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FIGHTING THE ADMINISTRATION'S ABUSE OF POWER

Miriam Ben-Porat Interviewed by Manfred Gerstenfeld

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Israel's Current Ombudsman

[Editor's Note: This *Jerusalem Letter* highlights the thought and accomplishments of one of the outstanding personalities in Israeli public life, and is adapted from *The Future of Israel*, a forthcoming book of interviews of Israeli public figures by Jerusalem Center Fellow Manfred Gerstenfeld, to be published by the Jerusalem Center for Public Affairs.]

In 1988 the Knesset elected High Court Justice Miriam Ben-Porat to be Israel's State Comptroller and Public Complaints Commissioner. The latter function is more commonly known as the Ombudsman. She has brought new vitality, new concepts, and a new approach to the position, establishing new norms in many grey areas. In 1993 she was unanimously reelected for another five-year term.

Ben-Porat was born in Witebsk, Russia, in 1918, and grew up in Lithuania. After finishing high school in 1936, she made aliya to Israel alone. In 1945 Ben-Porat became a lawyer, serving in the State Attorney's Office from 1949, and becoming

Deputy State Attorney in 1953. In 1959 she was appointed a judge in the Jerusalem District Court, and in 1975 she became its president.

In 1976 she became the first woman appointed to Israel's Supreme Court. By the time she retired from the bench twelve years later, she was vice president of the Court. In addition to her judicial career, Ben-Porat taught law from 1964 through 1978 at the Hebrew University where she was an associate professor of law. She is the author of a commentary on the Law of Assignment, and has published many articles in the *Israel Law Review* and various other professional journals. In 1991 the government awarded her the Israel Prize, the country's highest honor, for her special contribution to state and society.

Ben-Porat has used an activist approach to wage a never-ending battle against abuses of power and against the politicization of public administration. She considers this ongoing struggle essential in order to keep the process of improving governance in Israel on track.

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The Gap Between Principle and Practice

Ben-Porat believes that Israel's legal principles and norms are of a very high standard, but the way the public administration applies them leaves much to be desired. "There is a gap between the real world and the theoretical world. If one does not apply the Supreme Court's norms, then they are only good for the very specific cases in which the court decided. We have many good laws, plus the norms of the Supreme Court, which compare well with those of any other democracy in the world. On the other hand, we have the grey reality that many of these norms are often not applied. This phenomenon has to be eliminated at the root."

She explains this concept in detail with examples from her experience in the Court and the State Comptroller's office. "On the High Court of Justice I heard many petitions against the government and the public administration. The Court's decisions established norms and, in fact, a common law constitution, since Israel does not have a written constitution. We operate according to these principles and norms, which are very effective."

"As State Comptroller and Ombudsman, one has to apply the same careful norms," Ben-Porat stresses. "The Ombudsman acts de facto as a popular court to which the citizen can appeal against the administration if he thinks he has been wronged. As Ombudsman, we do part of the work of the complaining citizen. We investigate and serve as his mouthpiece even if he has not brought up all of the relevant facts and arguments, or did not state the specific remedy he seeks."

Divided Loyalties of Political Appointees

In her desire for greater integrity in public administration, Ben-Porat has confronted systematically the problem of political appointees. "One must see the civil servant as the public's trustee. Citizens are entitled to benefit from his services. Political appointees, especially in key positions, may feel they owe their loyalty to those who appointed them rather than to the public which it is their duty to serve. If the government appoints an official for political reasons, he will be expected to serve the interests of those who appointed him. Even if the person is competent, there is a serious problem which is difficult to address. He may be talented, but he might not have been appointed had he not been a member of a certain party. If he is competent, he should be neither favored nor discriminated against. A lot depends on the person's integrity."

The public has a right to expect to be served by

public employees for its benefit, without any foreign considerations, and with due diligence. Therefore, Ben-Porat says, the most suitable persons should be appointed regardless of their political views, which should be a neutral factor. If the connection to a certain political party or the political views of a candidate constitute one of the factors in his nomination or appointment, then the appointment is flawed.

Ben-Porat points to a well-known corruption case to illustrate how complex the situation can get when political appointees do not separate their political interests from the public function they hold. She reads from the court ruling in this case: "A politician in a high government position or in the public administration should be aware and sevenfold prudent not to confuse his political status with that of a public servant. The citizen who needs service from the public administration cannot discern the intentions of the person who requests a political contribution. If he refuses the request, he has to fear that this may harm him in the future. Thus, the prestige of the administration and the trust of the public oblige a total separation between the political party interest, which the civil servant has according to his convictions, and the actual interest of the government office or body where he works, as well as his commitment to the public, which is entitled to his services."

Ben-Porat explains that the ruling is from a Supreme Court case involving a land dealer named Shmuel Einav. "For his business, he needed, like many others, the good services of the Ministry of Agriculture. Before the 1988 elections, those in power were looking for contributions for their party's campaign. They called a meeting, and Einav and others were present. The others left before they were asked to make a contribution. At the meeting there were clear hints that if those who wanted the ministry's good services would make contributions to the party, both sides would benefit. That was how Einav understood the matter."

"Now an odd thing happened," she continues. "Initially, a suit was brought against the land dealer, who was found guilty. But no effort was made at the time to press charges against the official concerned or lift the parliamentary immunity of the deputy minister involved. Only much later was a suit brought against those who had received the contributions. This shows the difficulty and the reticence to bring suits against civil servants and public appointees."

"There have been a significant number of cases of betrayal of the public's confidence or abuse of authority by highly placed officials. This abuse of authority

derives from the fact that both power and special interests corrupt. Here again, the problem of conflict of interest emerges; the obligation to serve the public conflicts with the obligation toward the party which got you your position."

"If an outsider hands out cash from the state's treasury to whomever he wants, everybody will agree that this is theft. If a minister or civil servant abuses his competence and transfers money to those who are not entitled to it, I do not see in this anything less criminal. They, however, do not run the same risk. So far, their fear to be brought to court has been minimal. If more charges were pressed against people in key positions, this would be the best deterrent. It would prevent others from doing the same things."

Ending Secrecy in Campaign Contributions

Ben-Porat continued the fight against the intermingling of political and business interests by changing the norms of secrecy regarding campaign contributions. "I realized that the names of the major contributors to the various parties were not made public. I investigated whether that was permitted by law. If that were the case, then the most I could have done would have been to say it seemed to me a bad law, but it is not my role to control the Knesset which elects me. Yet when I looked into the matter, I was told that nothing in the law guaranteed contributors' anonymity. I found that it was based on a silent understanding. Since the names had not been published for so many years, this was interpreted as if there were an agreement that if somebody made a contribution to a party, his name would not be mentioned in the State Comptroller's Annual Report. Nor would the State Comptroller disclose it in any other way."

"I knew that Knesset Member Amnon Rubinstein had proposed a law which fixed a maximum amount per contribution, but I faced a dilemma. I did not want to be seen as wanting to take the place of the legislature. That would have meant an abuse of my authority. On the other hand, I considered this an important area where I should watch out for the administration's integrity, which is my role as written in the law."

"The proposed law did not progress in the Knesset. Finally, after consultations in our office, I reached the decision that the names of those who contributed more than NIS 10,000 would be published. We disclosed only contributions which were received after a period of grace of a few weeks, having given prior notice of my intentions to the parties. Also, if somebody brought

forward good reasons to remain anonymous, such as that he would incur risks in his country of residence abroad if his contribution were known, we would consider his request."

"Then another strange thing happened. In the framework of the discussion of an unrelated financial law, a proposal was made to change the State Comptroller's Law in such a way as to give the Knesset chairman discretion over which parts of the State Comptroller's report would remain secret. By chance, one of our staff members saw this proposal before it came to a vote. I asked to appear before the Knesset Finance Committee. I must say, to their honor, that its members were quite ashamed about the proposal and cancelled it, but that only happened because I intervened in time."

The Importance of Timely Intervention

This brings Ben-Porat to another of her favorite themes: the importance of intervening in a timely manner. By embracing an activist approach, she tries to prevent mistakes before they happen rather than criticizing them after things have gone wrong.

"I intervene if I see that a project is proposed which is not economically sound. That makes much more sense than reacting after it has already been completed. What can I say then? That it is not a good idea to build unprofitable plants? Everybody knows that. I want to prevent them from being built in the first place."

"The government can be of another opinion," she admits. "I have to express my opposition in time — not when it is too late — provided the facts at my disposal support my opinion. There are many countries which have not reached this level in their approach to the function of the State Comptroller; even the most enlightened ones hesitate."

Before discussing concrete examples to illustrate the need for a precautionary approach, Ben-Porat offers a hypothetical one. "Let us assume that the government wanted to sell military equipment which contained confidential technology. The sale would reveal life-threatening secrets to a state which is not very friendly to us. Should I remain silent and let the sale go through? Should I only investigate after this has happened, and conclude that we have all been put in danger? In my opinion, that is forbidden. I say this to support my approach that one — only in exceptional cases and in a prudent way — has to use this instrument of interference before the damage is done and before the state has taken on a legal commitment."

Intervening to Prevent Mistakes

But the examples are not all hypothetical. Ben-Porat lists several situations in which her office intervened to prevent mistakes. In one, the government had decided to privatize several state-owned companies, in line with global trends. One of the companies up for privatization was the Jerusalem Economic Corporation, which had major land holdings, mainly in the Jerusalem area.

"I asked myself, 'Do I have the right to say, privatization is fine, but why start with a company which holds significant amounts of government-owned land?' When we looked into the matter, it turned out that some of the company's land holdings were very depressed in value. We had reason to believe that this was a temporary situation. We said that if the government needed money, why not sell the valuable land holdings of the company? That could have brought in a lot of cash, while retaining in government hands the land which was likely to increase in value."

Ben-Porat says that her office's investigation indicated that this approach would prove more effective than selling the company outright. Her staff had the company's land holdings appraised and found that the holdings were worth far more than the proposed selling price. "I then suggested that the government keep the company and sell part of the land. We said very carefully, 'Why not consider this option?' We did not say that we wanted to decide instead of the government; we merely asked them to reconsider."

But there was more to the story. Ben-Porat's office discovered that the government had not consulted the company's board about the proposed transaction. "According to the law, one of our tasks is to check the legality of the public administration's actions. When we queried this, we were answered: 'Why should we ask the board of directors? They do not want to lose their function, so they surely will oppose the sale.'"

"If one pushed this kind of argument to the extreme, then a judge in a court case would not hear the defendant at all because he would probably deny the charges. In this specific case we said, 'Perhaps the board of directors will bring convincing arguments that the company should not be privatized. The board members may indeed have an interest in the company not being sold, so they will probably bring the best arguments against the transaction. It seems logical that before the government decides what policy to follow, it should hear all the relevant arguments.'"

"I therefore decided to raise this issue in a letter to the Minister of Finance, using carefully worded

questions aimed at drawing his attention to arguments against the transaction. Despite my questions, the transaction was completed. What should I have done? Should I have waited until they sold the company? By then the country would have incurred a loss."

She cites yet another example of the need for timely intervention. "The previous Minister of Housing intended to sign an agreement for the construction of 20,000 housing units — a huge contract for a small country — with one developer without a public tender. The terms of the agreement seemed to us very onerous for the state. When the ministry agreed to issue a tender, we examined it and found that it had been tailor-made for that developer. It barred smaller companies from participating. We commented on this during the negotiations. Then the minister reduced the tender to 10,000 units, and later to 5,000. Finally, he abandoned the whole project. If we had not intervened in time and the agreement had been signed, we could only have cried over spilt milk and calculated the damage, part of which could not even have been measured in financial terms."

Active monitoring of public administration is a cornerstone of Ben-Porat's approach. "Let us assume that somebody who participates in a public tender finds out that his bid was the lowest but the tender was awarded to a competitor. If he wants to prevent this, he has to appeal to the High Court without delay. He certainly must do so before the competitor starts to carry out the work. If he comes later, the court will say, 'We're very sorry. You can file a civil claim against the public administration and try to prove that you have suffered damage, and — quite naturally — conflicting views of a problem can arise. Your competitor, however, is innocent. He has a signed legal, valid contract.'"

Taking on the IDF Over Gas Masks

One of the most famous cases Ben-Porat has handled concerned the gas masks distributed to the public before the 1991 Gulf War. "During the Gulf War we heard that some of the gas masks did not fit the people who wore them. A significant number of people were not protected while they thought they were." Ben-Porat decided she could not delay action on such an important issue. The potential damage was so great, she reasoned, that her office was entitled to intervene. She wrote a letter to the Minister of Defense, and the letter was leaked to the press. "I am very much against leaks such as this, even if sometimes they have positive results. I then brought the issue before the State Audit

Affairs Committee of the Knesset even before we had issued a report." Although this order of things was at variance with standard procedure, Ben-Porat justified it because of the severity of the matter at hand.

Problems of Jurisdiction

The State Comptroller's fields of activity often coincide with those of the Attorney General, Ben-Porat says, noting that certain tensions between various authorities are unavoidable. Nonetheless, she feels that many of these tensions damage the object of good government.

For example, she says, a conflict exists between two parallel court systems that deal with issues of personal status: the rabbinical court and the general court. Neither will hear an appeal of a decision by the other, and they often issue decisions that conflict with each other.

"What is the competence of the State Comptroller?" she asks. "The law states that the State Comptroller has to examine the legality of the actions of the public administration. If he or she decides that a certain action is not legal, this may conflict with a prior opinion of the Attorney General."

"This puts the executive branch in a very difficult situation. It sees itself — rightly so — bound by an opinion of the Attorney General. Many years ago, a committee headed by Supreme Court Justice Agranat decided that where there is no court ruling, the Attorney General's opinion is binding. That committee addressed a more limited issue: the relationship between the Minister of Justice and the Attorney General. It did not discuss the position of the State Comptroller. The latter should be free to decide whether the actions of the public administration are legal or not. When the State Comptroller, in his function as Ombudsman, expresses his opinion, it would not be correct to appeal to the Attorney General because that would undermine the State Comptroller's position."

She says that a citizen who seeks the aid of the Ombudsman in effect is saying, "I did not get what I was entitled to." Determining what the citizen deserves requires an interpretation of the law. If the Ombudsman were to be bound by the Attorney General's position, the situation would be intolerable.

An additional problem of jurisdiction that has occupied Israeli public opinion extensively in recent years involves the relationship between the High Court and the government. Ben-Porat underscores the many nuances of the issue: "It is very difficult to determine

where the High Court can express its opinion, because the case is not political, and where it cannot, because the issue is political. Even if the case is political but has general public aspects as well, the High Court can express its opinion. I cannot say whether that is necessary, right or wise. The only question I can answer is whether the Court is allowed to do so."

Ben-Porat says the High Court has great discretion here. It should avoid dealing with those issues which concern the political world and the public at large when the result would be that the court would lose credibility in the eyes of the public. This is the crucial issue.

"If somebody comes and says he wants to see norms established, or that he has been harmed by the public administration, then the court has the competence to deal with it. In each generation, the High Court has, however, to determine the borders of its intervention. A major consideration here has to be that public trust in it will not be harmed."

For similar reasons, Ben-Porat turned down a Knesset request for the State Comptroller's office to write an opinion on the politicization of the army. She thought it would be unwise to express herself on what generals could and could not say. The Knesset, she said, should address the issue.

While these issues are important, Ben-Porat is most concerned with pragmatic collaboration between institutions. In the struggle against the abuse of power by the public administration, she often has to bring matters to the attention of the Attorney General so he can take any necessary action. "Of course he has his own discretionary power to decide, but I am allowed to do all in my power to convince him to act against abuse of power."

"The same goes for the police, which I want to encourage not to be reticent to investigate highly placed people. My idea of what a public figure should be is somebody who acts correctly and not somebody who abuses his power in a highly-placed position for which he apparently is not suited. If the Attorney General and the police were to take this approach, I think that we would make a major step in the right direction against abuse of power."

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Manfred Gerstenfeld is an international strategic consultant to the senior ranks of business and government. He is the co-author of *Revaluing Italy* (1992) and author of *Environment and Confusion* (1993).

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Raphael Israeli

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Co-published with University Press of America, 1993, 220pp. Softcover \$21.50.

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**The State of Israel, The Land of Israel:
The Statist and Ethnonational Dimensions of Foreign Policy**

Shmuel Sandler

The impact of the nation in foreign policy is not synonymous with that of the state. Understanding the effect of the nation is important because of the contemporary reawakening of primordial national aspirations. This study examines nation-centered concerns in foreign policy as practiced within Israel. It reviews and analyzes the roots of the territorial dimension in Israeli foreign policy since the establishment of the state up to the present; the impact of Israeli domestic politics; and the rise of ethnonationalism in Israeli foreign policy.

Greenwood Press, 1993, 300pp. Hardcover \$39.95.

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The Political Economy of Israel: From Ideology to Stagnation

Yakir Plessner

The failure of the Israeli economy can be explained by its departure from the institutions and rules which govern predominantly market economies. Israel's economy has been operating on principles too far from European Liberalism (or American neo-Conservatism) and too close to Socialism. While national imperatives may have been a reason for ignoring economic considerations, ultimately this strategy led to domination of the economy by the government and the systematic exclusion and distrust of private enterprise. As long as the economy is not reformed to create a hospitable climate for private investment, Israel will not be able to extricate itself from economic stagnation. A major critique of Israel's socialist economy, this work is part of the JCPA's study of the political economy of Israel.

State University of New York Press, 1994, 330pp.

Softcover \$21.95; Hardcover \$65.50.