thought it might not be appropriate for the Supreme Court to be built by the donations of a non-Governmental factor. I understood his reservations to the

effect that the Supreme Court should be built by the nation, however, first, we should remember that under the terms of the Rothschild Foundation there is a specific prohibition on the Rothschild family of England conducting any business in this country. Thus, no cases will be coming before the Court which could create a conflict of interest. Secondly, in a country like Israel, where there is a lot of criticism on the policies of Governmental authorities in matters of welfare and new immigrants, I do not know what attitude would have been taken by the public to the spending of money on the construction of this building. Mrs. De Rothschild understood this problem. She was very pleased that she could give us the means and that we were not forced to take the money from any source which could be claimed to be part of the budget of the country.

The Supreme Court in this country is certainly respected not because of this building, but because of its judgments, because of its leadership in strengthening the rule of law, in fact and not only in theory. The Court has done this for 50 years and has therefore, I venture to say, a stronger position in the framework of the Governmental authorities of this country than most courts in other countries. If I look at the European countries there is no question that the Court in our system is a much stronger entity than in any country on the Continent and if I can use de Gaulle’s term - the presence of the Supreme Court in Israeli society is much stronger than in other countries. I mention this not because I wish to describe the Court as a strong entity in public life but because this creates the confidence of the ordinary citizen that it is worthwhile to approach the Court; that the Court has the open-mindedness and the readiness to find certain phenomena illegal and unjust.

**JUSTICE - How do you regard the prevailing perception of the Court as a bulwark against instability in democratic life?**

**Justice Shamgar** - I would not call it the last bastion. That is too presumptuous. I think one aspect of the existence of a Court in which you can ask for justice is that it opens avenues of approach. One of the side effects is strengthening the other authorities. When we lay down the law, and create this opening for citizens or for people who are not citizens of this country, to fight for their rights, the strength of the other authorities is also increased. Their way of dealing with cases is regarded as being under review and therefore the actions of the authorities also gain in stature and are strengthened by this process of mutual supervision which exists under our system of separation of powers.

**JUSTICE - So do you take the approach that the Supreme Court has the right to exercise judicial review of any matter that is brought before it?**

**Justice Shamgar** - No, I do not take that position. I have written and expressed this view in a number of my judgments, particularly in the *Ressler case,*¹ which dealt with the military service of *Yeshiva* students. There, I voiced my dissatisfaction with the present situation and demanded a new revision every year, which, much to my regret, has not been adopted. There, I think, for the first time, the different positions emerged regarding the justiciability of problems which come before the Court. Justice Barak voiced his opinion that every problem can be adjudicated by the Court, because the Court reviews the reasonableness of the matter at hand. My opinion was (and it was also the majority view) that you don’t regard every problem arising in society or in the economy or in any other area as something which is justiciable. There must be a legal element in the case, and certainly there are problems which are mixed problems in which there is a legal factor and an economic factor or other similar factors. In such cases one decides on the justiciability of the matter according to the dominant factor. If the dominant factor is the legal factor, the Court may deal with the case, but if the dominant factor is, for example, an economic problem, we should refuse to hear it because we do not deal with economic policies. Whether anti-inflationary measures should or should not be adopted is not a legal decision, it is a decision of policy and in order to have a democratic Government one must leave problems which belong to other arms of Government to them.

**JUSTICE - How do you see this in terms of locus standi, the need for people who come before the Court to possess an interest in the matter being adjudicated?**

**Justice Shamgar** - Justiciability and standing (*locus standi*) are two different problems. During my term of office as President of the Court, we were very liberal on questions of standing. In order to try and accord the right definition to each

¹. H.C. 910/86 *Ressler v. Minister of Defence*, 42(2) P.D. 441
problem - whether it is justiciable - one must first allow a person to apply to the Court and enable us to decide. We have had cases where people were allowed to present their petitions but then we decided we would not deal with the problem presented to us. One example which comes to mind concerned the settlements. We had a petition to the Supreme Court sitting as the High Court of Justice but we held that establishment of settlements was not a legal problem with which we would deal, but mainly a political problem and that the petitioners should turn to other authorities. I think this point was put to a certain extent rightly many years ago by the British Justice Lord Diplock, when he said: problems of policy are for the Parliament not for the Court, but from the point of view of the supervision of the legality of the actions of Government, the Court is the proper authority. We look at the legal ingredient, at the behaviour according to legal criteria. Policy is for Government, Parliament, the public and the press.

JUSTICE - Don’t you think that the liberal policy of locus standi has the unfortunate side-effect of overburdening the system in a country which is in any event litigious in nature?

Justice Shamgar - I think this problem has been exaggerated. I am not against statistics, but the kind of cases which provide an addition to the work of the Court as a result of our liberal approach form a very small percentage. We have large numbers of cases before the Court because we are indeed a litigious society, perhaps immigrant societies generally are more litigious when people become aware of their rights. In this country, people are aware of their rights and that is why we have so much litigation, mainly in the civil area. A large proportion of the cases burdening this Court are civil appeals. These appeals involve questions which are becoming increasingly complicated because of the modern economic reality, reflected, for example, in complex property combination transactions. Problems of civil appeals are more complicated today than they were 30 or 40 years ago. There is also a rise in crime. We must confront the very sorry fact that we have dangerous drugs and murders in this country in growing numbers. Every murder case ends up in this Court on appeal. Thus, for many years, we have promoted the reform of our Court system. Such reform would decrease the number of cases in this Court.

JUSTICE - Would you favour having a separate criminal court structure alongside the civil court structure, or at least a Criminal Court of Appeal?

Justice Shamgar - No. So far our system has been that the Supreme Court at the top of the pyramid and the lower Courts deal with all matters. As far as I know there is no intention of changing this. In the lower Courts, such as the Magistrate’s Court and the District Court, there are divisions. The Family Court, for example, is not a separate Court but is part of the Magistrate’s Court and certain judges are allocated to that Court for this duty. Similarly, in the Supreme Court - all the Justices deal with all matters. I would say that this is our strength because all of us are experts on all kinds of cases. Therefore, we also believe that this Court should be the Court dealing with constitutional cases because we have here the highest legal expertise in the country. In order to deal with constitutional matters one should not have to be an expert on constitutional law only. The Constitution comprises different ingredients taken from all areas of law and therefore in this Court we opposed the establishment of a separate Constitutional Court. There is also an apprehension that such a Court could be politicized if composed under a different system to the one currently operating. We have the most advanced system in terms of the appointment of judges.

JUSTICE - How would you then solve the problem of overburdening?

Justice Shamgar - The reform I started in 1984 and which has now been adopted by the Orr Commission is that we increase the powers of jurisdiction of the Magistrate’s Court so that a large percentage of all cases - civil and criminal - start in the Magistrate’s Court. In 1984, we increased the powers of the Magistrate’s Court to offences carrying a penalty of up to 7 years, now they are to be increased to 10 years. We also increased the power of the Magistrate’s Court in civil matters to NIS 1 million. We would have been able to act more swiftly had we had the full cooperation of all other factors, which had reservations about this reform. By increasing the powers of the Magistrate’s Court, from which appeals go up to the District Court, only a smaller number of appeals reach this Court, since leave to appeal - known in America as certiorari - is required on the second appeal. Once the main number of appeals rests with the District Court, a smaller number will reach the Supreme
Court - following the decision on the application for leave to appeal - and this Court will have part of its burden taken away.

JUSTICE - In England, judicial review is handled by the Queen’s Bench Division of the High Court - have you considered confining judicial review to lower levels in Israel as well?

Justice Shamgar - Yes, but it has its problems. The direct approach to the Supreme Court in this country, sitting as High Court of Justice, is a historical fact. During the time of the British Mandate, like in most British colonies, only the Supreme Court had the power to deal with prerogative writs, because only in the Supreme Court of these countries was there a majority of British judges. In our Supreme Court, there were 4-5 British judges, 1 Jew and 1 Arab. After the establishment of the State we did not have a written Constitution and the direct supervision by the Supreme Court of Governmental actions was regarded as important in order to establish an efficient rule of law. We are now one of the last countries in the world which only has a number of Basic Laws but no Constitution. Having a prestigious Supreme Court issuing writs to the Governmental authorities is always effective. In all these years, there has not been a single case where an order of the Supreme Court was not immediately respected by the Governmental authorities against which the order was made.

Direct access to the Supreme Court also has another advantage. If you start at the lower Court, there is a right of appeal to the Supreme Court, which may be a time consuming procedure, whereas sometimes one needs immediate decision. There are some matters which we have relegated to the District Court - such as questions of public tenders and zoning which we do not regard as central to constitutional rights but more as administrative matters, and by referring them to the District Court we relieve the pressure on the Supreme Court. Last year the Court heard about 7,000 cases and this was the reason for the increase in the number of Justices some years ago from 12 to 14.

JUSTICE - Do you believe that the composition of the Supreme Court sufficiently reflects the composition of the population?

Justice Shamgar - The Court never represents exactly the composition of the population. Members of the Court are appointed according to a system which is very objective. There is a commission of 9, which in my opinion is much better, from the point of view of the merits of the decision, than the system of public elections of judges or of appointment by the head of the executive arm, which is always influenced by political decisions. Here there are 9 people, each of whom has his personal opinions, but the appointment is by majority decision. Indirectly, this is a democratic process because this is a commission which comprises two members of the Government, two members of the Knesset (one of whom is always from the Opposition), two members of the Bar (which is non-political) and 3 Justices - thus representing all bodies which are interested in an adequate system of justice. It is a merit system which appoints people according to their ability and I think there should be no restrictions on the kind of person appointed in terms of affiliation, ethnic origin or sex.

I am certain that in about 4-5 years the composition of this Court will also change as people retire and others are appointed from the lower Courts. I am happy that we have crossed the barriers we had at the establishment of the State, and we are furthering the proper mixture which will arrive not by political decisions but through a development which is natural, namely, judges rising from the ranks to the Supreme Court. This also applies to Arabs. In my time we increased the number of Arab judges by a large extent; we just need patience, the change will come naturally. Impromptu action such as that demanded by some politicians is perhaps politically correct but it is bad for confidence in the Court. The Courts follow developments in other areas, they don’t precede them.

The process of reform of our judicial system by increasing the power of the Courts has also been adopted by other countries, which have a similar system. For example, in England, the power of the County Courts has been increased in order to decrease the pressure on higher courts. In the U.S. too, Magistrates are being used in the lower courts and are allocated cases. This is a natural conclusion to reach if we don’t want to add additional courts. Adding an additional court between the District Court and the Supreme Court would only prolong the already lengthy proceedings and make them more difficult and expensive.

JUSTICE - Would you favour the introduction of a legal aid system?

Justice Shamgar - It is entirely a financial question. We already have a public defence system in criminal cases. We are a
welfare society to a certain extent but I don’t think we have reached the stage where we can fully supply legal aid, we should start with building houses for the needy, etc. which is more important at this point. There has been a failure of all our plans and projects on pro bono representation. We tried it several times using different approaches but so far it has not attracted interest except among certain university students. This could be one of the solutions for representation in cases where the parties lack funds.

JUSTICE - Turning to the role of the High Court of Justice, how do you see its place in the Israeli legal system? Is its centrality justified?

Justice Shamgar - Yes, it is a main feature of public life. The assumption by the Governmental authorities that a person aggrieved will approach the High Court of Justice is one of the elements which influences its decision. If the authority is convinced of its conclusions and believes that the person has no right, it will act as it sees fit, but in cases of doubt it will often concede, if it believes the person will approach the High Court. I don’t have statistical proof, but it is my belief that there are more cases where Governmental authorities think that they should accept the demands of a person aggrieved, than cases coming to Court. For example, Tel Aviv University undertook a study on the percentage of success of petitions filed by residents of the Territories who approached the Supreme Court sitting as the High Court of Justice. They counted the decisions but didn’t open the files and, for instance, counted the withdrawal of a petition as a rejection. However, in many of the cases, a petitioner retracted his petition after the Court ordered the State Attorney to investigate an allegation of an illegal act against that petition and the Government accepted the claim in whole or in part. Such cases should, of course, be seen as successful petitions. Looking at it in this way, a different study has shown about a 60% success rate of petitions.

We are the first and only country which has opened the doors of its Supreme Court sitting as a High Court of Justice to the

One of the five main court rooms in the Supreme Court building
inhabitants of territories under military Government. This has never occurred before either in Europe or in other countries, and this is because as a matter of theory of public international law, such inhabitants do not have the right to approach the Court, being subject to a different sovereign entity. However, when I was Military Advocate General, we did not oppose such applications to the Court. It creates an additional avenue of review of the behaviour of the military authorities. In the Abu Itta judgment we wrote that an Israeli soldier carries with him not only his duties under public international law but also the duties of an Israeli official under Israeli administrative law. He has to behave in the Territories as he behaves here, and if a person has a right to be heard before a decision is made against him here, he possesses the same right there as well.

JUSTICE - What kind of interrelationship should there be between the military and civil judiciaries?

Justice Shamgar - When Israel was established we had our first military code, which did not follow the lines of British law. The military prosecutor had powers of arrest and other powers which should normally be confined to the Court. But our new military law passed in 1955 - which I helped draft - is a very modern advanced law. For example, the rules of procedure of our military law were later copied into our criminal procedural code. The idea was to create a system in which there were experts in law who were in uniform and had an understanding of Army life and Army problems, and were therefore part of the system. Nevertheless, I was dissatisfied with the lack of independence of the military judiciary. Therefore, in the first Shamgar Commission, which concerned military justice, I proposed that military judges be appointed in the same way as their civil counterparts. It took some time because the Minister of Defence, the then Chief of Staff opposed the proposal, but it was adopted in 1977. The commission appointing military judges is now very similar to the civil commission I mentioned earlier, and includes members of the Knesset and members of the judiciary and therefore ensures the independence of military judges, although they continue to be part of the Army. The Military Appeals Court is composed of a majority of legally qualified persons, and in the lower Courts there is a legally qualified judge as a presiding judge. This is effective because the professional judges have a better understanding of the problems arising and it has proven itself in practice. The Military Advocate General supervises the system of prosecution and legal advice (except the courts) and is the legal advisor of the Chief of Staff. He is appointed by a person outside the military hierarchy, namely, the Minister of Defence.

One of the reforms which I introduced in the Shamgar Commission Report was the introduction of an appeal from the Military Court to the Supreme Court; in important legal cases, leave to appeal can therefore be sought from the Supreme Court, thus creating a hierarchy headed by the civil Supreme Court.

JUSTICE - How do you see the role of the State Inquiry Commission?

Justice Shamgar - State Commissions of Inquiry following disasters are nothing unusual in democratic States. I think it is very reasonable to have judges presiding as chairmen of these commissions. In my view, the commissions have not been overused. The Commission of Inquiry Law is relatively new. It was introduced in 1969, partially as a result of public polemics on the Lavon Affair. In that affair which took place in the early 1960s, Ben Gurion had demanded a legal inquiry. The Ministry of Justice proposed this law, which introduced the idea of an independent chairman and of the appointment of the members of the commission by the President of the Supreme Court. I think for inquiries into phenomena such as the murder of the Prime Minister, or the burning of the al-Aqsa Mosque or the massacre in Hebron - this is the most efficient means available. There has been some opposition to having a judge involved in what are claimed to be political matters, but the 1973 War, for example, was not a political matter. It was a matter which needed the decision of a very high ranking judicial authority, in order that his decision be accepted. Imagine what would have been the reaction had only non-judicial public figures been involved.

In most cases, commission recommendations have been adopted. There have been some exceptions, for example, the appointment of an Intelligence Advisor to the Prime Minister, which was one of the conclusions of the Agranat Commission, has not yet been accepted. We repeated this recommendation in the commission dealing with Prime Minister Rabin’s murder.

JUSTICE - Can we turn now to the occasional public criticism expressed on the punishments imposed by the Courts?

1. H.C. 69/81 Abu Itta v. Commander of Judea and Samaria, 37(2) P.D. 197
Justice Shamgar - Each and every case must be regarded on the merits. The facts of one case are not similar to those of another. I do not favour minimum and maximum penalties, I believe they should be left to the discretion of the judge. Referring to punishments generally, I admit that I favour more severe punishments. I think there are certain types of cases, especially those which involve crimes of violence which are frequent in our daily lives, where we have to adopt a more severe attitude. This was my attitude throughout the years. I think that if suitable punishments are not meted out in certain cases there is a loss of deterrence. Deterrence is based not only on the knowledge that there will be individual consideration of each case but also on the knowledge that in certain cases society will react very strongly against certain phenomena which it will not suffer and this must be expressed in punishment. It cannot be expressed merely through admonitions. Punishment is something people should know about. They should know that if they commit car thefts, burglaries, violence in the family, they will go to prison. I think that without severe punishment in proper cases we are loosing our battle against crime.

JUSTICE - Do you see pardon as a vehicle for rehabilitation, and how do you regard the movement to grant a general pardon as part of the 50 Years celebration?

Justice Shamgar - Pardon as an individual means exists all the time. They are individual and are exercised in proper proportions. But a general pardon, I think, will only cause damage, because it means releasing into the streets hundreds of people who have committed offences which will increase the danger to the ordinary citizen. We now have the new Basic Law on Human Dignity and Freedom. This Basic Law is not only aimed at the offender it is also designed for the victim. The human dignity and rights of the victim should also be protected, and if you increase the danger of crime in the streets, violence, sexual crimes, etc. by releasing large numbers of criminals, you are simply cleaning up the prisons in order to make it easier for the prison authorities, and give credit to offenders, only because Israel has a birthday. I am against general pardons because I know it will relieve the prisons of pressure and overcrowding, but it will turn out hundreds and perhaps thousands of criminals, who are released not because of personal reasons but because of political reasons, and this I think is a mistake.

JUSTICE - Do you think the abolition of capital punishment in Israel was a mistake in view of the rise in terrorism?

Justice Shamgar - I don’t think it was a mistake. These are some of our moral convictions. Putting a person to death by the Government is something which is inhuman and cruel. I think even in relation to terrorist acts - from an optimistic outlook that one day we will have better relations with our neighbours - the fact that we did not carry out executions is something which I hope will assist us. I know there are always cases where the reaction is ‘why don’t we have the death penalty’ - like the Moor murders in England - that is a natural reaction but we should act on the basis of principles, and from a moral point of view. At the same time, I am against the system we have in this country where we release murderers very quickly. The murderer receives imprisonment for life and then the deductions start, and after 9 or 10 years he is out again. I think it is a mistake which devalues the importance of human life, it works comparatively automatically in our system, save for exceptional cases where the President refuses to fix the number of years in prison. The system should be more individualized and there should be more regard to the facts of the case and the behaviour of the person. I do not think people should be kept in prison for 50 years, but that doesn’t mean we should go to the other extreme.

JUSTICE - You fulfilled the function of Attorney-General for 7 years; do you think the perception of its centrality in Israeli life is justified?

Justice Shamgar - Yes. I think we have improved on this institution, because the Attorney-General in other Anglo-Saxon countries (the office doesn’t exist in Europe) is a political figure, he is a member of the Government and appointed together with the party which is in power. We have turned it into an office of a public servant. He is the highest ranking civil servant. It started with the Mandatory system, when the Attorney-General was one of the assistants of the High Commissioner. The Attorney-General is a civil servant, who is non-political, independent, and objective and is appointed in order to enforce the rule of law,

Jerusalem sunset view of the Supreme Court, with the Knesset and Israel Museum in the background, on the next two pages.
subject always to the Courts. It is a very important system. It is a centralized system; we do not have independent District Attorneys, like in the US, but a unified consolidated system, where there is an Attorney-General and a State Attorney and his assistants, who are his aids, and the Assistant Attorney-General who deals with legislation and another who deals with legal advice. It is a centralized system which is very efficient and has been, I think, very helpful to the public and to the authorities, because it tries to channel the conduct of the Governmental authorities into legal avenues. The authorities always have someone to turn to for advice and the public has someone to turn to who is sitting inside the system and is the person heading the prosecution.

JUSTICE - How do you see the interrelation between Rabbinical law and the law of the country?

Justice Shamgar - In general there are peaceful co-relations. The system of having Religious Courts, not only Rabbinical Courts but also Moslem Courts and Christian Courts, did not start in the State of Israel but during the time of the Ottoman Empire. The Christian European nations did not agree that their citizens living in the Middle East be judged in matters of personal status according to Islamic law, which was the law of the State at the time, and therefore they demanded that the Ottoman Port allow the creation of separate autonomous Courts for matters of personal status. During the British Mandate the only change made was the addition of the Sharia Courts because Islamic law was no longer the governing law. We added the Anglican Courts and the Druze Courts and the Bahais also received recognition as a religious faith, although they do not have a separate Court.

JUSTICE - How do you see the problem of exclusive jurisdiction, would you not prefer to see a system of jurisdiction by consent in matters of personal status?

Justice Shamgar - The position taken by the Religious Court is that in order to be recognized by the religious authorities as a member of the Jewish nation we must have, for example, marriage according to Jewish law. It has been claimed that marriage under civil law might lead to the creation of two nations - because of the problem of mamzerut (bastardy), or other problems. There are complicated issues which must be solved one day. Israel cannot be the first country to abolish Moslem Religious Courts, this would lead to international problems.

With regard to the problem of conversion, I hoped the solution proposal by the Ne’eman Commission would be adopted. If an agreement is reached to have an institute in which Judaism is taught and both the Reform and Conservative movements accept that the final arrangements are performed by the Rabbinical Court - as was proposed by Ne’eman - this could be a very important development, because everything accepted by consent is very important. But, much to my regret, I don’t see it yet as being promoted and the existing friction is creating unnecessary hardship and leads to much self-questioning: we accept Jewish families into this country, people who are and want to be part of our nation and yet have not found the ways and means to ease the entry into the nation.

JUSTICE - In conclusion, applying a perspective of 50 years, would you say the pressures and danger to the supremacy of the Supreme Court have increased or decreased over the years?

Justice Shamgar - The Supreme Court has now a much stronger position in Israeli society than it had 50 years ago. 50 years ago it was a body which was respected but which was to a very large extent unknown to a large section of the population. It had not yet developed its own jurisdiction to an extent which was enabled by 50 years of activity. Although there is criticism, which is normal in a democratic society, we are in a much stronger position than we were in at the time of the establishment of the State.

Books Just Received

The Lie that Wouldn’t Die, Judge Hadassa Ben-Itto, (a history of the Protocols of the Elders of Zion), Aufbau Verlag, Germany, April 1998 (in German); Zemora Bitan, Israel, April 1998, (in Hebrew).
