

**WHAT HAPPENS WHEN THE JUDICIARY SWITCHES ROLES WITH THE  
LEGISLATOR?  
AN INNOVATIVE ISRAELI VERSION OF A MIXED JURISDICTION**

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**Summary**

Civil Law codices are analytic, abstract and removed from the specific influence of particular cases. When rules are codified In Common Law systems they reflect a collection of rulings and not a collection of analytic principles. These differences stem from the nature and the motivations of the legislative enterprise. Civil-continental legislation originates in a legislative initiative "from above". It is driven by the aspiration for legal harmony and completeness, and was originally formulated by academics. Legislation in the common-law countries results from a "bottom up" effect in which reality dictates the nature of the developing rules, step by step.

Civil law systems like Common Law systems accept the supremacy of the statutory law over judge-made law. Yet when the judiciary has the authority or the power to influence the legislative agenda there is a veritable role switch. In a manner resembling continental-style legislation, the court reviewing existing legislation determines an abstract principle, usually in reliance on a particular constitutional text, and it is the legislature that is required to distill the principles into specific legislative norms, a function normally fulfilled by the common law court. The question forming the basis of this paper is the nature of the legislative process and the legislation produced by this kind of relationship.

The paper addresses this question through the narrow prism of a detailed examination of a particular Israeli test case in which the Israeli Supreme Court handed down a ruling on a fundamental principle but on its own initiative delegated to the legislature the task

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of implementing it and providing a specific legislative enactment of this principle, on the basis of which the Court would then rule on the concrete case. The result in this particular case was that the traditional roles of the respective branches were reversed. The practical result of the move to delegate the implementation of a far-reaching and fundamental ruling to the legislature was a subversion of the fundamental ruling and delayed justice for the parties who sought a resolution of the matter.

The paper claims that this mechanism leads to the creation of a new variety of a "mixed-system". The judiciary abandoned its primary obligation, namely to serve as an instance for resolving disputes, while the legislature became an executor of judicially enunciated principles. The law thus enacted resembles, in its detailed and complex language, a common law text while the principle formulated in the judgment of the court resembles a section of an analytical "civil law" statute. When the motivation for legislation stems from the court's directives, rather than the governmental or legislative interests, the legislature or the executive branch has an interest in thwarting the court's intention through the use of various tactics readily at its disposal. This process also affects the vague and detailed formulation of the legislation, which has a character rather different from the abstract nature of civil law legislation. The lesson that this episode teach us, which the court itself internalized, is that a court cannot really dictate a legislative agenda and that it should instead focus on its designated role – the resolving of concrete disputes.

**KEYWORDS:** Judicial Review; Legislation; Legislative Process; Separation of Power; Bureaucracy; Executive Branch; Constitutional Review; Administrative Law; Common Law; Civil Law; Mixed Jurisdictions; Israel; Property rights; Expropriations; Land Law