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DEMOCRACY AND THE NEW CONSTITUTIONALISM IN ISRAEL

*Michael Mandel**

Democracy and the New Constitutionalism

In a recent paper, I argue that the “new constitutionalism” — the transformation in the relations between courts and representative institutions that has swept the world and that is now sweeping Israel too — can best be understood as one of those “changes of everything so that everything would remain the same”.¹ The promotion of courts and the demotion of legislatures through the judicial enforcement of “rigid” Charters and Bills of Rights has “legalized politics,” changing its nature as well as its locus. Contrary to those who regard this as an essentially democratic development, I argue that it is, to paraphrase Reuben Hasson, a weapon in the hands of democracy’s enemies.² I argue that the new constitutionalism was intended to operate and does operate as an *an-*

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1 Michael Mandel, “A Brief History of the New Constitutionalism, or ‘How We Changed Everything So That Everything Would Remain the Same’”, (1998) 32 *Isr. L.R.* 250.

2 R.A. Hasson, “How to Hand Weapons to Your Enemies — The Charter of Rights Fiasco”, (June, 1982) 5 *Steelshots*.

tidote to democracy, that it was meant to preserve the oligarchy of private property from the mortal danger posed by representative institutions elected by people without property, the original Greek "*demos*" from whence the term. As long as representative institutions were kept the personal possessions of the rich, through limitations on suffrage and other devices, their constitutional theorists sang the praises of parliamentary sovereignty. But the moment the propertied classes lost control of these institutions, these same constitutional theorists started to worry about the "tyranny of the majority" the way they never worried about the tyranny of the minority. They went to the drawing board and came back with judicial review. They changed everything (namely constitutional theory) so that everything (namely the oligarchy of the wealthy) would remain the same. They placed boundaries around government action and called on the legal profession to police the boundaries.

In my paper on constitutionalism, I try to sketch a proof of this thesis by confronting the historical, empirical and philosophical arguments for the democratic character of judicial review, drawing on as many historical and international examples as I can. A worthy thesis about judicial review has constantly to measure itself up against the facts and must emerge not only intact but actually enriched by confrontation with the myriad national and supra-national varieties of the species. Experience with the Canadian³ and Italian⁴ worlds of legal politics has also taught me that the deeper one goes into the specifics, the more one learns about the generalities.

Hence this paper's attempt to investigate the democratic question of judicial review in yet another specific context. But here I must offer an important caveat. Israel may be a little country but it has a big ego, one which it comes by honestly, of course, as the cradle of many religions and a territory violently disputed by empires for most of recorded history. In other words, Israeli reality is complicated and not that easy to penetrate. As a Jew, I am far from a stranger to this reality, but as a

3 See, for example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishers, rev. ed., 1994) and, more recently, *Law, Politics and the Supreme Court: The Québec Secession Case* (The Hebrew University of Jerusalem Halbert Center for Canadian Studies, 1998).

4 Michael Mandel, "Legal Politics Italian Style", in C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York University Press, 1995).

non-resident with very little Hebrew there are limits to my abilities to wrestle all the issues to the ground. Hence, I propose the following as only a rough sketch of how the democracy question might be played out in the legalization of politics in Israel, closer to the first than the last word, and far more illustrative than exhaustive in its use of examples. I more than welcome the response of Israeli scholars and I urge them to answer the questions I can only raise.

The Legalization of Politics in Israel

Can the anti-democratic thesis, which seems to me to have so much explanatory power in so many different contexts, shed any light on Israel's constitutional developments? I propose to test it by examining the history, theory and practice of Israeli constitutionalism. Historically, what has to be explained in Israel's case is the delay in the adoption of modern constitutionalism until the 1990s, that is both its failure in the early years of the state and the timing of its recent success. Usually, constitutional judicial review appears contemporaneously with extended suffrage, which allows its defenders to claim it as democratic and its detractors to explain it as an antidote to democracy. Israel was created with universal suffrage for its citizens, but its "constitutional revolution" did not occur until more than forty years later. Theoretically, the question is whether the democratic defence of modern constitutionalism has more validity in the Israeli context than in others, primarily because of the peculiar nature of Israeli politics which make for representative institutions particularly prone, it is said, to anti-democratic behaviour. Finally, what has to be accounted for and evaluated is the Israeli court's record for delivering relatively democratic decisions, at least when compared to the rest of the world's constitutional courts.

For reasons of space, I can give only the barest outline of the history of Israel's constitutional development.⁵ Despite the enactment of several "Basic Laws" and some exceptional decisions starting in the late 1960s

5 A full account can be found in Claude Klein, *La Démocratie D'Israël* (Editions du Seuil, 1997) and a briefer one in David Kretzmer "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?", and "The Supreme Court and Parliamentary Supremacy", in Itzhak Zamir and Allen Zysblat, eds., *Public Law in Israel* (Clarendon Press, 1996) 141 and 303.

on election financing (*Bergman*⁶), Israel remained under a parliamentary sovereignty regime until the 1990s. The major turning point occurred in 1992, the year of what Justice Aharon Barak, President of the Supreme Court of Israel, has called the "constitutional revolution". In that year, two new Basic Laws were passed containing many of the important elements of a classic Bill of Rights: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. As its title indicates the former statute was more restricted in application, while the latter had most of the elements of a classic liberal Bill of Rights, except, notably, equality rights. It declared its purpose to be "to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state".

It was not long before these laws bore their first jurisprudential fruit (or rather meat). In the very year of their passage a provision of the Meat and Meat Products Law was declared invalid as a violation the Basic Law: Freedom of Occupation. The case, *Meatrael v. Rabin*,⁷ involved the importation of non-kosher meat, that is meat that did not comply with the Jewish religious dietary laws. However, this did not lead to a change in the status of the importation of non-kosher meat, but rather to a change in Basic Law: Freedom of Occupation. The Labour party government of the time depended on the participation of the ultra-orthodox Sephardi party, Shas, and it agreed to revise the Basic Law to allow for exemptions of specific laws, including, naturally, the meat law, which was later granted a permanent exemption.⁸

The 1994 amendment of the Basic Law: Freedom of Occupation to accommodate the meat question was also taken as an occasion to make other substantial revisions to both of the 1992 Basic Laws. Each would henceforth include an expansive new first section:

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

6 *A. Bergman v. Minister of Finance and State Comptroller*, in Zamir and Zysblat, *ibid.*, at 310.

7 (1992) 47(v) *P.D.* 485.

8 *Ha'aretz* (Eng. ed.), March 19, 1998, at 3.

The Declaration of the Establishment of the State of Israel includes several additional egalitarian elements conspicuously absent from the two Basic Laws themselves:

The State of Israel ... will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all of its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.⁹

In addition to this change to both of the laws, Basic Law: Freedom of Occupation was redrafted in the somewhat loftier terms of Human Dignity and Liberty.

More Basic laws were formally introduced in 1998 (but not yet passed as of this writing): three by the government (on the judicial system, on freedom of expression and association, and on social rights) "in honor of Israel's 50th anniversary",¹⁰ and one by an independent group of government and opposition members to entrench freedom of religion and religious pluralism.¹¹

In 1995, the Supreme Court issued its decision in *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.*¹² in which Judge Barak, joined by a majority of the court, outlined his theory that Israel had, since 1992, achieved full-fledged constitutional judicial review, and his defence of this as a democratic development.¹³ The Court held that this even applied to Basic Law: Human Dignity and Liberty which lacked the formal "rigidity" (an enhanced majority needed for amendment) that had hitherto been regarded as a hallmark of constitutional

9 See the official government website <<http://www.israel-mfa.gov.il/peace/independ.html>> and Appendix to Daniel J. Elazar, ed., *Constitutionalism: The Israeli and American Experiences* (University Press of America, 1990) 211; *Eton Rishmi* 14.5.1948 Vol. 1, p. 1, at p. 2.

10 *Ha'aretz* (Eng. ed.), February 6, 1998, at 1.

11 *Ha'aretz* (Eng. ed.), June 23, 1998, at 3.

12 *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.* (1995) 49(iv) P.D. 221, opinion of the President of the Court, Justice Aharon Barak.

13 *Infra* n. 79.

status. However, the decision of the lower court striking down a farm credit relief law as a violation of the right to property was reversed and the law upheld. In 1997, the Supreme Court finally used its newly-declared power in the case of a group of stockbrokers and actually overruled a law as a violation of Basic Law: Freedom of Occupation.¹⁴

Since the "constitutional revolution" of 1992 the courts, and especially the Supreme Court, have been more and more in the thick of things, deciding and negotiating issues of religious pluralism and civil rights. Its President, Justice Aharon Barak has a very high profile in the mass-media. The court has been attacked by the religious parties for a supposed ethnic and secular bias and it has been argued that a special, more representative constitutional court should be adopted, along the lines of most European jurisdictions. The court, for its part, has found many defenders and has not been shy in its own defence. In June, 1998, Justice Barak proposed a referendum on the constitution and declared that a representative court would be a "disaster".¹⁵

A Change of Everything So That Everything Would Remain the Same?

How does all this fit within the general panorama of the development of modern constitutionalism? The answer seems to be "pretty well", though there are some very important differences that need some accounting for.

Developments from 1948-1973

The movement for a Bill of Rights can be usefully divided into two stages, the first running from the founding of the State until roughly 1973. In the first stage, the movement seems to have had, for the most part, the same kind of political sponsorship and political opposition that we find throughout the history of modern constitutionalism, with the political Right mostly in favour and the political Left mostly opposed. The position did not change much from the configuration in the original debate in the Knesset in 1950. In that debate the secular parties of the

14 *Association of Investment Management in Israel v. The Minister of Finance.*

15 *Ha'aretz* (Eng. ed.), June 18, 1998.

Right were the advocates of a written constitution and a Bill of Rights. The main components here were the General Zionists and the Herut. The General Zionists were a classic party of property and business. They wanted Prime Minister Ben Gurion to declare Zionism incompatible with socialism. However the General Zionists were at first only a junior partner in the opposition. The leading party was the Herut. The Herut was the direct successor of the radical Revisionists and the terrorist Etzel (or Irgun), whose main plank was an uncompromising position on the national question (all of the ancient land of Israel for the Jews).¹⁶ Though they were unflinchingly anti-Labour, their social and economic position differed at first from the pro-business General Zionists, containing much anti-capitalist rhetoric, alongside the anti-socialist kind.¹⁷ At this stage Herut advocated a kind of state-corporatism, not fundamentally unlike Italian Fascism, with which the Revisionists were notoriously close before Mussolini's anti-semitic turn in the late 1930s.¹⁸ However, shortly after the elections to the Constituent Assembly and certainly by the time the constitutional debate was taking place, Herut modified its economic platform to be closer to the free-enterprising and increasingly successful General Zionists, who replaced Herut as the main opposition party in 1951. The two parties would ultimately merge in Gahal in 1965 and Likud in 1973. Thus, in the 1950 debate on the constitution, Herut leader Menachem Begin could be found arguing for a Bill of Rights as a guarantee of the "night-watchman" state for which "every free man prays".¹⁹ Herut's advocacy of a Bill of Rights has been thought inconsistent with its other right-wing positions:

16 The designation "Revisionists" came precisely from the programme to revise the boundaries of the State to include the whole of ancient Israel.

17 Peter Y. Medding, *The Founding of Israeli Democracy, 1948-1967* (Oxford University Press, 1990) 64.

18 Meir Michaelis, *Mussolini and the Jews* (Clarendon Press) 86-87.

19 "When liberal thought flourished it was said of the state's authority that it ought to be limited to the role of 'night watchman'. That period is past, and every free man prays that we will not be forced to admit that it has gone forever". *Knesset Debates*, February 1, 1950 reprinted in Itamar Rabinovitch and Jehuda Reinharz, *Israel in the Middle East: Documents and Readings on Society, Politics, and Foreign Relations 1948-Present* (Oxford University Press, 1984) 45. See also Amos Perlmutter, *The Life and Times of Menachem Begin* (Doubleday & Co., 1987) 250ff. and Medding, *supra* n. 17, at 39.

Special circumstances have forced the Labor opponents into positions not usually associated with conservatism. For example, Herut ... has advocated laws to protect civil liberties.²⁰

But, in fact, the advocacy of judicial review was merely the classic position adopted by the parties of property in many constituent assemblies after the Second World War.

Also consistent with the general configuration of the period, at least in Europe, was the position of the main party of the Left, the party of labour, Ben Gurion's Mapai, which was opposed to the adoption of a Bill of Rights.²¹ In the Knesset debate, Ben Gurion mounted a strong defence of the democratic character of parliamentary sovereignty and majority rule.²² It is clear that one element of his opposition was an antipathy to judicial review. According to one commentator, "most critical of the constitutional role of the Supreme Court in the United States, he claimed that even the Americans did not always accept it with love".²³ In an earlier debate about due process and emergency regulations, Ben Gurion had, in fact, rocked the legal profession with this statement:

Every jurist knows how easy it is to weave juridical cobwebs to prove anything and refute anything ... as a law student I know that no one can distort any text and invent farfetched assumptions and confusing interpretation like the jurist.²⁴

20 Don Peretz and Gideon Doron, *The Government and Politics of Israel*, (Westview Press, 3rd ed., 1997) 108.

21 The notion of Mapai as a party of the Left is sometimes hard for Israelis to accept, given its control of government and its general hegemony for the first 20 years of the State's existence, not to mention its encouragement of private capital and its antipathy to the Soviet Union. However, its labour-oriented and social democratic policies and ideology — a welfare state with extensive union rights and most of the economy in public or union hands — as well as its membership and constituency put it firmly in the camp of contemporary European socialist parties. As in most of Western Europe, the social democratic parties were the leading parties of the working class with the communist parties very much junior partners. Where the communist parties were dominant, they were non-revolutionary and reformist as well. See Donald Sassoon, *One Hundred Years of Socialism: The West European Left in the Twentieth Century* (Fontana Press, 1997).

22 Medding, *supra* n. 17, at 39.

23 Nathan Yanai, "Politics and Constitution-making in Israel: Ben-Gurion's Position on the Constitutional Debate Following the Foundation of the State", in Elazar, *supra* n. 9, at 107.

24 Pnina Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy", (1990) 24 Isr. L.R. 211, at 226.

Ben Gurion's antipathy was in no way merely personal; it was an axiom of the labour movement based on the broad experience of judicial review as anti-labour and pro-property. The only examples of judicial review known to Israel's first leaders were the American, German and Austrian ones, all examples of reactionary courts that sided with the rich against the poor, business against labour and the Right against the Left. The position of Israel's Labour government was precisely the position taken by the Italian Left — Socialists and Communists — who railed, to no avail, against the obstacles put up by the new constitution to the potential exercise of democratic, working-class sovereignty. It would certainly be stretching things to accept Ben Gurion's claims to have been motivated by abstract democratic principles, especially in light of his subsequent attempts to abolish proportional representation in favour of the much less democratic English riding system;²⁵ but the fact that his argument — that democratic societies do not need Bills of Rights — prevailed among the generation who had lived through the War is a nice corrective to the claims that the "lessons of history" had proved to everybody that democracies could not survive without them.

Israeli Peculiarities: Disunity on the Left and Religious Opposition

If support for constitutionalism by the parties of business and opposition by the parties of labour put Israel in the classic mould, there were some notable Israeli peculiarities.

In the first place, the Left was not united on the question, as it was, for example, in Italy. Mapam, the Zionist socialists to Mapai's left, joined Herut and the General Zionists in advocating a written constitution and a Bill of Rights. It is not entirely clear whether Mapam envisioned judicial review, however. The opposite seems true from the Knesset debate:

What is the minimum beyond which the legislative, executive, *and* judicial powers must not go? We feel that in a state like ours this is

25 Medding, *supra* n. 17, at 171-174. This is why the provision invoked in *Bergman* (1969), enacted in 1958, had the special majority requirement; it was put there to protect proportional representation: Klein, *supra* n. 5, at 163.

one of the most important factors, and for this reason the drafting of a constitution is an urgent matter.²⁶

Mapam was rigorously pro-Soviet until the Prague trials in the mid-fifties (when a Mapam member was put on trial in Czechoslovakia for spying), and the Soviet Union had a famous written constitution, full of separation of powers and, most notably, ambitious social rights alongside the traditional political and civil rights. However, the Soviet constitution eschewed judicial review, and was understood mainly as an outline of the governmental structure and, on the question of rights, as an educative document. These aspects were the ones stressed by Mapam. It is hard to believe, at any rate, that Herut and Mapam could ever have agreed on a concrete proposal.²⁷

Another peculiarity in Israel was the opposition of the religious element, who claimed the Torah was Israel's only constitution. Religious opposition to the secularism of the Supreme Court started with the boycott of its inauguration in 1948 and has remained implacable to the present day.²⁸ This is to be distinguished from the support given to the constitution by the religious parties ("Christian Democrats") in Germany and Italy, though it must be said that these parties were also the parties of property, while the religious parties in Israel have always been more narrow in their focus.

What Took So Long?

But what really distinguished Israel was that the modern constitutionalist movement did not make any headway at all for an entire generation after the State's establishment, especially when it was suc-

26 Yisrael Bar-Yehudah (Mapam), Knesset Debates February 1, 1950, *supra* n. 19, at 44 (emphasis added).

27 "The left (Mapam) and right (Herut) were in uneasy — and often acrimonious — alliance over the need for a constitution or bill of rights: the one, to enshrine its labor ideology as a national heritage, the other, to protect itself and other minorities from deviation from constitutional freedoms through a parliamentary "mechanical majority". Avraham Avi-hai, *Ben Gurion State-BUILDER: Principles and Pragmatism 1948-1963* (John Wiley and Sons, 1974) 251.

28 Pnina Lahav, "The Supreme Court of Israel: Formative Years 1948-1955", (1990) 11 *Studies in Zionism* 45, at 49.

ceeding so famously elsewhere in the world. The standard explanations of Israel's failure in this regard fall into the two categories of ideology and party politics.

Ideology?

The ideological explanations include the influence of the British tradition of parliamentary sovereignty and a reluctance to adopt a constitution for the Jewish people when only a tiny minority of the world's Jews lived in the country. On examination, these explanations turn out to be unconvincing. The British tradition was even more powerful in India, and, at the very moment of Israel's foundation, a rigid constitution was being enacted there to protect private property from democracy. The British themselves had even shown the way with the entrenched property provisions of the Government of India Act in 1935.²⁹ Indeed, it's only logical: every country that has adopted constitutional judicial review, from 18th century America to 20th century South Africa, has had to do so in violation of a prior tradition, and that includes Canada in 1982.

The argument that Israelis were yet only a tiny minority of the Jewish people was made in the 1950 debate on the constitution as a counsel of patience: since the country was counting on massive immigration, it was too soon to lay down a definitive constitution.³⁰ In fact, the population would double within six years and quadruple within twenty, with Israel's percentage of the world's Jews increasing from 5.7% in 1948 to 12.8% in 1954 to 27.4% in 1986 and 35% in 1996.³¹ But, the argument proves too much. If it were true, how could one account for the momentous decisions Israel took through the years of its underrepresentation of world Jewry, from defining "who is a Jew" through war and peace? And how could one account for the fact that Israel more or less quickly enacted all the components of a constitution *except* judicial review? And that, when it finally did enact judicial review, it was still a society deep in flux and constituting but a third of the Jews of the world?

29 H.C.L. Merrilat, *Land and the Constitution in India* (Columbia University Press, 1970) 37-51.

30 Rabinovitch and Reinharz, *supra* n. 19.

31 Asher Arian, *The Second Republic: Politics in Israel* (Chatham House, 1998) 26.

Party Politics?

The party-political explanations include the opposition of the religious parties (who were part of the Mapai-led government coalition) and the problems that a Bill of Rights might have posed for the policies of the government. These included such classic constitutional flash-points as the inevitable discriminatory treatment of the large Arab-Muslim minority in a state that was meant by its founders to be a "Jewish state", the confiscation of property for settlement, and emergency security measures in the continuing state of tension with the surrounding Arab countries.

The opposition of the religious parties should probably be regarded more as an asset to Mapai in its opposition to a constitution, because it was certainly not an insurmountable obstacle. The religious parties were always a minority whose opposition could be overcome by a combination of the majority secular forces. It should not be forgotten that the religious parties boycotted the inauguration of the Supreme Court because it was too secular for them — but they did not leave the coalition over it. And in the late fifties it was always possible to govern without the religious parties and with Mapam. It took the religious parties until 1982 to even shut down the national airline on the Sabbath.³² The notion of a Mapai that would have drafted a Bill of Rights but for the opposition of the religious parties is very far-fetched. Furthermore, the religious parties could have been accommodated by any number of drafting manoeuvres, as indeed the Italian Constituent Assembly had managed to accommodate the privileges of the Catholic Church by entrenching them in the constitution of 1948. In fact, when the Basic Laws of 1992 were passed it was over the opposition of the religious parties, notwithstanding their greatly increased political weight, but the laws were drafted in such a way as to exclude questions that might offend their constituents. All rights having to do with religious freedom were excluded completely, a concession proponents of the Bill of Rights had already made in 1988;³³ and the problem of equality was solved by the deft formula of "a Jewish and democratic state". The religious parties have had no problem getting and extending their notwithstanding

32 Martin Gilbert, *Israel: A History* (Doubleday, 1998) 502.

33 Amnon Rubinstein, "The Struggle Over a Bill of Rights in Israel" in Elazar, *supra* n. 9, at 141.

clause for the ban on non-kosher meat, and when the Justice Minister introduced the new fiftieth anniversary Basic Laws, he promised the religious leaders in writing "that the laws would not affect religious law or questions of religion and state," and that he would "consult them about the implications of every paragraph".³⁴

The availability of formulae like "Jewish and democratic" also shows why the fear of potential Arab claims for equality cannot explain the delay of constitutionalization. Constitutions do not automatically result in successful equality claims, because constitution writers (not to mention constitutional courts) generally have little problem dealing with questions of special minority rights in one way or another. Again, Canada is an example. It enacted a constitution against the will and over the opposition of the large French minority, entrenching special language rights for only two of the many linguistic groups in the country. In Israel, the "constitutional revolution" took place at the very moment when the claims of the Arab minority in Israel proper and the territories occupied since 1967 were being advanced more strongly than ever, a period spanning the *Intifada* and the Oslo Peace Accords.

Labour Hegemony

No, the real difference in Israel seems to have been the simple one of the balance of forces. The classic advocates of judicial review, the parties of property and limited government, were in opposition, and the classic opponent of judicial review, the party of labour and big government, was firmly entrenched in power.

The balance of power between property and labour was different in Israel because Israel was an entirely different type of state from the old states that adopted judicial review in the twentieth century. Granted the Jews had ancient claims to the land, nevertheless virtually the entire polity of the new state had settled in the quarter-century since the Balfour Declaration of 1917. Though the class structure was not untypical of Europe, it was the representatives of the working class and not the bourgeoisie who were in control of the indigenous movement for a Jewish State and then of the State itself. The main political, social and economic institutions were under Labour hegemony well before the

34 *Ha'aretz* (Eng. ed.), February 6, 1998, at 1.

establishment of the State. The Labour-controlled Histadrut was the country's largest entrepreneur and employer and Ben Gurion was the head of the Histadrut before founding Mapai. The degree of organization of labour, its control of the economy and its representation in the State was unheard-of outside the Soviet bloc. By 1969, most salaried employees worked either for the government or the Histadrut.³⁵ Public expenditure as a percentage of GNP rose from 33.1% in 1960 to 59.8% in 1970, peaking at 82.8% in 1975.³⁶ Although Labour governed without the parties to its left, the combined electoral strength of Jewish socialism and communism from 1949 until 1973 was an absolute majority.

How different this was from Germany or Austria in the twenties or Italy and Germany after the Second World War, when the Right was still powerful enough to impose limited government on the new representative institutions. It was very far from the virtually universal situation in Europe of an old, aristocratic, financial and industrial propertied class having to admit universal suffrage, but retaining the political hegemony necessary to maintain control through constitutional means. In fact, in Israel capital was very weak and actually dependent on the State. Because of the extraordinary reliance on the importation of both capital and labour, Israel developed a very "strong state". And, far from posing a threat to a developed ruling class, since the Labour Party was, in fact, moderate on economic issues, the state was a crucial factor in the "incubation" of capitalism until it could stand on its own two feet.³⁷ Labour hegemony was an effect of the real political economy of Israel in the first generation after statehood. The successful resistance to judicial review was an effect of this hegemony. No Western European labour, socialist or social democratic party was in any way near such a favourable position, and where they came close, as in Britain, Sweden and Norway, judicial review did not take hold until

35 Arian, *supra* n. 31, at 59.

36 Yair Aharoni, "The Changing Political Economy of Israel", *Annals of the American Academy of Political and Social Sciences* (1998) 127, at 132.

37 Ami Ben-Porat, *The State and Capitalism in Israel* (Greenwood Press, 1993). Israel, in its founding period, was "the country with the largest amount of governmental influence on the detailed operation of the economy among all western-type democratic states". It was characterized by a "relative weakness of private employers" who were "effectively ... represented by the government": Medding, *supra* n. 17, at 109, 116.

near the end of the century with the accession of the former two countries to the European Community.³⁸

Of course, it is possible to look at all of this outside of class questions, as a matter of pure power politics. What could be more natural than for the party in power to oppose judicial review and for the party in opposition to support it? Except that where the ruling party is a party of property, or where property is powerful enough to impose its conditions, there have been many contrary cases. The original United States Constitution was one, and Austria of 1920 was another, as were Italy and Germany after World War II, France in 1958, Spain in 1975, Canada in 1982, Russia in 1993 and South Africa in 1994.³⁹ In all of these cases, parties of government advocated or agreed to constitutional judicial review. The mistake in the conventional power-politics explanation lies in seeing governments only in terms of their own interests and not in terms of the interests they represent, or in terms of the relations of power and the balance of social forces in the country.

Naturally, class questions should not be overemphasized. Israel's government had many other things on its mind in the state's formative years.⁴⁰ All governments do. But the point is not to explain everything in terms of class struggle, or even to attribute any great importance to the issue of judicial review in the political calculations of the leaders of the various parties. On the contrary, what has to be grasped is the very *impudence* of judicial review, the novelty of "that bizarre creature" as the Italian Communist leader Togliatti had recently called it,⁴¹ fashioned by the propertied classes as one of several possible antidotes to the enormous dangers posed by the new phenomenon of governments elected by the propertyless classes. Why should such a government accept limits

38 Sassoon, *supra* n. 21, at 27-59; 117-36.

39 Mandel, *supra* n. 1.

40 As Ben Gurion told Mapam in 1949: "We will eventually establish a socialist regime, but for the immediate years ahead our concern must be immigrant absorption. Our national income is very small. It must be increased by raising productivity, using more modern machinery, introducing improved management techniques, and restraining the greed of the capitalists — all this demands planning". David Ben Gurion, *Israel: A Personal History* (Funk & Wagnalls, 1971) 344. "We are the sons of a people whose fate differs from that of all other peoples, and we are faced with a task that was not imposed upon the workers of any other country". Gilbert, *supra* n. 32, at 251.

41 Mandel, *supra* n. 1, at 269.

on the sovereignty it had only just finally conquered if it didn't have to? The point is to see judicial review, at any rate in the first half of the twentieth century, as something that the propertied classes managed to impose on fledgling representative institutions in those cases where the parties of the working class were not in a position to resist.

So the hegemony of labour at the helm of a strong state and the relative weakness of capital seem to me the most convincing explanation for the lack of a constitutional Bill of Rights in the first generation of the State's existence.⁴²

Developments from 1973 to the Present

Shinui, Free Enterprise, Electoral Reform and the Bill of Rights

Now it is precisely when this equation changed that the tide turned in favour of constitutionalization. This happened around 1973 after Labour's sharp drop at the polls from 46.2% in 1969 to 39.6% in 1973, with Likud (the successor to Herut and the General Zionists) topping the 30% threshold for the first time, up from 21.7% to 30.2%.⁴³ It was then that the movement for a constitutional Bill of Rights took on new allies. One important group was represented by the party Shinui ("change") led by Amnon Rubinstein, a law professor from Tel Aviv University. Shinui was formed in 1973 with a Bill of Rights as a central part of its platform. The party was in the classic mould of proponents of Bills of Rights, as its programme contained other typical "liberal"

42 "Further examination of the attitude of the parties of the Left in Western Europe to constitutional questions confirms that virtually all of them were united in their unashamed centralism ... But they were all also 'parliamentarist': they were not in favour of presidential systems ... nor were they in favour of a strong constitutional court or a second chamber which would weaken the powers of the main chamber. This is not surprising: the Jacobin tradition of the centralist state had been incorporated lock, stock and barrel to the continental socialist tradition. Socialists assumed that a move away from capitalism would require a firm use of the state machine: there was no point in limiting its powers. Constitutional courts gave power to senior judges and the Left — quite understandably — did not trust judges ... The allergy of the British Labour Party to any constitutionalism originated in the same fear: any obstacle to parliamentary sovereignty would be used by its opponents to block reforms and socialism". Sassoon, *supra* n. 21, at 131.

43 Klein, *supra* n. 5, at 324.

measures, including privatization of the economy and electoral reform, the latter aimed at doing away with Israel's very pure form of proportional representation in favour of constituency-based elections. Only the great importance of peace in Israeli politics could allow the party to present itself as left-wing:

Although it supported free enterprise, privatization and electoral reform, Shinui announced that it considered itself part of the Labor-left camp. Shinui's identification with a dovish position regarding the Arab-Israeli conflict led many to mistake it for a left-wing party.⁴⁴

Indeed, Rubinstein, in describing his Bill of Rights initiative in 1990, admitted that he had essentially copied the Likud programme:

Now this bill of rights, this Basic Law of individual freedoms or freedoms of the individual passed its first reading in the previous Knesset through a trick I employed. I simply copied verbatim the law presented by the Likud in the Fifth Knesset a long time ago [1961-65] when they were still at least apparently committed to the idea of civil rights and I embarrassed them into voting for it. Once they voted for it, the Labor opposition could not afford to vote against it and so it was passed unanimously without a majority actually wanting it. That happens occasionally.⁴⁵

The calls for free enterprise and a Bill of Rights continued to be linked through to the 1990s. Here is an example from political scientist Ira Sharkansky who, after complaining that "Israel's government dominates the national economy like none other outside the socialist block," wrote:

The democratic norms of Israel encourage each sector to press the government for even more outlays. The Israeli government cannot order labor unions, industries, or citizen groups to cease demanding government aid for the purposes that they favor. Israel's lack of a written constitution allows the government to do whatever a major-

44 Peretz and Doron, *supra* n. 20, at 105.

45 Rubinstein, *supra* n. 33, at 139.

ity of the Knesset desires ... Israeli citizens cannot call on a legal measure of special standing when they seek to assert their rights against a bureaucrat's ruling or against the law that stands behind it.⁴⁶

Shinui played a crucial role in the first transition of power from Left to Right by joining forces with the Democratic Movement for Change in the 1977 election. The thrust of this movement was electoral reform, a goal also extremely important to Shinui. The plan was to introduce a constituency system which, by eliminating or at least reducing the influence of the small parties in favour of two or three large, less ideologically divergent ones, would make alternation more likely and thus break the dominance of Labour. A small move had already been made in this direction with new electoral rules in 1973 that distributed unused votes to the larger parties (instead of to the smaller parties, as had previously been the case) and a move to direct local elections in 1975. The surprising success of the Democratic Movement for Change in 1977 in syphoning off almost a third of Labour's votes actually led to the immediate transfer of power to the Likud. Though the DMC joined the Likud in government, Shinui itself split and joined the opposition. Labour was never to regain its hegemony. In fact, the effective deadlock of the two parties led to national unity governments between from 1984-90.

The Decline of the WASP

The drive for electoral reform intensified as a result of another important development of the 1977 election, the political self-affirmation of the Sephardi Jews whose origins were in the Arab world as opposed to Europe. This poorer, more religious community had by now achieved net demographic preponderance, and by 1977 had moved substantially to Likud. The ethnic card played particularly strongly in the 1981 elections, primarily to Likud's advantage; but it did not find a permanent home in the Ashkenazi-led Right. Instead, the nineteen-eighties saw the rapid development of specifically Sephardi parties, as

46 Ira Sharkansky, "Israel's Political Economy", in Ehud Sprinzak and Larry Diamond, eds., *Israeli Democracy Under Stress* (Lynne Rienner Publishers, 1993) 154.

well as the resurgence of specifically religious parties. This signified a loss of political hegemony, not just for the Labour Party, but for the so-called "WASP" ("White Ashkenazi Sabra/Secular with Proteksya [connections]") in general. Both Labour and Likud started to haemorrhage badly. Labour's percentage of the vote declined from 36.6% in 1981 to 34.9% in 1984 to 30% in 1988. Likud had dropped from 37.1% to 31.8% over the same period. Between 1984 and 1988, the ultra-orthodox parties and the Sephardi Shas rose from 8.3% of the votes to 13.1%. Shinui, too, had peaked in 1984 at 2.6% and was back to 1.7% in 1988.⁴⁷

So the loss of hegemony of the big parties was itself only a symptom of a loss of control of the political system by the secular Ashkenazi elite of all of the parties. It was this more than anything that intensified the attempts to change the electoral system in a strongly majoritarian direction. Apart from the proposal to move to the extreme first-past-the-post English system, there was also a proposal to move to the more moderate German system under which half of the seats would be distributed on a majoritarian basis and half on a proportional basis. This was to be accompanied by a raised minimum threshold of 3.3% from the 1% then in force for Knesset elections. After the inconclusive elections of 1988 and a second national unity government, this time under Likud leadership, Rubinstein formed the cross-party lobby group "A Constitution for Israel" with another law professor from Tel Aviv, Labour MK David Libai and right-wingers Uriel Linn of Likud and Yoasch Tsidon of Tsomet. The group took advantage of the rise in political discontent over the national unity governments. One study showed that, between 1973 and 1990, negative responses to how Israelis "saw politics in Israel" went from 30% (1973) to 56% (1984) to 77% (1990).⁴⁸ It was in this context that the electoral reforms and the Basic Laws of 1992 were passed, essentially, if not formally, *as a package*. The attempt to dislodge the proportional system failed, and only a slight rise (from 1% to 1.5% of the vote) in the minimum threshold for entering the Knesset was achieved. However, the reformers did manage to get a law passed for the direct election of the Prime Minister at the same time as the Basic Laws. This law provided for run-off elections if necessary with the prize going to the first candidate to top 50% of the votes. The

47 Klein, *supra* n. 5, at 326.

48 Gadi Wolfsfeld, "The Politics of Provocation Revisited: Participation and Protest in Israel," in Sprinzak and Diamond, *supra* n. 46.

practical power of the successful candidate was strengthened by making it legally impossible to remove the Prime Minister without new Prime Ministerial elections, which, in the absence of an extraordinary no-confidence vote of eighty out of one hundred and twenty members, would result in new elections for the entire Knesset. This was supposed to increase the bargaining power of the Prime Minister to form coalitions and to keep them intact and in line.

In fact, when first put into practice in 1996, the law had the effect of allowing voters to divide their vote between the Prime Ministerial election, in which they chose one of the two major contenders, and the Knesset elections, in which they were free to vote their identities. This is thought to have led to the further voter fragmentation that occurred in that election and the resultant apparent *increase* in bargaining power in the hands of the small parties. In 1998 attempts were already underway to repeal the law. A *Ha'aretz* editorial of 1998 shows how important the object of weakening the power of the small parties was in the eyes of the supporters of the law:

The direct election law has failed to fulfil the principle goal it was supposed to attain — namely, reduction of the pressure of the ultra-Orthodox parties — and has even increased extortionist efforts to the point of paralyzing the government. Furthermore the law has failed to live up to its promise that it would increase the prime minister's manoeuvrability ...⁴⁹

But the editorial also indicates that there was another perfectly predictable effect of the law besides the weakening of small parties:

The direct election method has weakened both the Knesset and the government and any prime ministers elected through that political method will turn their political party into a convenient instrument for achieving their goals and will simply drain the party of all its power and ideological content. The same process that the Likud underwent is now occurring in the Labor party, where Ehud Barak has cut himself off from the old guard, has severed his links with the party's ideological platform and has plunged into hot water by adopting contradictory positions and by creating bizarre coalitions ... Such

49 *Ha'aretz* (Eng. ed.), May 19, 1998, at 6.

moves blur Labor's identity. The direct election law has now produced another candidate for the prime ministership: Tel Aviv Mayor Roni Milo, who is galloping toward the post of prime minister on the back of a vague center despite the lack of both a political movement and a platform.⁵⁰

Amnon Rubinstein's own defence of the law despite these effects (on the unconvincing ground that it would prevent an ultra-orthodox Prime Minister from being elected) suggests that the weakening of the Knesset and the "end of ideology" — a classic objective of free enterprisers — was part of the objective all along.⁵¹ It was also no surprise when, in 1998, a joint Labor-Likud lobby took advantage of the discontent with the law to re-propose constituency elections with raised minimum thresholds.⁵²

Neo-Liberal Economics and the Constitution

So the party of the Bill of Rights was also a party of electoral reforms aimed at artificially preserving the hegemony of an elite that had lost its appeal to the electorate. It was also the party of neo-liberal economics, in favour of freeing the economy from political interference through privatization of public enterprise, de-regulation of markets and re-commodification of services. And, indeed, the movement for a Bill of Rights is almost exactly co-extensive with the movement to end Labour control over the economy through the state and the Histadrut. Quite momentous changes occurred over the period.

In the mid-seventies, under the international and local pressures that hit governments and labour movements throughout the world, Israel's "strong state" that had dominated the economy in partnership with the Labour movement, started to weaken. Stagnation in the seventies was followed by hyper-inflation in the eighties. To get out of debt, the state was forced to accept such market-imposed austerity measures as public service spending cuts and the privatization of its assets to its creditors.⁵³ After 1975, public expenditure started to decline as a per-

50 *Ibid.*

51 *Ha'aretz* (Eng. ed.), June 2, 1998, at 6.

52 *Ha'aretz* (Eng. ed.), July 6, 1998, at 1.

53 Aharoni, *supra* n. 36, at 137-139.

centage of GNP from a peak of 82.8% in 1975 to 77.4% in 1980 to 70.5% in 1985 to 59.4% in 1990 to 54.7% in 1994 and 56% in 1995.⁵⁴ In the words of Ran Hirschl, who has recently made a powerful argument for linking Israel's constitutional revolution to its neo-liberal economic revolution:

The state's roll-back from the formerly state-controlled public services arena, as well as an increasing recommodification of formerly decommodified services, indicate Israel's movement toward a variant of neo-liberal market economy. Examples of these two processes are the new Medicare Law (1994); the recent privatization of health, media and telecommunications services, and state owned banks; the gradual deregulation of the land market; the complete deregulation of the foreign currency market; and the emergence of private medical services and private higher education institutions. In addition, the local market has been opened to multinationals and imported goods; consumption patterns have become "Americanized"; and a "stock exchange culture" has arisen".⁵⁵

Equally important for the hegemony of labour was the virtual destruction of the Histadrut, once the economy's powerhouse. By 1995, it had been deprived of its enterprises and its privileged position in health services and reduced to a mere trade union with a membership that had been depleted by 75% since only ten years before. Nor was economic liberalism a partisan matter; it infected Labour and Likud ranks equally. It was Labour maverick Haim Ramon who led the dismantling of the Histadrut.

The state and Labour ceded their ground directly to private business. Their slack was picked up by the big international firms whose direct capital investment had soared by 1995 to \$2.3 billion, rivalling the American government's \$3 billion per year in grants.⁵⁶ By the time of the constitutional revolution, capital's "incubation" period was clearly over and it was strong enough to stand on its own two feet. A predictable result of this was that, by the 1990s, the highly egalitarian society of the

54 *Ibid.*, at 132.

55 Ran Hirschl, "Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order", (1998) 46 *American Journal of Comparative Law* 427, at 432-433.

56 Arian, *supra* n. 31, at 66.

heyday of Labour hegemony had outstripped even the United States in economic inequality.⁵⁷ In this context, the electoral defections from Labour that started with the Democratic Movement for Change (which has been attributed partly to a tax revolt by high earning former Labour supporters⁵⁸), can be seen as a shift in allegiance of a significant segment of the old WASP elite — a jumping ship from the leaky state/labour sector to the buoyant private sector where these people became the new elite of manufacturers, bankers, hoteliers, directors-general “and a large group of lawyers who represent economic organizations”.⁵⁹

It's easy to see how all this would lead to the double solution of electoral reform and constitutional rights.

Electoral reform would allow the maintenance of control over the representative institutions by those who had lost the support of the electorate, by forcibly narrowing the choices in the election for Prime Minister to one of the two major groupings and by increasing the strength of the office itself. As for the Bill of Rights, its guarantees against the state — in typical fashion, the Basic Laws applied only to the government — would limit the power of the representative institutions to interfere with the private sector where the elite increasingly made its increasingly unequal living. More importantly, the court was one of the places dominated by the very elite that was pushing for the reforms. It is a fact, as the religious and Sephardi parties claim,⁶⁰ that the courts, and especially the Supreme Court, are overwhelmingly secular and Ashkenazi.⁶¹ And given the method by which judges are appointed, it is likely to remain that way. Right now, all judges, including Supreme Court judges, are chosen by a committee in which not only is the legal profession in a net majority, but the Supreme Court itself

57 *Ibid.*, at 70-71.

58 *Ibid.*, at 70.

59 Yossi Beilin, *Israel: A Concise Political History* (St. Martin's Press, 1992) 214. See also Yitzhak Rabin's speech to the Knesset on July 13, 1992: “Rabin made it clear that the Labour Party was finally turning its back on its Socialist legacy. His government would, he pledged, increase economic growth by ‘retooling the economy for open management, free of administrative restrictions and superfluous government involvement’. There was, he said, ‘too much paperwork, not enough production’”: Gilbert, *supra* n. 32, at 551.

60 *Ha'aretz* (Eng. ed.), February 4, 1998, at 1.

61 Klein, *supra* n. 5, at 145: “Le débat actuel porte donc sur le portrait type du juge à la Cour supreme, présenté comme ashkénaze, libéral et laïque. La vérité est que la grande majorité des juges nommés correspondent bien à ce modèle”.

is actually dominant. The Committee consists of two Cabinet Ministers, two Members of the Knesset, two lawyers chosen by the Bar Council and three Supreme Court Judges (of which one must be the President) chosen by of the Supreme Court judges themselves. According to Allen Zysblat, "a convention exists that a candidate for the Supreme Court will not be selected if the choice is not acceptable to representatives of that Court".⁶² The judges, who can be appointed at any age, can only be forced to retire at age seventy. There appears to be no constitutional court so self-perpetuating in the world. What better refuge from the anti-WASP storm engulfing parliament?

Israel appears to fit the category of constitutionalization as a change of, if not "everything", then of some important things, in order to keep things the same. In fact, there are several historical precedents strikingly close to the Israeli situation. In Canada, the loss of control of the Quebec legislature by the federalist forces led to the imposition of a constitutional re-arrangement that subjected the government of Quebec to the supervision of a Supreme Court of Canada appointed entirely by the federalists themselves. There is also a striking similarity in the Israeli developments of the 1990s and the Austrian developments of 1929, in the simultaneous expansion of the role of the constitutional court and the innovation of direct election of the head of the government, a move denounced at the time by constitutionalist Hans Kelsen as a step toward the dictatorship that actually took over five years later.⁶³ In Italy, the current attempts to squeeze out the small parties after a loss of hegemony of the old guard, and the move toward the direct election of the Prime Minister, are also part of a package that includes a yet more prominent role for the constitutional court.⁶⁴

The Democratic Defence

Naturally, these changes have not been presented by their sponsors in the terms I have used to analyze them, that is as an antidote to democracy. On the contrary, as any observer of the Israeli constitutional

62 Allen Zysblat, "The System of Government", in Zamir and Zysblat, *supra* n. 5, 1 at 15.

63 Mandel, *supra* n. 1.

64 Parlamento italiano, commissione bicamerale, *Testo approvato il 4 novembre 1997: Progetto di legge costituzionale*.

debate well knows, the constitutional revolution in Israel, as elsewhere, has been presented as a change in *aid* of democracy.⁶⁵ In the rest of this paper, I propose to examine the democratic defence of the constitutional revolution on both the theoretical and the empirical terrains.

There are essentially two versions of the democratic defence of modern constitutionalism: a political one that relies on traditional majoritarian notions of democracy, and a judicial one that says democracy is not about majority rule at all.

Protecting the Majority

According to the political defence, Israel is supposed to present the case of a secular majority held hostage by a religious minority — what's more an anti-democratic minority that knows how to manipulate the parliamentary system. For this we are told that we need the protection of electoral reform and the courts. This is how Amnon Rubinstein described his preference for the new electoral system he helped to create:

Since the Likud came to power in 1977, the ultra-Orthodox parties have been the ones to tip the scales at election time, and no government can be established without them. What is wrong with that? In many parliamentary democracies, the size of the coalition and the identity of the prime minister depend on minority parties. The problem with the ultra-Orthodox occupying this position is an entirely different one. First, unlike most of Europe's center parties, the ultra-Orthodox are not a part of the national-Zionist consensus — for reasons that range from their attitude toward Israel's flag and national anthem to their failure to serve in the army. Secondly, the ultra-Orthodox parties are not ordinary democratic parties.⁶⁶

65 Mandel, *supra* n. 1.

66 Amnon Rubinstein, "The Benefits of Direct Elections" *Ha'aretz* (Eng. ed.), June 2, 1998, at 6. See also Bernard Susser, "The Direct Election of the Prime Minister: A Balance Sheet", in Daniel J. Elazar and Shmuel Sandler, eds., *Israel at the Polls 1996* (Frank Cass, 1998) 237, at 239: "to avoid the demoralizing spectacle of coalition-making parties abjectly prostrating themselves to their potential junior coalition partners".

Another example is the statement of Yossi Sarid, the leader of Meretz (of which Shinui is one component) on the passage of the kosher meat amendment to Basic Law: Freedom of Occupation:

The vote constituted a non-kosher parliamentary slaughter of the interests of a majority of the Israeli public.⁶⁷

The claim to speak for the majority seems to have its basis in the fact that perhaps 70% of the Jewish population can be defined as secular.⁶⁸ But it is not at all clear that this majority agrees with Rubinstein and Sarid on any of the positions they advocate. Take the issue of civil marriages, now banned in Israel. Rubinstein has, in fact, introduced a Basic Law: Freedom of Religion that seems to have the recognition of civil marriages as its main point. However, a 1993 study found that, despite this mainly secular public, only 39 percent of Israeli Jews favoured the introduction of civil marriages, while 44 percent were opposed and the rest were uncertain.⁶⁹

So we have an unclear majority. How do we clarify it? Do we go to court? But even those who claim judicial review is essentially "democratic" (a question we discuss below) do not claim that it is a mechanism for determining majority will. Certainly it cannot do that as well as a legislature. Well then, do we reform the electoral system to narrow the choices to one between the two mainstream secular parties or, even worse, to introduce constituency voting so as to allow government *against* the majority? That won't do it either, of course. In fact, the

67 *Ha'aretz* (Eng. ed.), March 19, 1998, at 3. Meretz is a small party based around peace and civil rights, made up of the tiny remnant of Mapam, the civil rights party Ratz, and Shinui. It received 7.4% of the vote in 1996.

68 Klein, *supra* n. 5, at 73. Naturally, the percentage is disputed. There is some participation in religious practices even by those who define themselves as secular: Yochanan Peres and Ephraim Yuchtman-Yaar, *Trends in Israeli Democracy: The Public View* (Lynne Rienner Publishers, 1992) 28. On the other hand 56% of Israeli Jews never attend synagogue on the Sabbath: Daniel J. Elazar and Shmuel Sandler, "Introduction: The Battle over Jewishness and Zionism in the Post-Modern Era", in Elazar and Sandler, eds., *supra* n. 66, at 15.

69 Klein, *supra* n. 5, at 77. Perhaps it is relevant here to add that I define myself as a secular Jew and that I find it absurd that civil marriages are not permitted in Israel.

almost pure form of proportional representation practiced in Israel seems to be practically the best means of finding out what the majority really wants, because the distribution of the various representatives in the Knesset is about as close as you can get to the distribution of views in the population. Since one cannot pass a law in the Knesset unless one has more than fifty percent of the MKs, that means that, in Israel, you get about as close as possible to the situation where one cannot pass a law without the support of more than fifty percent of the voters. When one party "holds the others hostage", this just means that, without that party's agreement, one does not have the majority one claims to have. Nor is this what Ronald Dworkin and Justice Barak deprecate as a mere "statistical democracy" of isolated individuals.⁷⁰ These numbers represent real collective interests and values shared among and between real communities. Proportional representation epitomizes representative democracy because it does not allow one to pretend to represent a majority of these real people when one does not in fact represent them. It does not allow one to ignore the claims of the various minority communities that make up the majorities of real life. They have to count equally, not according to whether they appeal to legal principles that some court recognizes, but precisely according to their real, one-person-one-vote representativeness. Treating people as equals is the real historical and moral foundation of democracy. It requires taking equal account of everybody's interests *as seen by them*. That includes the way people rank their interests, their priorities. Proportional representation is the best practical expression of this because it requires *compromise*, not as a virtue but as a necessity, born out of the need to form a real majority. Proportional representation is therefore a material guarantee that everybody's interests, as seen by them, will be taken into account equally. What is decried by the electoral reformers as the "demoralizing spectacle" of big parties having to make deals with small parties is simply this. Proportional representation is the surest way of affording

70 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 19; *United Mizrahi Bank*, *supra* n. 12, at 122.

the members of the minority "equal concern and respect" (in Dworkin's words) to that of the members of the majority.⁷¹

"Majority Rule is Undemocratic!"

The second democratic defence of the constitutional revolution is all about the courts and takes us deep into the heart of legalized politics. This defence does not depend on implausible assumptions about a real majority will outside of representative institutions but frankly admits that the point is to limit what the majority wants; it tries, instead, to show that this is nevertheless "democratic". By now this defence has several classic elements to it which can be found echoing throughout the world of modern constitutionalism.

The first element is the detachment of democracy from majority rule. Democracy is re-defined as being about democratic results: the promotion of democratic values, human rights, and equality. It is no longer,

71 Dworkin, *ibid.*, at 8. The point can be illustrated by the failure of a Labour-sponsored attempt in July 1998 to end the exemptions from compulsory military service granted to ultra-orthodox Jews (*Ha'aretz* (Eng. ed.), July 8, 1998, 1). The law failed despite the claims of its sponsors that the majority of Israelis were in favour of ending the exemption. One stumbling block was that the Arab MKs voted with the religious parties and most of the governing coalition on the promise that a bill to draft Arab citizens, also sponsored by Labour, would be blocked. But what can this have meant if not that the supposed majority was an artificial one? This majority was only to be seen if the question of drafting the ultra-orthodox were taken in isolation; but it did not exist in isolation. There was no majority for the proposition that both Arabs and ultra-orthodox Jews be drafted, which was the more accurate position of the sponsors of the Bill. The unwillingness of the sponsors to take into account the position of the Arab minority lost them their support and their majority. Nor could those in the governing coalition who, in isolation, may have wanted the ultra-orthodox drafted, have afforded to lose their support on other issues evidently of greater importance to them. So, proportional representation provided both a superior picture of majority will and a superior protection of minority rights than any other electoral system, much less an abstract opinion survey. This is similar to the most recent capital punishment debate in Canada's Parliament. A majority of the public and the Members of Parliament were said to support capital punishment, but when it came to the vote, they could not agree on precisely what type of murderer (premeditated, sex, child, repeat, police, etc.) to execute. Those who wanted one type executed found no executions at all better than the alternative of executing another type. The majority was purely abstract and unreal.

indeed it never was, about democratic procedures ("one person, one vote"). It is not about means but about ends. The key is not that the majority rules but that it respects these values. But it is not enough for this argument to succeed that it be shown that the majority merely should not violate these values — something easy to accept and a familiar goal of democratic politics through traditional majoritarian means — it has to be deduced from this that majorities should not be *allowed* to violate them, that there should be some non-majoritarian mechanism that stands above the majorities and forcibly constrains them to act democratically. Here is Justice Aharon Barak in his landmark decision of 1995 in *United Mizrahi Bank*:

In this context, endowing the majority with the power to impair the rights of a minority is an undemocratic act. Protecting individual rights, minority rights and the fundamental values of the legal structure against the power of the majority is a democratic act ... Indeed "true" democracy cannot exist without limitations of the power of the majority so as to protect the values of the State of Israel as a Jewish and democratic state, and so as to protect the fundamental values, of which human rights are primary. Democracy of the majority alone, unaccompanied by a democracy of values is formal "statistical" democracy. True democracy limits the power of the majority in order to protect the values of society ...⁷²

I want to return to this question of the democracy of ends versus the democracy of means later on, because what is at stake will be clearer then. But for now, let us pursue the classic defence. The next element is really the crucial one for the democratic legitimacy of the courts. It holds that if the majority is to be prevented from trampling on democratic values, then only a court is capable of doing the preventing. In the Israeli version of this argument, the court ends up by identifying democracy with itself:

But is judicial review democratic? Is it democratic that the court — whose judges are not elected by the people and do not represent a social and political platform — be empowered to invalidate a law enacted by elected officials? ... The substantive answer is that the

⁷² *United Mizrahi Bank*, *supra* n. 12, at 79-80.

judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights as expressed in the constitution. Democracy is a delicate balance between majority rule and the basic values of society ... Democracy also means substantive democracy, which is concerned with the defence of human rights in particular.⁷³

To maintain that judicial review is undemocratic is to maintain that safeguarding human rights is undemocratic. To maintain that judicial review is undemocratic is to maintain that defending the rights of the individual against the majority is undemocratic.⁷⁴

No doubt the Israeli Supreme Court's reputation for delivering democratic decisions (a matter we explore later) is better deserved than most constitutional courts, and perhaps that can explain Justice Barak's permitting himself such an exaggerated claim. But can it really be true that judicial review is "the very essence of democracy"? Can it be true that all of the other institutions that encourage and guarantee respect for democratic values, such as elections, parliaments, parties, unions, education, media, *ad infinitum* are non-essential? Can it be true, therefore, that until the "constitutional revolution" of 1992 Israel had no claims to democratic status (or only the minor ones associated with the *Bergman* line of decisions), not because of the real deficiencies in human rights in the country, of which there were many, but because of the lack of judicial review? And if Israel was not a democracy in 1991, can it be true that the entrenchment of a few rights in Basic Laws and their recognition by the courts brought us out of the dark ages of non-democracy, while everything else — economic, social, political, religious and racial relations — remained essentially the same?

So let us scale down Justice Barak's claim to something more realistic and read him to mean that judicial review is an "important" ingredient, maybe even "one of the essential" ingredients of democracy — the democracy of ends and not of means. But it is not enough to say that democracy ultimately requires respect for democratic values to make the claim for judicial review. It has to be shown why this democracy of ends is better achieved by the means of judicial review than by the means of majority rule.

73 *Ibid.*, at 120-121.

74 *Ibid.*, at 123.

There are two standard responses here. One is a rather formalistic and tries to avoid the question altogether. Look, it says, the people themselves, through their legislatures, democratically enacted these constitutions, put in the important democratic rights and told the courts to enforce them. What could be more democratic than that? In this category we can place Justice Barak's statement in the Stockbrokers case of 1997: "The justification in this is the subordination of the legislature to the supra-legal constraints *which he himself set forth*" (emphasis added).⁷⁵ From this we can also understand Justice Barak's call for a referendum on the constitution to consolidate the democratic mandate.⁷⁶

There are several fatal flaws in this short way around the question. In the first place, the mandate given by legislatures for the act of judicial review is often not clear. So unclear was Israel's constitution on the very question of its superior validity that it took Justice Barak the longest opinion in the history of the court to establish it, and even then he didn't convince the entire court.⁷⁷ In fact, on one of the many pages of the *United Mizrahi Bank* decision, it is possible to find Justice Barak praising the courts of "various countries" for not waiting for mere constitutional texts to bring about their constitutional revolutions:

The fundamental values and basic human rights are so deep and so important that the courts of various countries are prepared — without any constitutional text — to negate parliamentary power to impair those values".⁷⁸

Justice Barak knows that constitutions are not like other laws. They are not *meant* to be applied literally. The text is only the tiniest part of

75 "Hatsiduk lekach hu b'kfifuto shel hamchokek lehora'ot chukatiot-alchukiot, shehu atzmo kav'an", *Association of Investment Managers*, *supra* n. 14, para. 19. For similar remarks in the Canadian context see *Vriend v. The Queen* (Supreme Court of Canada, April 2, 1998), para. 132. The Canadian Court also marshalled the democracy-of-ends-not-of-means argument (para. 176).

76 *Ha'aretz* (Eng. ed.), June 18, 1998.

77 Klein, *supra* n. 5, at 134.

78 *United Mizrahi Bank*, *supra* n. 12, at 80. For another example see Justice Barak's minimalization of the importance of the failure to enact a Basic Law on criminal procedure where constitutional due process is concerned: Aharon Barak, "The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its effect on Procedural and substantive Criminal Law", (1997) 31 *Isr. L.R.* 3, at 17.

the story. And Justice Barak was only being faithful to the dominant view of constitutional "interpretation" when he defined his task in *United Mizrahi Bank* as nothing less than "making sense of the whole national experience".⁷⁹ Now, as anyone who witnessed the controversy over the fiftieth anniversary television series "*Tekumah*" on the history of Israel knows, what the sense of Israel's "whole national experience" is depends on who is trying to make sense of it. And it has been conventional wisdom in the legal profession for almost a century that "the constitution is what the judges say it is".⁸⁰

That is why a referendum on the constitution would be something of a democratic hoax. We had one in Canada on a text so vague it could not have made the slightest bit of difference to the outcome of any case and, therefore, gave merely the illusion of participation.⁸¹ A referendum that ratified either of the Basic Laws would still leave the question of what "Jewish and democratic" meant, and, therefore, the outcome of any given case, *entirely* up to the judges. Judicial review would be no more democratic because of such a referendum than if the people voted to hand over power to the army. It might, in some senses, be considered a democratic act, but it would certainly be the last one.

Judicial "Objectivity"

If the constitution is what the judges say it is, then the question is a simple one: why should judges be thought to be better at delivering democratic results than legislatures? The standard response is that, unlike voters, legislatures and politicians, judges are non-partisan, neutral and *objective*. Justice Barak knows that this is a crucial element of the justification, so he tried his best to convince us of it in *United Mizrahi Bank*:

79 *United Mizrahi Bank*, *supra* n. 12, at 67. Here Justice Barak was just following Ronald Dworkin, *supra* n. 70, at 11, who put it this way: "The moral reading asks them to find the best conception of constitutional moral principles — the best understanding of what equal moral status for men and women really requires for example — that fits the broad story of America's historical record".

80 "We are under a Constitution, but the Constitution is what the Judges say it is". United States Supreme Court Justice, later Chief Justice, Charles Evans Hughes, speaking in 1907, to be quoted and popularized by President Franklin D. Roosevelt, in his radio talk of 1937: David M. O'Brien, ed., *Constitutional Law and Politics. Volume Two: Civil Rights and Civil Liberties* (Norton & Co., 2nd ed., 1995) 69.

81 Mandel, *supra* n. 3, at 106-126.

The justification applies when the judiciary gives expression to the values of society as they are understood by the culture and tradition of the people as they move forward through history. This justification does not, however, operate when the judge expresses his subjective beliefs. Indeed, judicial objectivity is part and parcel of the basis of judicial review of constitutionality. In granting weight to different considerations the judge aspires to the best of his ability to achieve judicial objectivity. He reflects neither his personal values nor his personal considerations. The judge reflects "the values of the State of Israel as a Jewish and democratic state".⁸²

His daily bread is none other than the basic values, which he balances objectively. He does not seek power, nor does he crave to rule. He does not seek to impose his personal views on society. He wishes only to do justice in the case before him and to adjudicate each case justly. Since the establishment of the State of Israel, the High Court of Justice has stood — and with it the entire community of Israel — as the bastion of Israeli democracy ... [and quoting former Supreme Court Justice Berensohn:] "the court is the most secure and objective refuge that the citizen has in his dispute with the establishment."⁸³

Well, as Marx and Engels once wrote, "every shopkeeper is very well able to distinguish between what somebody professes to be and what he really is".⁸⁴ And, in fact, as often as judicial objectivity has been protested by judges and lawyers, it has been belied by the practice of the people responsible for setting them up to judge. The device of "concentrated" judicial review identified with Hans Kelsen (which Justice Barak opposes) takes judicial review out of the hands of the ordinary courts and places it in the exclusive jurisdiction of specially appointed, politically sensitive, constitutional tribunals. It was adopted by most of the countries that form part of what Justice Barak calls the "community of democratic countries ... with constitutional bills of rights" that Israel

82 *United Mizrahi Bank*, *supra* n. 12, at 126.

83 *Ibid.*, at 127.

84 Karl Marx and Friedrich Engels, *The German Ideology* [1846] (Progress Publishers, 1976), 70-71: "Whilst in ordinary life every shopkeeper is very well able to distinguish between what somebody professes to be and what he really is, our historiography has not yet won this trivial insight. It takes every epoch at its word and believes that everything it says and imagines about itself is true".

joined in 1992.⁸⁵ They adopted that system precisely to obviate the biases of ordinary judiciary: in post-World War I Austria, to avoid the imperial judges who proved so friendly to the right-wing militias; in Germany, Italy, Spain and South Africa, to circumvent the judges trained under Nazism, Fascism and Apartheid. Even in the United States, everybody understood the determined and successful efforts of successive Republican administrations of the 1980s to appoint conservative judges, and of President Clinton to do the opposite in the 1990s. The periodic U.S. Senate grillings of potential candidates (such as the world-famous Thomas/Hill confrontations of 1991) would be impossible to comprehend if it were all merely a good-hearted, non-partisan search for the person best able to put their personal values aside. Nor would it be possible to understand the wild swings in the jurisprudence of the United States Supreme Court, if it were all merely a matter of judges doing their best to objectively interpret the same constitution and the record of American history. In Canada, the metaphor of the "leaning tower of Pisa" is used to describe what happens when the federal government appoints all of the judges of the courts that adjudicate its jurisdictional disputes with the provincial government of Quebec.

It is on this crucial question of objectivity that the Israeli court is, in fact, most vulnerable. For instance, the following item appeared in the *Ha'aretz* of February 4, 1998:

During a debate on "the undermining of faith in the judicial system" Tuesday, Yitzhak Cohen of Shas declared: "The percentage of Sephardim in this country is over 65 percent, and in the nature of things, they are either religious or traditional. In contrast, the judicial system is an Ashkenazi system in terms of ethnic composition: Over 85 percent of the holders of judicial posts are Ashkenazi. They are all secular. The Supreme Court is almost entirely Ashkenazi". Cohen charged that a situation has been created in which those on the bench are Ashkenazi and those in the dock are Sephardi — "just like the relations of horse and rider".

"If judges see themselves as fit to legislate — what is known in low Israeli slang as 'judicial activism', as if the use of the foreign term is enough to change the facts — even though they were not chosen for this by the populace, it is impossible not to say that they see them-

85 *United Mizrahi Bank, supra* n. 12, at 1.

selves as gods. We have before us a new form of idol worship, no less damaging and dangerous than its primitive predecessors. The MKs, politicians, public figures and writers who see everything that comes out of the High Court of Justice's mouth as the word of God are the high priests of this modern, primitive idol worship".⁸⁶

This episode was just part of a general assault on the objectivity of the courts by the Sephardi and religious parties. One of the country's most influential Sephardi Rabbis went so far as to say that the judgments of the Supreme Court were "worse than the laws of the goyim", which, in the context of Israeli politics, was just a way of drawing attention to the fact that the judges are secular.⁸⁷ The most famous statement on the lack of judicial objectivity was that of Ariele Deri MK, leader of the Sephardi religious party Shas, who said that he "would even oppose the enactment of the Ten Commandments as a basic law for fear of how the court might interpret it".⁸⁸

A few months after the Shas attack, the complaint was raised a notch higher to the level of Deputy Minister for Religious Affairs Yigal Bibi of the National Religious Party (Zionist orthodox), who defended the rabbinical courts by comparing them with the civil courts thus:

I recommend that the Knesset discuss the state we have reached in Israel, where there is no law and no justice, only miscarriage of justice. People don't go to court because they know there is no justice. Whoever sees what goes on in the Supreme Court, where cases wait for years, will learn that it is all judicial activism. Everything is open; everything is justiciable. If the Supreme Court continues to fail to uphold the law, we will have to pass a law requiring the court to judge according to the law ... Listen to the jurists — not to me. Listen to what the best jurists say. I organized a conference of jurists. They are shocked by what is going on. There is no judicial system ... It's time to say that the emperor is naked".⁸⁹

Comments like these have clearly hit a nerve. Not only have defenders of the court impugned the critics' personal credibility, which is only

86 *Ha'aretz* (Eng. ed.), February 4, 1998, at 1.

87 "Hebrew-speaking *goyim*" is the way one religious politician described secular Jews.

88 *Ha'aretz* (Eng. ed.), February 6, 1998, at 1.

89 *Ha'aretz* (Eng. ed.), June 10, 1998, at 1.

fair,⁹⁰ they have also demanded their punishment, charging them with "subverting the judicial system [and thereby] eroding the strength of Israeli democracy and indeed of society and the state".⁹¹ They have even accused the critics of endangering judges' lives.⁹²

But, not only do the critics have a strong factual basis for their claims in the ethnic and religious demography of the judiciary,⁹³ they are also merely expressing, as the Deputy Minister correctly pointed out, the conventional scholarly wisdom of almost a century.⁹⁴ Furthermore, it is difficult not to sympathize with the frustration of the religious and Sephardi parties. No sooner have they succeeded in gaining some leverage for themselves in the parliamentary enterprise, no sooner have they learned how to use it to redirect some of the largesse of the state in their direction and to the realization of their values, than the traditional elites seek to turn the tables on them by changing the constitutional rules of the game — in other words, to change everything so that everything remains the same. At first sight this seems not at all dissimilar to the legitimate frustration of nationalist Quebecers in Canada, who, as soon as they started to use their constitutional power to correct the imbalance between themselves and English Canada, found the constitution changed against their will and all resulting disputes assigned to the courts appointed by their English Canadian adversaries.

90 Deri himself has been charged with several counts of corruption and editorialist Ze'ev Segal argued in *Ha'aretz* a few days after the outburst by Cohen that Shas was merely trying "to trample faith in the legal system — the same legal system in which several Shas members have been interrogated, suspected and charged with offences": *Ha'aretz* (Eng. ed.), February 8, 1998, at 6.

91 *Ha'aretz* (Eng. ed.), June 11, 1998, at 6.

92 Ze'ev Segal, "Judges in the crosshairs", *Ha'aretz* (Eng. ed.), May 25, 1998, at 6. Justice Barak was subject to a particularly crude death threat in 1996 from a telephone caller who said: "You'll rot next to Rabin's grave, then you will understand". He now has a 24-hour armed guard: Gilbert, *supra* n. 32, at 595. See also *Ha'aretz* (Eng. ed.), June 12, 1998, at 3.

93 Klein, *supra* n. 5, at 143.

94 See *supra* n. 80.

*The Difference with Israel**Undemocratic Legislators*

But there is at least one big difference here between Quebec and Israel and it lies in the peculiarity of Israeli politics. Unlike French Quebecers — unlike, indeed, all the working classes who had the constitutional tables turned on them this century — the religious and Sephardi parties are hard to accept as the bearers of democratic values. Though their electoral base is in Israel's propertyless classes, in many respects their platforms hold out the promise of only more inequality: sexual, religious, racial, and even, in their alliance with the Right, class inequality. Their strength is somewhat of an anomaly among the developed countries of the world and it has to do with Israel's unique history: a state settled and dominated by immigrants from highly developed Western countries which nevertheless depended for its existence on the integration of a large mass of immigrants from underdeveloped Eastern countries; the centrality of the Jewish religion in the official state ethos and the consequent unusual proportion of the state's resources devoted to the encouragement of religious institutions and communities; a permanent state of war, a large alien minority and a long territorial occupation that easily lend themselves to an authoritarian and racist mentality.⁹⁵

Everyone has heard of Shas leader Ariele Deri's comment about how he would not trust the Court even if the Ten Commandments were written into the constitution,⁹⁶ but his subsequent apology to Justice Barak for such harsh criticism is much less well known. Deri said of Barak that "if he were a yeshiva student, there is no doubt that we would be dealing with the greatest figure of this generation".⁹⁷ As someone with more than a passing personal familiarity with the Yeshiva

95 According to a 1992 poll, only 40% of the ultra-orthodox appear to think that a democratic government they disagree with is preferable to a non-democratic government, while seculars favour democracy by 73% and observant Jews who are not ultra-orthodox favour democracy by 60%. The same discrepancies can be seen in attitudes to Arabs. Agreement with the statement "the State of Israel belongs to the Jews and only to the Jews" was expressed by 76% of the ultra-orthodox, 56% of observant Jews and 28% of secular Jews: *Ha'aretz* (Eng. ed.), June 2, 1998, at 3.

96 See *supra* n. 88.

97 *Ha'aretz* (Eng. ed.), March 26, 1998, at 1.

and an increasing familiarity with the courts, Deri is well placed to understand their similarities. Sacred texts are what their interpreters say they are, whether they are rabbis or judges.⁹⁸ The specific Israeli dilemma in constitutional politics is that we are caught between the devil and the deep blue sea, not to mention the frying pan and the fire. The alternative to the characteristic modern legal obscurantism of the courts is the ancient ultra-orthodox religious obscurantism of the rabbis. It's either dissenting judges or disputing rabbis to solve our problems for us by pulling the answers out of ambiguous texts like rabbits (*chas v'chalila!*) out of hats.

"Democratic" Judges

But it would be false to put the alternatives in such an equivalent manner, because there is yet another important peculiarity about Israel: the tendency of the Supreme Court, when it intervenes, to intervene on the side of democracy — to favour equality where the religious parties seek to impose a radical inequality.

We have already mentioned the *Bergman* line of cases in which the Court held that the method of financing parties according to their representation in the outgoing, as opposed to the incoming, Knesset discriminated against new parties.⁹⁹ Naturally this put the newer, smaller parties in a better, more equal position — though the impact should not be exaggerated, as the court-approved system still tended to reinforce inequality by authorizing more money for the older, bigger parties.

98 The story is told of Moses when he received the laws of kashrut from the Lord on Mount Sinai. Moses was particularly troubled when the Lord intoned "THOU SHALT NOT SEETHE A KID IN ITS MOTHER'S MILK. "Does that mean", Moses asked, "that we can't eat milk and meat at the same time?" The Lord, evidently frustrated, replied: "MOSES, LISTEN TO WHAT I'M SAYING: THOU SHALT NOT SEETHE A KID IN ITS MOTHER'S MILK. Moses, still puzzled, reflected and then ventured: "Okay, I think I've got it now. We have to wait three hours after eating meat before drinking milk and one hour after drinking milk before eating meat?" The thundering voice of the Lord came back: "MOSES! LISTEN TO MY VOICE: THOU SHALT NOT SEETHE A KID IN ITS MOTHER'S MILK! Moses, now very excited: "Okay, okay, now I've got it for sure. We have to keep separate sets of dishes for milk products and separate sets for meat products and they have to be washed separately and ..." "MOSES! ... OH, ALL RIGHT, HAVE IT YOUR WAY ..."

99 *Supra* n. 6.

However, most of the Court's democratic activism has been in the exercise of its traditional, common law powers, not to overrule the legislature, but to operate in the many gaps left by it, powers which let the Court decide, but which leave the legislature legally free to disagree. Here the Court's interventions in favour of democracy have been numerous.

For example, the Supreme Court has been much praised for its actions in defence of "freedom of speech". As long ago as 1953, it overturned suspensions of a Communist Party newspaper critical of government's stance against Soviet Union in the famous *Kol Ha'am* case¹⁰⁰ and in 1989 it overturned a ban on a newspaper article critical of Israel's secret service.¹⁰¹ The Court has also been praised for acting in favour of the democratic principle of government obedience to law. In 1990, it overturned the government's decision not to prosecute bankers involved in illegal practices that led to a stock market crisis, holding that the government had taken an unreasonable view of the "public interest" and ordering a reconsideration.¹⁰² In 1993 the Court overruled Prime Minister Rabin's decision not to remove Ariele Deri as Minister of Interior after Deri had been indicted for corruption, holding, once again, that the Prime Minister had misused his discretion.¹⁰³ Prior to that, it acted in favour of the democratic principle of "transparency" by affirming the duty of a government to publish its coalition agreements when it presented itself to the Knesset.¹⁰⁴

The Court has also intervened on behalf of sexual equality, striking out as discriminatory the retirement provisions in collective agreements that forced women to retire five years earlier than men,¹⁰⁵ holding that gay couples are entitled to spousal pension benefits¹⁰⁶ and that women

100 *Kol Ha'am Company Limited v. Minister of Interior* in Zamir and Zysblat, *supra* n. 5.

101 *Meir Schnitzer and Others v. The Chief Military Censor and Others* (1989), English translation in Zamir and Zysblat, *supra* n. 5, at 108.

102 *Uri Ganor, Advocate and others v. The Attorney General* (1990), *ibid.*, at 334.

103 *The Movement for Quality in Government in Israel & Others* (1993) 47(v) P.D. 404, 10 Selected Judgments of the Supreme Court of Israel 258.

104 *Shalit v. Peres & Others* (1990) 44(iii) P.D. 353, 10 Selected Judgments of the Supreme Court of Israel 204.

105 *Nevo v. National Labour Court and Others* (1990) 44(iv) P.D. 749, 10 Selected Judgments of the Supreme Court of Israel 136.

106 *El Al v. Danilevitch* (1994) 48(v) P.D. 749, discussed in Klein, *supra* n. 5, at 140, n. 1.

may not be disqualified from religious councils or election committees for local rabbis.¹⁰⁷

The religious council cases are also important examples of the Court's defence of religious pluralism, as are its invalidation of the disqualification of Reform and Conservative Jews from religious councils as violating the principle of equality,¹⁰⁸ and its barring of the Rabbinate from using its authority to grant kashrut certificates to coerce adherence to other aspects of religious law.¹⁰⁹ The Court has ordered the government to allocate land for the establishment of secular cemeteries,¹¹⁰ and it has ordered municipal authorities to grant a performance licence for a Christian missionary film.¹¹¹ On the question of "Who is a Jew?" for the purposes of the automatic right to citizenship under the Law of Return, the Court first rejected the rabbinical definition for a much broader, secular one, and then, when the law was amended and the rabbinical definition was introduced, the Court interpreted the word "conversion" to include non-orthodox conversions.¹¹²

Even in the treatment of Arabs, where the court has been criticized for having "a sense of law and justice that stops at the Green Line,"¹¹³ the Court has a number of positive interventions to its credit. In a famous case in 1979 (the "*Elon Moreh*" case), the Court overturned the establishment of a Gush Emunin settlement on Arab land, holding the military governor's security reasons merely a pretext for political rea-

107 *Shakdiel v. Minister for Religious Affairs* (1988) 42(ii) P.D. 221 (abridged in 24 Isr. L.R. 129); *Poraz v. Mayor of Tel Aviv* (1988) 42(ii) P.D. 307.

108 *Hoffman v. City Council of Jerusalem* (1994) 48(i) P.D. 678. See also recently the decision of the High Court of Justice reported in *Ha'aretz* (Eng. ed.), November 24, 1998.

109 *Raskin v. Religious Council of Jerusalem* (1990) 44(ii) P.D. 673 (abridged in 26 Isr. L.R. 77).

110 *Menucha Nechona Society v. Minister of Religious Affairs* H.C. 397/88.

111 *The Galilee Experience v. Mayor of Tiberias* (1991) 45(iv) P.D. 58.

112 *Hitachdut Hasefaredim Shomrei Torah v. Director of Population Registry* (1989) 43(ii) P.D. 727 discussed in David Kretzmer, "Constitutional Law", in Amos Shapira and Keren C. DeWitt-Arar, eds., *Introduction to the Law of Israel* (Kluwer Law International, 1995) 39, at 43.

113 Gideon Levy, *Ha'aretz* (Eng. ed.), January 25, 1998, at 6. See, also, Klein, *supra* n. 5, at 140, n. 2 ("on a pu dire que l'activisme de la Cour supreme s'arretait à la ligne verte") and Tom Segev, *Ha'aretz* (Eng. ed.), February 6, 1998 at 8: "As it approaches its 50th birthday, it should be commended for its positions on civil rights, but it must be said that the court does not do a good job defending the human rights of Arab residents of the territories".

sons.¹¹⁴ The Court has stopped some proposed demolitions of Palestinian homes on the grounds of suspected involvement of residents in terrorist activities, holding that the principle of proportionality required the government to use its lesser powers of sealing a house pending the outcome of investigations.¹¹⁵ During the Gulf War of 1991, the Court ordered the government gas mask distribution programme to be extended to Palestinians in the Occupied Territories.¹¹⁶ The Court has also acted against discrimination against Israeli Arabs, holding, for instance, that an Arab juvenile could not be denied access to special juvenile facility as an alternative to prison just because a separate one for Arabs had not been built yet.¹¹⁷

The Limits of Judicial Democracy

So the Israeli Court has quite a few democratic interventions to its credit. Nevertheless, it would be a great exaggeration to say that it has been a fearless and consistent defender of democracy. There are many cases in which, just like other courts around the world, it has *refused to intervene* when the authorities have acted undemocratically. For example, despite the interventions just mentioned, the Court has earned its bad reputation on Arab rights in the Occupied Territories by a series of decisions not to intervene. For example, it has refused to intervene in the demolition of houses on the basis of the reasonableness or legitimacy of the practice as a form of collective punishment, as opposed to its procedural correctness in a given case;¹¹⁸ and it gave a narrow reading to the Geneva Convention in refusing to interfere with deportations of Arab residents suspected of hostile activity against the

114 *Izat Muhamed Mustafa Dwaikat and others v. The State of Israel and others* (the "Elon Moreh Case") (1979) Zamir and Zysblat, *supra* n. 5, at 379.

115 *Association for Civil Rights in Israel v. Central District Commander and Another* (1989), 9 Selected Judgments of the Supreme Court of Israel 1; *Turkeman v. Minister of Defence* (1994) 48(i) P.D. 217.

116 *Morcus v. Minister of Defence* (1991) 45(i) P.D. 467.

117 *National Council for the Child's Welfare v. Minister of Labour and Welfare* (1993) 47(i) P.D. 148, discussed in Asher Maoz, "Constitutional Law", in I. Zamir and S. Colombo, eds., *The Law of Israel: General Surveys* (Sacher Institute for Legislative Research on Comparative Law) 5.

118 David Kretzmer, "Forty Years of Public Law", (1990), 24 Isr. L.R. 341, at 355, n. 54.

occupying authorities,¹¹⁹ even when these were done in violation of the principles of due process.¹²⁰ The Court has upheld the policy of selling apartments in the Jewish Quarter of the Old City of Jerusalem only to Jews¹²¹ and the banning of an Arab Nationalist Party from standing for election because it repudiated Israel's right to exist,¹²² but denying that the same principle applied to Jewish parties advocating racism.¹²³

On the question of religious pluralism, the Court has refused to interfere with the orthodox monopoly on performing marriages,¹²⁴ and has repeatedly denied petitions by reservists who claimed that the exemption of Yeshiva students from military service was unreasonable and discriminatory.¹²⁵

So, alongside the court's interventions on behalf of democracy there have been many failures to intervene that have upheld undemocratic governmental practices. In this, Israel's Supreme Court is like many other constitutional courts throughout the world. However, what is really unique about Israel's Supreme Court, modest though it may appear, is its almost complete lack of *undemocratic* interventions, that is decisions which, by overturning democratic government initiatives, have actually made matters worse. One cannot find instances, such as those which litter the law reports of other countries, of the Supreme Court interfering with government attempts to limit and regulate the power of property, to take the workers' side in labour relations, or to correct historical imbalances by affirmative action programmes. Af-

119 *Asser Al Aziz, Ald Al Aziz, Abd Al Afri and others v. Commander of IDF Forces in the Judea and Samaria Region* (1988), Zamir and Zysblat, *supra* n. 5, at 410.

120 *Association for Civil Rights in Israel v. Minister of Defence* (1993) 47(ii) P.D. 267; 10 Selected Judgments of the Supreme Court of Israel 168. However it must be said that in this case the Court granted a retrospective right to an in-person hearing for those wishing to have one, even if the application was made from outside Israel.

121 *Burkan v. Minister of Finance* (1978) 32(ii) P.D. 800.

122 *Yeredor v. Chairmen of the Central Elections Committee for the Sixth Knesset* (1965) 19(iii) P.D. 365, discussed in David Kretzmer, *supra* n. 112, at 41.

123 *Neiman v. Chairmen of Central Elections a Committee for the 11th Knesset* (1984) 39(ii) P.D. 225, discussed in Claude Klein, "The Defence of the State and the Democratic Regime in the Supreme Court", (1985) 20 Isr. L.R. 397.

124 *Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs* (1989) 43(ii) P.D. 661 abridged in (1991) 25 Isr. L.R. 110.

125 *Ressler & Others v. Minister of Defence* (1988) 42(ii) P.D. 441; 10 Selected Judgments of the Supreme Court of Israel 1. In December, 1998 the Supreme Court ruled the discrimination formally illegal without taking a position on the merits. This is discussed below.

firmative action in favour of women has been left judicially unharmed¹²⁶ and the Court has resisted the call to interfere with the rare cases of discrimination in favour of Arabs.¹²⁷ The only important cases of undemocratic interventions by the Supreme Court have been with respect to freedom of speech for Jewish racists, when, in the 1980s, the Court upheld the complaints of Rabbi Meir Kahane and his racist "Kach" movement against censorship by the Broadcasting Authority,¹²⁸ and against the banning of his party by the Knesset Elections Committee.¹²⁹

So the democratic credentials of the Supreme Court of Israel are much better than those of most other constitutional courts in the world, because the Israeli Court's significant democratic interventions, while keeping company with many refusals to intervene in the undemocratic behaviour of the government, are not as usual outweighed by anti-democratic interventions against government. On balance, therefore, it is hard to avoid the conclusion, unique as it is, that the Supreme Court of Israel's interventions have done more democratic good than harm. Does this prove Justice Barak's thesis about judicial review and the "democracy of ends"?

Not quite.

126 For example the Government Companies Law of 1975 (as amended in 1993) provides for affirmative action for women in the directorships of public companies. Opposition to discrimination against women can be found in the earliest legislation of the State. E.g., the Women Equal Rights Law, 1951 (5 L.S.I. 171) provided that "any provision of law which discriminates, with regard to any legal act, against women as women, shall be of no effect".

127 *Avitan v. Israel Lands Administration* (1989) 43(iv) P.D. 297, discussed in Maoz, *supra* n. 117, at 32, in which discrimination in favour of Bedouins over Jews in the matter of subsidized land was upheld.

128 *Member of Knesset Rabbi Meir Kahane and the "Kach" Movement v. The Executive Board of the Broadcasting Authority and Others* (1985) Zamir and Zysblat, *supra* n. 5, at 74.

129 *Neiman et al.*, *supra* n. 123. To these cases, one might perhaps add the much milder one of *Universal City Studios Inc. & Others v. Film & Theatre Censorship Board & Others* (1989) 43(ii) P.D. 22, 10 Selected Judgments of the Supreme Court of Israel 229, where the Court overturned the ban on the film "The Last Temptation of Christ" which offended many Christians, as well as being a thoroughly bad movie.

The Great Constitutional Revolution Ushers in a Timid Court

In the first place, it bears repeating that most of the Court's democratic activity has come within the confines of the "rule of law" as traditionally understood, that is, ensuring the government's compliance with enacted law, or filling in the gaps where parliament has failed to legislate. That is, almost all of the activity for which the court deserves praise comes within traditional notions of the division of powers and outside the realm of modern constitutionalism.¹³⁰ Secondly, there seems to be a temporal dimension involved: however effective and activist it may have been before it, since the much-heralded "constitutional revolution," the Court seems to have become relatively timid and ineffective. Having established its authority, it seems hesitant to use it. Some critics have attributed this to the high profile the constitutional revolution itself has bestowed, and the Court's consequent vulnerability to a democratic critique and the charges of bias outlined earlier.¹³¹

Nothing could be a better example of judicial ineffectiveness than *Meatrael v. Rabin* itself, the 1992 decision on the importation of non-kosher meat: it was legislatively overruled without even a whimper, and, indeed, with the votes of several secular MKs.¹³² Similarly inconsequential was the court's intervention in 1996 on the explosive question of whether a major thoroughfare in Jerusalem which passed through an ultra-orthodox area should be closed on the Sabbath. A government with heavy religious participation had ordered it closed, and the court

130 This is also the case for several recent high-profile interventions: the disqualification of a Jewish party from running in municipal elections on the grounds of racism reported in *Ha'aretz* (Eng. ed.), October 30, 1998, was a straightforward application of the Municipal Elections Act. The acquittal of kibbutzniks for charges of working on the Sabbath used traditional rules of statutory interpretation (*Ha'aretz* (Eng. ed.), December 6, 1998).

131 Alon Harel, "The Rule of law in Israel: Philosophical Aspirations and Institutional Realities" (1998, unpublished manuscript in the possession of the author) at 7: "Others believe that a written constitution may lead to greater caution on the part of the judges and therefore may eventually be detrimental to the protection of human rights ... Courts which have to defend their very constitutional powers to review statutes are less able vigorously to defend human rights. Ironically, it is therefore the Courts' declaration of de jure constitutional power which weakens their de facto political power and consequently undermines their ability and commitment to the protection of human rights".

132 See *supra* nn. 7 and 8.

issued a temporary injunction. However, the court's ultimate decision was limited to brokering a compromise that would allow the orthodox to shut the street down "during prayer hours".

Predictions as to what posture the Court might take on religious pluralism in the future under the Basic Laws would be foolhardy. The texts, as all constitutional texts, are completely indeterminate. On the other hand, the relentless pressure of the religious sector is starting to show. Justice Barak has taken to including somewhat gratuitous religious references in his decisions under the Basic Laws. In *United Mizrahi Bank* he ended with this:

The prospect is the ascent of the glory of human rights, and increased goodwill and fellowship among humans, each born in the image of the Creator.¹³³

In the *Stockbrokers* case he referred to the *Mishna of Rabbi Eliezer*: "The trade distinguishes the person and constitutes an expression of God (*Elohim*) in him".¹³⁴ After the attack on the Supreme Court for interfering with the Rabbinical Courts, Justice Barak went out of his way to praise their work.¹³⁵ Despite the control exercised by the legal profession over new recruits, the religious conversion of society cannot leave the courts immune. In March of 1998, a religiously observant District Judge held that the prohibition of the sale of non-kosher meat in a secular neighbourhood of Ashkelon was consistent with the values of Israel as a Jewish and democratic state.¹³⁶

Justice Barak recently issued an expectation-lowering "clarification" of his famous dictum that "everything can be adjudicated:"

I always claimed that 'the law is everything' (in the spirit of the biblical injunction) but I never claimed that everything was juridical (meaning that it can or should be adjudicated). Not everything is suitable for resolution by the courts.¹³⁷

133 *United Mizrahi Bank*, *supra* n. 12, at 163.

134 *Association of Investment Management*, *supra* n. 14, at paragraph 15.

135 *Ha'aretz* (Eng. ed.), June 17, 1998, at 1.

136 *Ha'aretz* (Eng. ed.), March 11, 1998, at 1.

137 *Ha'aretz* (Eng. ed.), July 24, 1998, at 6.

A few months after this, the Court delivered its judgment on the draft exemptions of ultra-orthodox Yeshiva students, holding that the fifty-year old practice (repeatedly upheld by the Court in the past) was illegal because it had been adopted by executive decision and not legislative enactment. The Court gave the legislature one year to pass a law to deal with the question one way or another. In the unanimous decision by an unprecedented eleven-member panel, the court expressly took no position on the merits of the exemption. Indeed it exalted the role of the Knesset in deciding questions of such importance. The decision left the Knesset absolutely free to do what the political forces dictated. The lobbying began immediately. Meretz proposed to reduce the exemption from the current 31,000 annually to where it stood before the Right took power, at 800. A cross-party compromise was shaping up that would leave some form of special treatment in place for all the Yeshiva students, with special paramilitary units and training in vacation. The press reported that most politicians were satisfied. Secular supporters called it "cleverly crafted judicial restraint";¹³⁸ secular critics called it "cowardly" — a way to legalize an illegal practice.¹³⁹ According to one Yeshiva student interviewed in the street: "It's all hot air and nothing will come of it".¹⁴⁰

So the willingness of the Court to stand up for the secular cause is far from given. And even if the courts were willing to set their faces against religious coercion, the very weak rigidity of the Basic Laws in the reality of Israeli politics would not pose any serious obstacles to the religious sector having its way.

If, on religious issues, the question is whether the Court can maintain its good reputation, on the question of the treatment of the Arabs, the question is whether the Court can overcome its bad one. In March 1998, the Supreme Court deeply shocked its defenders by making partially public a ruling that it was permissible for the State to hold

138 Ze'ev Segal, "Cleverly crafted judicial restraint", *Ha'aretz* (Eng. ed.), December 10, 1998.

139 Orit Shohat, "A cowardly decision", *Ha'aretz* (Eng. ed.), December 11, 1998.

140 *The Jerusalem Post*, December 10, 1998. Other recent examples of judicial reticence are the refusal to intervene in the appointment of a Shas MK with a criminal record to the Chair of a Knesset committee (*Ha'aretz* (Eng. ed.), October 20, 1998) and the rejection of a petition to provide handicapped voters with access to polling stations (*Ha'aretz* (Eng. ed.), October 30, 1998).

Lebanese civilians hostage as bargaining cards for possible prisoner exchanges. According to the evidence, twenty-one such hostages were being held, some for several years. The hostages themselves posed no threat to security nor were they guilty of any wrongdoing. Justice Barak wrote for the two judges in the majority:

I am convinced that detentions of individuals for the sake of freeing our missing and captured men constitutes a vital interest of the state ... There is no denying the fact that Israel is in a state of emergency due to the threats hovering over its existence and citizens from within and from abroad ... In situations like this, damage to basic human rights is obligatory. Sometimes even grave and painful damage.¹⁴¹

The case did not even involve a question of the Basic Laws overruling a clear legislative directive; it was just a matter of interpreting the rules for administrative detention. The dissenting Justice Dorner held that there was not enough proof that the detention would help achieve any legitimate ends. According to a commentator in *Ha'aretz*:

Now the Supreme Court has put its stamp of approval on a new disgrace. Justice Barak has once again proved that when the Supreme Court deals with security matters, he will condone almost automatically any human rights violation, regardless of the moral cost.¹⁴²

Another matter that has provoked world-wide criticism is the Court's treatment of the physical abuse of Palestinian prisoners by Israeli authorities. In 1987 a retired President of the Supreme Court, Justice Moshe Landau, recommended that the Shin Bet internal security service be allowed to use "moderate physical pressure" including "rough shaking" to obtain information in urgent cases where this was necessary to prevent terrorism. The Supreme Court has frequently been criticized for its acceptance of the practice and its refusal to hold the security services to high standards of proof. In May 1998 the United Nations Committee Against Torture condemned Israel for the use of methods

141 *International Herald Tribune*, March 5, 1998, at 1.

142 Gideon Levy, *Ha'aretz* (Eng. ed.), March 8, 1998, at 6.

that contravene the International Convention on Torture.¹⁴³ The Association for Civil Rights in Israel had submitted several petitions against the practice, and the Court, after previously issuing temporary injunctions but ultimately ratifying every case, held full hearings in May 1998. Witnesses testified to being forced to wear hoods soaked in vomit or urine and being shaken violently, bound and gagged in painful positions, deprived of sleep and subjected to blasts of cold air and loud music. The evidence submitted to the Court was that 85% of 1000-1500 Palestinians detained were subjected to torture. At least one death had occurred due to "rough shaking".¹⁴⁴

Finally, there is the question of "civil" discrimination against Palestinians, even those who are citizens of the State of Israel. Discrimination in public education allocations and services has compounded the poverty of Arab citizens, who have to endure twice the national poverty rate.¹⁴⁵ While the courts have intervened at the margins (ordering a speed-up in the inclusion of Arabic on inter-city road signs and the provision of electricity to Bedouin schools¹⁴⁶), questions that go to the heart of the conflict, such as budgetary allocations and, especially, the question of land, have been carefully avoided.

Given the territorial struggle that has characterized the history of the region, it not surprising that the most sensitive disputes have been over land and housing. There is mounting evidence of the discriminatory enforcement of building by-laws in the destruction of houses built without permits. According to one estimation, though Arabs account for 57% of illegal construction, 90% of demolitions are of Arab housing.¹⁴⁷ Part of the reason appears to be that illegal housing built by Jews is often condoned after the fact.¹⁴⁸ Moreover, the relatively high rate of Arab poverty means the community is exposed to a relatively high rate of housing problems compared to Jews.¹⁴⁹ The details of some of these

143 *International Herald Tribune*, May 19, 1998, at 3.

144 *International Herald Tribune*, May 21, 1998, at 10. In September 1999, as I corrected the page proofs to this article, the Supreme Court finally ordered what amounted to a temporary stop to the practice of torturing prisoners. The decision is discussed below.

145 *Ha'aretz* (Eng. ed.), November 27, 1998 reported that the poverty rate for 1997 among non-jews was 30.3%, compared to a poverty rate for the total population of 16.2%.

146 *Ha'aretz* (Eng. ed.), November 27, 1998.

147 *Ha'aretz* (Eng. ed.), April 7, 1998, at 6.

148 *Ha'aretz* (Eng. ed.), April 9, 1998, at 6.

149 *Ha'aretz* (Eng. ed.), March 17, 1998, at 2; April 7, 1998, at 6.

figures have been disputed but not the substance.¹⁵⁰ The government admittedly favours Jews over Arabs in leasing land as part of the age-old Zionist policy that goes to the very nature of the State. One device used is for the State to transfer public land to the Jewish Agency which then, according to its mandate, leases only to Jews.¹⁵¹ A challenge to this practice was brought to Court in 1988 by an Israeli Arab family denied permission to lease land reserved for Jews. The lawyer cited *Brown v. School Board*, but, according to a report on the story in the *International Herald Tribune*, Justice Barak “pleaded” with both sides to find a compromise and said it was “one of the most difficult and complex judicial decisions that I have ever come across”.¹⁵² A *Ha’aretz* editorial condemned the Court’s hesitation in these terms:

The couple’s case has been pending before the High Court for three years. Justice Aharon Barak, sitting at the head of five justices, asked the state to solve the problem out of court several weeks ago so it would not be forced to render a ruling or set a precedent on a sensitive issue. Barak’s assumption that the Israeli public was not “mature” enough for a ruling in principle is odd.¹⁵³

The Plot So Far

So Israeli constitutionalism has to account for a goodly and increasing number of failures to oppose the undemocratic actions of government, even though it has (like the other constitutionalisms around the world) some significant democratic interventions to its credit. As we argued earlier, Israel also fits the traditional anti-democratic model in its origins “pretty well”. However, it offers one significant peculiarity in its practice, namely a unique absence of undemocratic judicial interventions. Though this may seem a small thing, it does mean that the claim that the court has done more democratic good than harm, if based only on the decided cases, might well have to be conceded. Whether this would put a dent in the anti-democratic thesis of modern constitutionalism or could be considered an exception explained by the exceptional nature of Israeli politics would be another question.

150 *Ha’aretz* (Eng. ed.), April 9, 1998, at 2.

151 *Ha’aretz* (Eng. ed.), March 10, 1998, at 6; March 13, 1998, at 1.

152 *International Herald Tribune*, March 2, 1998, at 2.

153 *Ha’aretz* (Eng. ed.), March 29, 1988, at 6 (“The ‘nation’ in discrimination”).

But this, at least, is one question we do not have to explore, because there are more ways that constitutionalism can damage democracy than by anti-democratic judicial decisions, and Israel is no exception.

Legal politics is not like other politics, even though it is not quite as different as it likes to pretend. No doubt its protestations about being "the essence of democracy" and eating a "daily bread" of "objectivity" contribute to the notion that it is an omnipotent body inhabiting an autonomous realm; but in fact it has a very limited ambit within which to operate, tightly circumscribed by the political climate of the country. There is even an encoded judicial etiquette for this: "the judiciary gives expression to the values of society as they are understood by the culture and tradition of the people as they move forward through history".¹⁵⁴

Why should the court be so limited? Nothing technical here. Nothing to do with the open-ended documents it administers. The limits on the Court have to do with its inherent legitimacy problems. These are unavoidable for any court and especially one in a "rifted" society, like Israel.¹⁵⁵ This leads inevitably to the Court agreeing with the legislature almost all of the time, with cases of disagreement, though much celebrated, being rare and limited. This has also been the case in Israel, even outside the Basic Laws in the rule-of-law realms where the courts have been most active. The difference in Israel is not quantitative but qualitative, with judicial disagreements tending to be on the side of democracy and not against it, as opposed to most of the world's constitutional courts. But it also bears emphasizing that it is impossible to predict how long this will last. Some of the most reactionary courts have had their good periods. The Supreme Court of the United States from 1954-1973 is a good example. After this twenty-year liberal interval it resumed the position to the right of government that it had occupied for a century and a half and has stayed there ever since.

In other words, the Israeli court's apparent timidity and ineffectiveness come with the territory of a constitutional court.

154 *United Mizrahi Bank*, *supra* n. 12, at 126. An obvious example of the dependence of the Court on the legislature for political direction is the equality case of *Nevo* (women's age of retirement), *supra* n. 105, which merely applied the Knesset initiative of the Equal Age of Retirement for Men and Women (1987) retroactively.

155 Ruth Gavison, "The Role of Courts in Rifted Democracies", a paper delivered in Jerusalem at the International Colloquium "Democracy and the Courts sponsored jointly by the Faculty of Law of the Hebrew University of Jerusalem and the Isr. L.R., June 30, 1998.

This has a number of very important results. In the first place, going to court will often be a concrete waste of time. Most lawyers know this, even if they do not always let their clients in on the secret. Political litigation is usually justified not on the chances of winning, but on the “educational” value, the contribution made to the wider political struggle by going to court to make a moral point against the government. But this is not one of those “win-win” situations. The considerable resources expended on judicial campaigns will always drain resources from these wider political struggles — though they certainly help to improve the resources of the lawyers involved in the legal campaigns, as well as their visibility. Often, moreover, it will serve to confuse and dissipate the political campaign itself.

The way this works is illustrated by the episode of the 1998 bill to draft Yeshiva students. At the very moment when this apparently hastily prepared, half-hearted and clumsy political effort was being debated in the Knesset,¹⁵⁶ the very same issue was being debated in the Supreme Court, which hemmed and hawed over whether it had the right to intervene. There can be no question that the simultaneous courtroom battle took the momentum, urgency and effort out of the Knesset initiative. And when the court finally decided, it took no position on the merits but merely pronounced that the Knesset should pronounce. Granted it set a time limit, but the issue would ultimately have to be decided according to the balance of political forces in the country. So the judicial manoeuvrings turned out to be a grand detour. Another example was the proposed Basic Law on Freedom of Religion. As an attention grabber on the issue of religious pluralism it made some headlines, but as a way of introducing civil marriages (which was the only concrete goal the sponsors seemed to be sure of) it so confused and complicated the issue that it was much less likely to succeed than some real political movement to address merely the one law.

Litigation and Legitimation

But worse than merely dissipating the resources of a political movement, constitutionalization can actually serve to defeat it by *legitimizing* the policy opposed. This, in fact, is one of the most familiar results of legal politics. Both because of their legitimacy problems and because

156 See *supra* n. 71.

of the usually limited nature of disagreements between judicial and governmental elites, constitutional courts tend to avoid direct confrontations and to limit themselves to symbolic ones. This phenomenon has been noticed in Israel as well. A case in point is the treatment of the Arab residents of the territories occupied by Israel since 1967. A study by Ronen Shamir found that (despite the occurrence of such "landmark cases" as *Elon Moreh*), of the sixty-five Arab petitions from the Territories adjudicated by the Supreme Court between 1967 and 1986, only five were upheld; in other words, the government won sixty out of sixty-five.¹⁵⁷ According to Shamir, "the significance of these landmark cases was primarily symbolic rather than substantive. The long-range outcome of these decisions legitimized governmental policies".¹⁵⁸ The *Elon Moreh* case itself, by emphasizing private property rights, actually legitimated the vast majority of seizures that could be characterized as not being about private property: "Thus, in its isolated and well-differentiated decision, the court established new limitations on the ability of future petitioners to resist land seizures and provided a sounder legal basis for future takeovers".¹⁵⁹ In fact, it is possible to argue that the constitutionalization process itself, coming as it did during the period of the *Intifada*, was partially an attempt to legitimize Israel's whole occupation policy in the face of blistering world criticism.¹⁶⁰

Now others have disputed the claim that the primary effect of the court's interventions in the Occupied Territories was legitimation. For example Asher Maoz:

The role judicial review plays in guaranteeing the rights of the inhabitants of the occupied territories cannot be measured in statis-

157 Ronen Shamir, "Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice", (1990) 24 Law and Society R. 781.

158 *Ibid.*, at 786.

159 *Ibid.*, at 789. I was informed by a member of the Dwaiket clan (though I cannot confirm this) that even the land in dispute in the *Elon Moreh* case was ultimately lost in a subsequent expropriation by the Israeli government for which the courts afforded no relief. This phenomenon is very old. Douglas Hay, in his justly famous study of the death penalty in 18th century England, noted how just one case of the execution of a nobleman served to legitimate the vast number of executions of poor people for a century: Douglas Hay, "Property, authority and the Criminal Law", in D. Hay, et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Allen Lane, 1975).

160 I owe this point to David Kretzmer who made it forcefully when he commented on this paper in its original version.

tics alone. The mere possibility that their actions may be subject to judicial review necessarily influences the security authorities in choosing the measures they take vis-à-vis the population in the territories. Also, a substantial proportion of petitions originating there lead to out-of-court settlements, thus distorting the true picture of successful applications to the Court as expressed in formal judgments.¹⁶¹

This seems, however, to be pure speculation and it is hard to see why the side with the 92% winning record in court would be more willing to make concessions in anticipation of litigation than the side that almost always loses. Maoz, too, seems to rely mainly on the symbolic effect:

Above all, the value of this unprecedented process of subjecting the military governor's actions to judicial review should not be underestimated.¹⁶²

Precisely the same debates have taken place around the question of repression, for instance the case of "moderate physical pressure" which the Israeli judiciary approved in limited form and simultaneously subjected to judicial review. While providing a forum for detainees to complain that the limits have been exceeded, the Court has yet to intervene on the side of a Palestinian complainant.¹⁶³ Critics have been caught between being relieved that a formerly dark practice is under supervision and being disgusted that "the respectable robe of the Supreme Court is waving above the interrogation cells":

On one level the bureaucratization of the process should be welcomed: the Palestinian detainee is no longer a victim of his interrogator's whims and perversions. But only a heart of stone can be oblivious to the horrifying aspect of the change: acts of torture and humiliation that were previously kept in the dark of the investigating rooms have been brought out into the light of day as legitimate means, just like prison or community service.¹⁶⁴

161 Maoz, *supra* n. 117, at 49.

162 *Ibid.*

163 Until September 1999. See below.

164 Gideon Levy, *Ha'aretz* (Eng. ed.), January 25, 1998, at 6.

The evidence cited earlier of 85% of Palestinians detained being subjected to torture suggests that the Court's intervention has in no way reduced the practice, and may even have increased it; at most it might be said that it has helped to keep it within the delineated bounds of severity. In other words, court intervention has likely not reduced the use, but only the *abuse* of the practice. This is consistent with procedural interventions by courts elsewhere. The procedural rights granted refugee applicants by the constitutional courts of the wealthy countries evidently have not raised the social status of refugees because they have not prevented these countries from sealing their borders, even if they have had to amend the constitution to do so. It is to be noted that the required majority for constitutional amendment in France and Germany (two-thirds) was considerably higher than Israel's fifty-percent-plus-one formula, but there was no difficulty at all in overcoming it.¹⁶⁵ The procedural interventions of the United States Supreme Court are world famous, but the country also holds the West's title for the highest rate of imprisonment and boasts a death penalty that executes about seventy prisoners a year, with blacks over-represented by more than 400% among those executed. Constitutional due process has led to record levels of punishment in Italy and in Canada.¹⁶⁶ An example from Canada shows how the phenomenon works. After the Second World War there was a major movement against the death penalty, but the government would only go so far as to remove the death penalty from certain forms of murder, leaving it in place for others. However, it added an amendment for the remaining capital crimes that there would be an automatic appeal to the Supreme Court of Canada. No doubt for supporters of the death penalty this was seen as progress, a way of ensuring that only those whose execution was approved by the highest court would be executed. But for opponents of the death penalty it was only a way of *perpetuating it* by making people feel better about it.¹⁶⁷ The

165 Mandel, *supra* n. 3, at 256; *supra* n. 1.

166 Michael Mandel, "Legal Politics Italian Style" in C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York University Press, 1995) 261, at 276-279; *supra* n. 3, at 220-228.

167 Mandel, *supra* n. 3, at 223.

court is the “good cop” to the government’s “bad cop”, but like the cops themselves, these are just different means to the same end.¹⁶⁸

The idea is that though the *form* of the policy changes, its substance does not. Hence the legal philosopher’s insistence on the distinction between “principle” (form) and “policy” (substance).¹⁶⁹ The result is to

168 On September 7, 1999, the Supreme Court issued its decision in the torture case, ruling illegal the investigative techniques that had been authorized by the Landau Commission 12 years earlier. The Shin Bet declared that it would order an immediate halt to the condemned practices, which had been routine up to then. A good, democratic result, no question about it. Should we chalk one up for the constitutional revolution? There are several reasons why we should not. In the first place, the court ruled solely on the formal question of whether the practice was authorized by *ordinary* law. In finding it was not, the court underlined the responsibility and power of the Knesset to legislate. Nor did it set any limits on the nature of a new torture law, besides dutifully pointing out that any law would have to comply with the (vague) provisions of Basic Law: Human Dignity and Liberty (unless of course these were overridden by the Knesset). The debate immediately started, with all sides, including the government, making their proposals for a new torture law to authorize what the security forces were claiming was necessary to fight terrorism. So to those who praised the court’s “sense of justice and courage” (Meron Benvenisti), others responded more accurately that the decision was an “evasion” and “an attempt to shirk responsibility” (Dan Margalit). The court’s failure to set real limits on torture must be placed in the timidity/ineffectiveness category discussed in the text. And since the decision did no order anything but a formal change, it is difficult to avoid the conclusion that the court’s main goal — hard on the heels of the United Nations’ condemnation of Israel’s investigative practices — was not to stop torture but rather to legitimate it, as well as the State and the court itself in the eyes of the world. Finally, how can we ignore the court’s years-long delay in condemning what had always been, in its now unanimous opinion, an illegal practice? In the words of one critic “Why has something that was legal up until a few days ago suddenly become illegal?” (Israel Harel). Even one of the court’s strongest supporters (Ze’ev Segal) called the decision “an act of repentance”. Journalist Orit Shohat put it quite eloquently: “Those very same judges who have just ruled that the torture methods must be stopped immediately heard horror stories year after year in the courtroom but, up until recently, did not seem to regard the issue as terribly urgent ... How do they justify to themselves the enormous amount of time it took before they decided to put an end to something that they regarded as clearly illegal?” So a balance sheet of the period from Justice Landau to the present would show judicial legitimization of routine torture for about twelve years, from which would be subtracted only the period of time it takes to put a new law in place. Even on the best-case scenario (the failure to enact a new law or, perhaps, some future constitutional ruling with teeth) it is going to take a long time before the damage already done by the court is ever erased. See *Ha’aretz* (Eng. ed.), September 8-10, 1999, for the quotes in this footnote.

169 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 85-92.

make us feel better about the policy, so it can continue on a more secure basis. This holds equally for bad policies and good ones, but here we are concerned with bad policies because we are talking about the court as a remedy for an undemocratic legislature. Court supervision has even been known to prop up whole systems, for instance the Italian Court, whose rather moderate reformism (mixed with some very anti-democratic decisions) can be argued to have contributed to the maintenance of a stagnant political status quo for most of the second half of the twentieth century.¹⁷⁰ Often the legitimizing form is purely procedural, and often this depends on sheer *access* to the court itself (even where this is usually unsuccessful) which becomes the legitimator of an otherwise repressive policy — something which obviously suits the legal profession and the Court so well that it starts to resemble the mobster's "piece of the action" more than a means of democratic opposition. It is not a big step from sheer access to the court to mere representation on it as legitimator, namely as a substitute for equality of treatment. The world witnessed such an exercise in the United States where the appointment of a conservative black man to the bench was a substitute for real equality for blacks in everyday life.¹⁷¹ In Israel, it took fifty years for the Supreme Court to agree to the appointment of its first Arab judge. This left Arabs still way under-represented on the Supreme Court, though less so than on the courts in general.¹⁷² But the main point is that it cannot seriously be thought that this will change the substance of what the court decides, especially since the Court could not bring itself to make this appointment without putting the judge in question on probation for a year.¹⁷³

One way of looking at the legitimation effect is to take seriously Justice Barak's notion of judicial review as a "non-conventional weapon". He has been criticized by the Right for the unfairness of using such a weapon in the secular cause:

The essence of the problem lies in the court's transformation, when sitting as the High Court of Justice, into the "non-conventional

170 Mandel, *supra* n. 165.

171 Mandel, *supra* n. 3, at 54.

172 *Ha'aretz* (Eng. ed.), April 12, 1998, at 2. Arabs constitute 18% of the citizens of Israel and 4.5% of all its judges. There are fourteen judges on the Supreme Court.

173 *Ha'aretz* (Eng. ed.), March 22, 1998, at 3.

weapon” of the secular side in its dispute with the religious public. “Non-conventional” in the sense that the court’s status turns its judgments into knockout blows that decide debates which, by their character, and by the custom in Israel, should be decided in the broad public arena.¹⁷⁴

But whether the Right’s criticism is just or not, another well-known drawback of non-conventional weapons is their tendency, one way or another, to destroy even those who try to make use of them. In other words, if law, like war, is “politics by other means”¹⁷⁵ we should never underestimate the difference a change in means can make.

The Question of Property

So far, our analysis has led us to the conclusion that, even on the best-case scenario — for which, naturally, there is no guarantee — the tendency of judicial review in Israel, as elsewhere, is to contribute to the decline in the “democracy of ends” on which it stakes its claim to democratic legitimacy. Even if the Israeli Supreme Court holds to the path it has been travelling pretty much throughout its existence, moderately to the democratic side of government and almost never on the undemocratic side, it will still effectively legitimate the anti-democratic policies that are pursued there, even while maintaining its own relatively democratic reputation. This is because its disagreements will be limited to rare, symbolic and procedural ones.

This is another way of saying that the democracy of ends cannot be detached from the democracy of means. Prior to the advent of judicial review, democratic theory always assumed that procedures and results were linked. The battle for universal suffrage (in favour of “one person, one vote” and against “one dollar, one vote”) was always fought on both sides — propertied and propertyless alike — on the assumption that it would make a difference in the result. And this assumption has found plenty of corroboration in the twentieth century, from the triumphs of the world’s labour movements to the violent reactionary storms un-

174 Yair Sheleg, “The High Court and a constitution”, *Ha’aretz* (Eng. ed.), June 14, 1998, at 6.

175 Mandel, *supra* n. 3, at xi.

leashed against them. The historical record shows that it was the tendency of universal suffrage to lead to revolutionary differences in result that in fact called forth the invention of judicial review — as an antidote — to protect oligarchy from democracy by building up constitutional walls around the newly democratic governments.¹⁷⁶ The majority rule lately deprecated as mere “statistical democracy” is only the practical expression of the deeply egalitarian principle of “one person, one vote”. Courts understand this clearly enough when it comes to their own affairs, because, like the rest of us, when they cannot agree on the result, they take a vote and go with what the majority thinks is right. That’s how equals decide things. The re-definition of democracy as detached from majority rule can only be explained as a desperate attempt to have it both ways: to deny democracy in practice while vowing undying devotion to it in theory.

Now lawyers and judges in any society are a propertied elite and that is why they have always been counted upon to protect property from democracy. As the early Soviet theorist Pashukanis wrote, however independent they might be of the state, they are not independent of the propertied classes.¹⁷⁷ Israel is no different in this regard, so where property is at stake it is hard to understand why a majority of these elites should be thought better at defining democratic values than a majority of the people themselves. If I were a statistician, I would know how to put this in terms of samples sizes and such like.

But yet another peculiarity of legal politics in Israel is that, at least so far, questions of class and property have taken a back seat to other questions of great importance: peace, security, race, ethnicity, religion and gender. What does this do to the strong property thesis advanced in the beginning of the paper, namely that modern constitutionalism is meant to protect the oligarchy of property from the threat of democracy? Clearly this was the inspiration in Israel as well, but if the proof of the pudding is in the eating, how can it be said to have been the practice when apparently non-class questions have dominated?

Interestingly enough, all of the decisions under the Basic Laws — as opposed to the traditional “rule of law” questions — have indeed concerned economic rights. The landmark *United Mizrahi Bank* case of

176 Mandel, *supra* n. 1.

177 Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Pluto Press, 1989) 149, n. 21.

November 1995 was a challenge by a creditor bank to a law which, in the interest of solving the financial crisis in the moshavim (cooperative farms) provided a mechanism for reducing, restructuring or even cancelling part of the debts owing, depending on the ability to pay of the debtor. The lower court had struck this down as an interference with property rights under Basic Law: Human Dignity and Liberty. Protection of the rights of rich creditors had been the first mission of the Supreme Court of the United States in the early 19th century, and, had the Supreme Court upheld this decision, it would have been in the classic mould of protecting economic power from democracy. However, while the Court took the opportunity to establish once and for all the binding nature of the Basic Laws and to lay down an expansive theory of judicial review, it did not strike down the law. Not that it had anything against property rights, which Justice Barak praised in the most idealistic terms imaginable:

The right to property is the cornerstone of the liberal system. It occupies a central place in liberal ideology, as security for the existence of other rights ... Indeed the right to property promises the individual financial freedom. It enables interpersonal cooperation. It enables a person to activate the autonomy of his personal will. Thence arises the connection between the protection of property and the protection of human dignity.¹⁷⁸

Of course, when property is unequally held, as it always is in "the liberal system", and as it increasingly egregiously is in Israel, property rights can only increase the human freedom of some at the expense of the human freedom of others.¹⁷⁹ Nothing could be more obvious when the conflict is between debtor and creditor, as it was in *United Mizrahi Bank* itself.

On the other hand, Judge Barak recognized the importance and worthiness of the interference with property in the case at hand:

The purpose is to ensure the rehabilitation of certain debtors and to prevent the collapse of their life's work ... This purpose is an impor-

178 *United Bank Mizrahi*, *supra* n. 12, at 133-134.

179 Gerald Cohen, "Capitalism, Freedom and the Proletariat", in Alan Ryan, ed., *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979).

tant social goal ... It expresses the policy of the welfare state ... In the end I am convinced that this is a borderline case that falls within that area permitting the lawmaker to design a legislative arrangement at its discretion ... In light of the fitting purpose — which deals with solving the deep crisis into which the agricultural sector has fallen — it seems to me that the means chosen by the legislature in the Amended Sector Law do harm creditors, but this harm does not exceed the extent necessary. I have not found that it goes beyond the domain left within the discretion of the legislature in a democratic society ...¹⁸⁰

It could have been a lot worse. Still, the characterization of a case like this as “borderline” is certainly ominous, given the high stakes and the imbalance of power between the bankers and the farmers. It bears underlining that it was only the existence of the Basic Law that put the relief plan at risk in the first place.

When, in 1997, the Supreme Court finally drew blood and struck a portion of a law, it was also an economic rights case, but one of monumental triviality. A group of stock-brokers complained that the transitional provisions of the new law to regulate the stock market exempted those with seven years of experience from having to take competency tests, but left it to the Securities Commission’s discretion whether those with less than seven years experience would have to take the tests. The court jumped to the defence of this downtrodden group (stock-brokers with less than seven years experience) and, after balancing their human dignity against the grave public interest in protecting the rich who play the stock market from incompetent brokers, removed the yoke of oppression and fearlessly declared that seven years was too long! Human dignity would allow no more than four (or maybe five) years of bondage, or maybe it would be content with a sliding scale of tests according to experience.¹⁸¹

But these cases are only suggestive; they are far too marginal to the issues at the heart of the constitutional revolution to prove a theory with. What can be said of all those issues that have occupied the Court in the rule of law area — the conflicts over sexual equality, racial and

180 *United Mizrahi Bank*, *supra* n. 12, at 155, 159.

181 *Association of Investment Management in Israel*, *supra* n. 14.

ethnic equality, and religious pluralism? What have they got to do with class and property?

Of course, class strongly informs these other conflicts, in the sense that there are clear class dimensions to conflicts that are fought out as secular/religious, Ashkenazi/Sephardi, Jew/Arab and male/female — all of these are also battles between economic unequals. Even peace and war have their class dimensions as a not untypical alliance between the parties of business and the poor faces off against the parties of organized labour, professionals and intellectuals. Furthermore, class inequality in Israel is growing lock step with the increasing reign of the free market, a matter as high on the agenda of the sponsors of the “constitutional revolution” as constitutional reform.¹⁸²

But what is the relation of the legal revolution to these questions? In some cases it is only too obvious, as when the court legitimates the material inequality of the Arabs and their repression by the Jews. But what about sexual equality and religious pluralism? This is not an easy question, but I would answer it this way: in these cases the court has been basically defending elite values, the values of Israel’s WASP propertied class that is so well-represented in the court. But, it might be asked in return, are not these values also more democratic? And the answer would have to be yes, but only a qualified yes — yes in a strictly limited bourgeois sense. Non-discrimination according to sex is not inconsistent with discrimination according to class; in fact it is a requirement of it. And it is also a fact that the court’s decisions on women’s equality have all been decisions that have benefitted women precisely according to their class. While the number of women directors of public companies increased in the mid-nineties (following judicial initiatives which followed legislative ones), overall wage and employment disparity did not.¹⁸³ The great mass of women who are not the elite are affected only negatively, that is by the increasing inequality in general — which includes inequality between women.

182 Arian, *supra* n. 31, at 70-71.

183 Shachar Goldman, “The Israeli Supreme Court as a social change agent, its actual role and possible implications on democratic values: the case of equality between women and men” (unpublished paper in the possession of the author), citing Women’s Lobby in Israel, *Women in Israel: Information and Data* (Jerusalem, 1997) 24; The Comptroller of State of Israel, *An Account on Nomination of Directors to Governmental Companies* (Jerusalem, 1998) 25; and State Treasury, *An Annual Account of Revenues* (Jerusalem, 1997).

As for religious pluralism, even the decision on the importation of non-kosher meat was a commercial rights decision in which the right to do business was put at the top of the list of fundamental human rights;¹⁸⁴ not only that, it was a case that arose as the very result of the privatization of the importation of meat, previously a government monopoly. In fact, it is a proven, insidious tendency of legal politics to confuse human rights with economic rights, indeed to transform the latter into the former — or at least to make the equation seem natural — by disguising their economic nature: the fact that *they can only be exercised according to the economic power of the right holder*. This phenomenon has already begun to be noticed by Israeli critics:

In Israel, freedom is not perceived in terms of individual rights or of man's liberation from superstition, but rather as undisturbed control of our private property.¹⁸⁵

A useful example of the way this happens is the question of businesses opening on Shabbat, a central battleground in the war between secular and religious, Sephardi and Ashkenazi, Left and Right. When I gave this paper in Jerusalem, my co-panelist and Canadian colleague Lorraine Weinrib used this example to show how effective the Canadian Charter of Rights was in the struggle for religious freedom. And, indeed, this was the way the question of Sabbath opening was litigated in Canada (though naturally the Sabbath in question was Sunday).¹⁸⁶ The Supreme Court held that the freedom of religion of a drug store that worshipped only the Almighty Dollar and wanted to open seven days a week was infringed by a law that required it to close on Sundays. Now the stores are always open and the streets are happily clogged with traffic, Sunday and all the other days of the week. Who opposed this decision? The Left. Why? Because they knew that Sunday shopping also meant Sunday *working*, in other words one less day off, or at least one more day of work on the bargaining table. Who supported the decision? Business. Why? Because they knew that if they could do business on Sunday, they could make that much more money, but that if they had

184 *Meatrael v. Rabin* (1992) *supra* n. 7.

185 Ze'ev Sternhell, "Clinging to the rabbi's coattails", *Ha'aretz* (Eng. ed.), April 10, 1998, at 7.

186 Mandel, *supra* n. 3, at 313-327.

to close, then maybe people would find some other way of enjoying themselves rather than spending money, maybe reading instead of buying books, listening to music instead of buying records, or maybe going for a stroll instead of going "recreational shopping". In France and Italy, the Left is fighting for a thirty-five hour week, to fight unemployment from the point of view of workers; but in Israel, the Left has risen to the religious bait and is effectively fighting for a longer working week. If the debate is fought in the constitutional terms of religious freedom, which treats commercial freedom as the paradigm case, and not in terms of the modest secular good of a universal day off (with an extra day off for shopping if need be), this seems inevitable.

Let me end this long piece with a true parable. When in Jerusalem, we like to run in Gan Sacher a few times a week. I was telling someone how much I love the view as you enter the park from the east by the Monastery of the Cross, but that it was spoiled for me by ... and before I could finish the person quickly supplied "the Knesset?" and I said, "No, I kind of like the Knesset. It's the ugly hotel towering above everything that spoils the view for me". Visitors to the Supreme Court's new building are inevitably told that it was built to be higher than the Knesset to symbolize that the law is above politics, but nobody ever points out that the Holiday Inn Crown Plaza towers over both of them. The Supreme Court building, opened in the very year of the "constitutional revolution" itself, is, indeed, a magnificent architectural achievement. It was built with lavish private funding from the Rothschild Foundation precisely to coincide with the movement for the constitution, which required a great leap upward in status for the Court in order to succeed. But, the way things stand, height-wise at least, it is as if the real authority lay with the international investors who paid for the hotel, and as if the Supreme Court, splendid above the Knesset, were there to make this ugly power invisible, if not to keep watch over the Knesset for it.