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State, Society And The In-Between Court - The Israeli Experience

By

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The interrelations between Israeli State, Society and the Court throughout 50 years are analyzed. It is suggested that the Court has been assigned, and taken on, three complementary roles: it has become an effective communication channel between an untrustworthy, over-bureaucratic and inefficient administration and a highly political people; an arena for public participation in the decision-making processes; and an avenue through which Israelis can protest against decisions taken by their governmental institutions. These roles have turned the Court into a public arena where open critical discourse is exchanged between the people and the government. It is further suggested that the relatively high esteem Israelis feel for the Court derive from its ability to advance two of Israelis' deepest and contradictory aspirations: by supporting the rule of law or overruling arbitrary decisions, while remaining reluctant to interfere with security considerations, the Court enable Israel to remain the only democracy in the Middle East.

Content

Introduction

"We appeal to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream - the redemption of Israel".

These words, sealing the Declaration of the establishment of the State of Israel fifty years ago, summarize the very meaning of the Israeli experience; the *people* in the *land*, sharing a common *past* in a present nascent *state*, to build their *future*. These People, that State, that future, which has became a past - is the substance of this thesis; the story of the interrelations between the people and their state and institutions. The project is ambitious, as I attempt to utilize social science theory in the service of law, positioning the Israeli Supreme Court within Israeli culture and society. The goal is to come to understand the role the Court has come to play in the uniquely Israeli context.

By examining the role the Israeli Supreme Court has come to play between the state and its citizens, this thesis will contribute to current efforts to decode the role of courts in societies in general, and in Israel in particular. By looking at the past and the present, the State and the society, the Court and the political branches, and by identifying the nexus of relations between the people, their representatives and their judiciary, the story of an overburdened court in an overburdened polity will be unfold. By analyzing the weaknesses of the political system, and the strengths of the judicial one, I shall explain why the people turned away from the political realm and towards the judiciary. I shall examine how the Court's transformation of the rules of standing and justiciability positively responded to changes within the Israeli society. By reflecting upon the desires

and aspirations of Israelis, I will suggest a way to understand the Supreme Court's status within Israel context.

The Israeli context is extraordinary. The next few pages will attempt to introduce its remarkable character. Much can be written, and much has been written, about Israel. My introduction shall only touch on the relevant issues I thought a reader should know in order to follow the arguments. One requires considerable familiarity with a number of important issues to understand Israel. I could not review them all. I had to choose, and hope that what I have chosen to highlight will prove an interesting and persuasive read.

On May 14 1948, the State of Israel was declared as a parliamentary republic. David Ben Gurion read the Declaration of Independence[1] and the members of the provisional Council signed it[2]. Israel was not merely a new parliamentary republic, it was also the first and only *Jewish* state. The establishment of the Israeli State marked the full realization of the aims of modern political Zionism - a movement built on centuries of Jewish history, tradition and longing. Modern political Zionism was centered on the realization of a 2000 year old dream - the creation of a Jewish state that would link the

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[1] For an English translation of the Declaration of Independence see D.J. Elazar, *Constitutionalism: The Israeli and American Experiences* (Lanham: University Press Of America, 1991) at 210.

[2] The Provisional Council of State was the direct continuation of the People's Council, and was supposed to serve as the legislative authority until an elected constituent assembly was convened. The Provisional Government - the executive arm of the People's Council - was supposed to serve as the executive authority. For the chronological events see D. Horowitz & M. Lissak, *Trouble in Utopia: The overburdened Polity of Israel* (Albany: State University of New York Press, 1989) at 156-157.

Jewish people with a specific geographic area - Eretz Israel[3]. *The establishment of the State was not just a mean: it was the end itself.* This goal was to be achieved through an ongoing effort. It began with the first movement of immigrants to come to Palestine during the late 1880s, continued with the struggle to achieve independence for the Jewish people in Zion, and was to be completed in attracting Jewish immigration from all of the Exile. Israel's independence was the most recent phase of four thousand years of Jewish history, replete with episodes of persecution, Exile, the Holocaust and the British Mandate[4]. Against this background one cannot overestimate the importance and excitement of that historical moment. May 14, 1948 was a moment of revolutionary change[5]. The Israeli people subscribed to the building of a new society with uncommon energy and great hope. An old-new society coalesced to close a chapter in the history of the Jews and inaugurate a new one - the age of sovereignty[6].

Having anticipated the re-birth of the Jewish sovereign entity for over two thousand years, the Israelis hailed and celebrated the birth of the new State. Their freedom and rights as a community were at long last gained with the birth of Israel. Only in the Jewish state could their rights, both as individuals and as a community be recognized.

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[3] The land of Israel. See B. Reich & G.R. Keival, *Israel: Land of Tradition and Conflict* (Boulder: Westview Press, 1993) 39; S. Avineri, *The Making of Modern Zionism: The Intellectual Origins of the Jewish State* (New York: Basic Books, 1981); D. Vital, *Zionism: The Crucial Phase* (New York: Oxford University Press, 1987); W. Laqueur, *A History of Zionism* (New York: Holt and Winston, 1972).

[4] The Exile, the Holocaust and persecution are explicitly mentioned in the Declaration of Independence as clear demonstrations of the urgency of solving the problem of Jewish homelessness. See, supra, note 1.

[5] I.S. Troen & N. Lucas (eds.), *Israel: The First Decade of Independence* (Albany: State University of New York Press, 1995) at 1.

[6] On the utopian terms in which writers and journalists anticipated the state and their commitment to shared values largely associated with Labor Zionism see E. Spicehandler, "The Fiction of the "Generation in the Land" in I.S. Troen & N. Lucas (Eds.), *Israel: The First Decade of Independence* (Albany: State University of New York Press, 1995) at 265.

These rights had long been denied throughout the Jewish experience in the Diaspora. As the fulfillment of an impossible political dream became tangible, Israeli state and society united to assure the miraculous moment would not go by.

Energy, hope and mutual support were essential as the young state soon encountered enormous difficulties and problems which threatened its very existence. While Ben-Gurion ceremoniously read out the Declaration of Independence, the armies of the Arab states entered Palestine and engaged in an open warfare with the defense forces of the new state[7]. Floods of immigrants from all over the world doubled Israel's population within its first four years[8]. Poor natural resources, combined with the burdens of war and mass immigration, created an unstable economy. Inflation, devaluation of the Israeli currency and austerity followed[9]. These dire circumstances, as well as the general commitment to a welfare state led to the development of a very centralized and powerful government in Israel[10].

From its inception, Israel's existence has been threatened by enemies from without and public peace has been disturbed by terrorists from within. Israelis lived in

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[7] On the War of Independence see J. Kimche & D. Kimche, *A Clash of Destinies: The Arab-Jewish War and the Founding of the State of Israel* (New York: Praeger, 1960); N. Lorch, *The Edge of the Sword: Israel's War of Independence 1947-1949* (New York: Putnam, 1961); L.R. Banks, *Torn Country: An Oral History of the Israeli War of Independence* (New York: Watts, 1982);

[8] On the immigration issue see M. Sicron, *Immigration to Israel 1948-1953* (Jerusalem: Falk Institute and Central Bureau of Statistics, 1957); H. Darin-Drabkin, *Housing and Immigrants Absorption in Israel 1948-1949* (Tel-Aviv: Gadish Books, 1955) (In Hebrew); J. T. Shuval, *Immigrants on the Threshold* (New York: Atherton Press, 1963).

[9] On the economical situation see N. T. Gross, "The Economic Regime During Israel's First Decade" in I.S. Troen & N. Lucas (Eds.), *Israel: The First Decade of Independence* (Albany: State University of New York Press, 1995) 231; Y. Aharoni, The *Israeli Economy: Dreams and Realities* (London: Routledge, 1991).

constant fear that the country's independence and very existence was at risk[11]. During its fifty year existence, Israel has had the need to go to war six times with its neighbors. It has also had to counter incessant threats of hostilities and terrorist attacks. Under such circumstances, Israel developed a high level of war preparedness, devoting enormous human and material resources towards security. Protecting the state quickly became the most important objective of its political system and top decision-makers; national security was from the very beginning been at the top of national priorities[12]. An enduring state of emergency was imposed in Israel in May 1948. Vast powers were vested in the executive hands[13] to assure rapid action in times of crises. By so doing, some power was taken away from other branches of government, especially, the legislative, weakening the Israeli Parliament - the Knesset[14].

A weak parliament not only results from a strong government. Other factors, some of them unique to the Israeli political system, contributed as well. The election system was based on proportional representation, with one national constituency.

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[10] I. Zamir, "Administrative Law" in I. Zamir & A. Zysblat, *Public law in Israel* (Oxford: Clarendon Press, 1996) at 18.

[11] See, for example, B. Kimmerling, *The Interrupted System: Israeli Civilians in War and Routine Time* (New Brunswick, U.S.A.: Transaction Books, 1985). The actual existence of a serious danger to Israel is almost uncontested. See M. Hofnung, *Democracy, Law and National Security in Israel* (Aldershot: Darmouth Publishing, 1996), especially page 45.

[12] *Ibid* at 47; Reich & Keival, supra, note 3 at 140-143; 172-179; D. Horowitz, "Is Israel A Garrison State?" (1977), 3 The Jerusalem Quarterly 58; M. Lissak (Ed.), *Israeli Society and Its Defense Establishment* (London: Frank Cass, 1984).

[13] Inter Alia, legislative powers. See Hofnung, supra, note 11 at 47-51.

[14] On the connection between a strong government and weaker parliaments see Hofnung, *Ibid.* On the Knesset see: A. Zidon, *Knesset: The Parliament of Israel* (New York: Herzl Press, 1967); E.S. Likhovski, *Israel's Parliament: The Law of the Knesset* (Oxford: Oxford University Press, 1971); G.S. Mahler, *The Knesset: Parliament in the Israeli Political System* (Rutherford, N.J.: Fairleigh Dickenson University Press, 1981); S. Sager, *The Parliamentary System in Israel* (Syracuse: Syracuse University Press, 1985). On the Israeli Government see: J. Badi, *The Government of the State of Israel: A Critical Account of Its Parliament, Executive, and Judiciary* (New York: Twayne Publishers, 1963); Y. Freudenheim, *Government*

Because of the relatively low threshold needed to gain representation in the parliament, the Israeli Knessot are composed of numerous parties[15]. Since even the larger parties cannot gain a majority, coalition agreements are necessary to constitute the government, resulting in the actual control of the government over the Knesset. Consequently the Knesset cannot fulfill its role as the executive's supervisor[16]. In addition, strict party discipline leaves the Knesset an unimaginative and passive institution[17]. These issues will be elaborated on in chapters two and three.

Political parties are such an important feature in Israel that it was once named the Parteinstaat - the Party State[18], and Israeli Knessot have contained between ten to twenty parties. These parties were the dominant political power in the Yishuv - the Jewish community in pre-1948 Palestine - and continued to be the ultimate channel of political participation and the powerful middleman between the citizens and the government[19]. Israel's political parties have gone through substantial numbers of mergers and splits,

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in Israel (Dobbs Ferry, N.Y.: Oceana Publications, 1967);G.S. Mahler, *Government and Politics in a Maturing State* (New York: Harcourt Brace Janovich, 1989).

[15] Knessot is plural of Knesset. On Israeli elections see: V. Bogdanor, "The Electoral System, Government, and Democracy" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 83; A. Arian (ed.), *The Election in Israel-1969* (Jerusalem: Jerusalem Academic Press, 1972); A. Arian (ed.), *The Election in Israel-1981* (New Brunswick: Transaction Books, 1984)

[16] A. Arian, *The Choosing People: Voting Behavior in Israel* (Cleveland: Case Western Reserve University Press, 1973);.

[17] Anyone who has watched the Israeli Knesset in action, would undermine this idea at first glance. After all, Knesset debates are extremely 'hot' and passionate. The Knesset is a vibrant parliament in that sense. Yet passionate debates rarely ever lead to firm or revolutionary action. The Knesset is thus like a barking dog that never bites.

[18] B. Akzin, "The Role of the Parties in Israeli Democracy" in S.N. Eisenstadt (ed.), *Integration and Development in Israel* (Jerusalem: Hebrew University Press, 1970) at 4; Reich & Keival, supra, note 3 at 93.

[19] On political participation in general see: L. Mitbrath, *Political Participation* (Chicago: Rand McNally, 1972); R. J. Dalton, *Citizen Politics in Western Democracies* (Chatham, NJ: Chatham House, 1988). On the Israeli political parties see: D. M. Zohar, *Political Parties in Israel: The Evolution of Israeli Democracy* (New York: Praeger Publishers, 1974); M. Wolffsohn, *Israel, Polity, Society and Economy 1882-1986* (Atlantic Highlands, NJ: Humanities Press, 1987).

disagreements and reconciliation as a result of ideological differences, policy disagreements, and personality clashes. They are also tightly organized and highly centralized, with party authority exercised over member's activities in virtually all areas of political concern. Yet until very recently, the electorate could not even determine a party's list[20]. Due to coalition agreements signed after the elections, the voters lost their influence over the government's composition.

Coalition agreements entail bargaining. Bargaining entails deals and counter-deals. Corruption began to infiltrate Israeli political culture shortly following the birth of the state[21]. The rule of the game was "you scratch my back, I'll scratch yours". As a result, public trust in politics in general and in the political parties in particular declined tremendously. The loss of confidence in the political parties had severe consequences. As parties have long been the public traditional and ultimate political communication and participation channel, Israeli citizens were now left without a trustful middleman to truly represent their needs and interests, while negotiating with the state's administration[22].

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[20] The Knesset candidates were chosen not by the public, but by the party's central committee. Thus, the voters could not 'write in' names, delete, or change the order of the candidates. That changed in 1992, as the Labor party, followed by the Likud, introduced a new election system whereas the voters influence the party's list. Bogdanor, supra, note 15.

[21] E. Sprinzak, *Every Man Whatsoever Is Right In His Own Eyes - Illegalism in Israeli Society* (Tel-Aviv: Sifriat Poalim Publishing, 1986) (In Hebrew); P.Y. Medding, *Mapai in Israel: Political Organization and Government in a New Society* (Cambridge: Cambridge University Press, 1972).

[22] That situation aggravated once Mapai - the most significant party from the Yishuv times and up until 1977 - lost its hegemony. Long after Mapai's power was broken, no alternative political power took over. Consequently, the people also lost their political elite, and were left without networks to communicate with the new government and state's officials. On Mapai hegemony see: Y. Shapiro, "The End of the Dominant Party System" in A. Arian (ed.), *Election in Israel-1977* (Jerusalem: Academic Press, 1980); Y. Shapiro, *An Elite Without Successors: Generation of Political Leaders in Israel* (Tel-Aviv: Sifriat Poalim, 1984) (In Hebrew);

Against this backdrop, other modes of political participation emerged. Informal participation has become a common feature of political participation in Israel of the 1980s: mass protest, provocation and grassroots political activism[23]. Contemporaneously, society's cleavages, although long-standing and sharp, became unmanageable[24]. Civil society's components - undeveloped during the early decades - became an increasingly important part of the Israeli landscape. The 1982 war in Lebanon precipitated a crisis in legitimacy. It broke society's deepest consensus, its war-time solidarity[25]. Other developments reflected the contours of a changing society. But while Israeli society experienced profound modifications, the Israeli polity remained paralyzed. Between 1984 and 1990, a number of National Unity Government ruled the country, constituted from both the Likud and the Labor parties - the two biggest parties in Israel. The result was stalemate. Both the Knesset and the government avoided acting or deciding on controversial issues, as they were constrained by veto-agreements. Politics became an ever-lasting chase to preserve and improve one's position at the expense of one's political rival.

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[23] S. Lehman-Wilzig, *Wildfire: Grassroots Revolts in Israel in the Post-Socialist Era* (Albany: State University of New York Press, 1992); S. Lehman-Wilzig, *Public Protest in Israel, 1949-1992* (Ramat-Gan, Bar-Ilan University Press, 1992) (In Hebrew); G. Wolfsfeld, "The Politics of Provocation Revisited: Participation and Protest in Israel" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Reinner Publishers, 1993) 199 at 200 (Hereinafter: "*The Politics of Provocation Revisited*"); G. Wolfsfeld, *The Politics of Provocation: Participation and Protest in Israel* (Albany: University of New York Press, 1988).

[24] Israel is a divided society. Consider the many divisions: the Arab-Jewish cleavage, the religious-secular, ethno-cultural, and class cleavage, see Horowitz & Lissak, supra, note 2, especially Chapter 2; S.N. Eisenstadt, *The Transformation of Israeli Society* (Boudler: Westview Press, 1985)

[25] On the Lebanon war and its implications of society see: Z. Chiff & E. Ya'ari *Israel's Lebanon War* (New York: Simon and Schuster, 1984); S. Helman, *Conscientious Objection to Military Service as an Attempt to Redefine the Contents of Citizenship* (Ph.D. dissertation, Hebrew University, 1993); R. Gal, "Commitment and Obedience in the Military: An Israeli Case Study" (1985), 11:4 Armed Forces and Society 553; E. Inbar, "The "No Choice War" debate in Israel" (1989), 12:1 Journal of Strategic Studies 22.

It was also during the 1980s' that the Israeli Supreme Court became an important actor, coming to stand as an intermediary between the state and its citizens[26]. The Supreme Court has a dual function. It is both the highest appeal court in civil and criminal matters as well as the High Court of Justice[27]. In this latter function, the Court sits at first instance to adjudicate at its discretion on all administrative matters and cases where it sees fit to ensure justice[28]. Although Israel has no formal constitution, the HCJ has also reviewed many Knesset and government decisions, using the rule of law doctrine to justify its intervention[29].

Commentators have accounted for the broad judicial review exercised as the HCJ in a number of ways. Some cite the Court's spirit of activism since the 1980s, as a simultaneous occurrence with the Government and Knesset deadlock[30]. Others have claimed that the Supreme Court promotes a sense of national unity in a divided society[31]. While each of these theories focuses on one out of the three actors (i.e., on the Court, or the political branches, or society), this paper attempts to delve more deeply into the features of Israeli society, political culture and the Court in order to better

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[26] The judicial system in Israel is composed of religious and civil courts. The civil justice system is made up of three levels: magistrate and district courts and, on the top of the pyramid, the Supreme Court.
[27] Or HCJ - the abbreviation of the High Court of Justice that will be used throughout this paper.
[28] Section 15(c)-15(d) of the Basic Law: Adjudication, 38 L.S.I. 101 (1984).
[29] Chapter four deals with this phenomenon in detail.
[30] See chapter four; see also: M. Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel" (1996), 44:4 American Journal of Comparative Law 585; D. Kretzmer, "Forty Years of Public Law" (1990), 24:3 Israel Law Review 341; I. Zamir, "Rule of Law and Civil Liberties in Israel" (1988), 7 Civil Justice Quarterly 64; I. Zamir, "Courts and Politics in Israel" (1990), Public Law 523; S. Netanyahu, "The Supreme Court of Israel: A Safeguard of the Rule of Law" (1993), 5 Pace International Law Review 1.
[31] M. Edelman, *Courts, Politics and Culture in Israel* (Charlottesvill:University Press of Virginia, 1994).

understand their *interrelations*. Focusing on its administrative decisions as the High Court of Justice, this paper suggests that the Court has taken on three complementary roles. First it has become an effective *communication channel* between an untrustworthy, over-bureaucratic and inefficient administration and a highly political and concerned people. Second, it provides an arena for *public participation*[32] in the decision-making processes. It bridges the gap between centralist, close-knit elite, party-oriented and party-controlled political representatives, and the average citizen who enjoys little influence in the public sphere. Third, the Court has become an avenue through which Israeli citizens can immediately protest against decisions and actions taken by their governmental institutions. Thus the Court provides another platform for *protesting*. These three roles have in effect turned the Court into a public arena, where open critical discourse is exchanged between the people and the government.

This paper suggests two main explanations for the transformation of the Court into an arena of participation, communication and protest. First, the Israeli Court represents an antithesis to the experience Israelis have with their legislative and executive branches of government. Whereas the latter are perceived as partisans, manipulated, corruptible and ultimately paralyzed, the Supreme Court is perceived as a professional, rational, practical, responsive and neutral institution[33]. Whereas the

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[32] Such a role of the court was recognized by Chayes, claiming: "...Popular participation in it [the new model lawsuit of the public law litigation - g.d.] is not alone through the vote or by representation in the legislature". A. Chayes, "The Role of the Judge in Public Law Litigation" (1976), 89 Harvard Law Review 1281 at 1316.

[33] For example, all judges, including those of the Supreme Court, are appointed by the Judicial Selection Committee, which is composed of the following members: the Minister of Justice (chair), one other government Minister, two Members of the Knesset (selected by secret ballot), the President of the Supreme Court, two other Justices of the Supreme Court selected by their colleagues on the court, and two practicing

bureaucratic elite and the political system seem small, cohesive, closed and unapproachable, the Supreme Court is accessible to all[34]. Inasmuch as the administrative machinery is inefficient, subject to coalition agreements and inattentive to the 'little citizen', the Court hears petitions relatively promptly, and issues decrees which force the government to adhere to the rule of law and administrative bodies to supply satisfactory answers to a claim or a contention[35].

This paper additionally proposes that the Supreme Court offers Israelis the possible realization of two of their deepest desires and inherently contradictory aspirations. Israelis take pride in the fact that Israel is the only 'real' democracy in the Middle East. This pride derives from the fact that Israel managed to keep its democratic regime notwithstanding the constant threat to its very existence. Israelis want to be part of the Western world, yet acknowledge their great difficulty in achieving this aspiration due to their geopolitical situation. They want to have a Western polity, with an accountable civil service and rule of law at the same time as they need their army and security arms free to defend their survival.

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lawyers representing the Chamber of Advocates. Thus, politicians constitute the minority of this Committee, reducing political influence. The way judges are selected and appointed thus seems to be in direct contradiction to the way coalitions are created and offices and ministries are distributed. For a detailed survey on the way judges are appointed in Israel see: S. Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Dordrecht: Martinus Nijhioff Publishers, 1994).

[34] The administrative fee to file a petition to the High Court of Justice has cost in 8/97 about 300 NIS (about 120 Canadian Dollars). At that time, to file a civil appeal has cost about 2,900 NIS (about 1160 Canadian Dollars); and to file a civil case was either 2.5% from the amount sued (which is divided to 1.25% paid the moment the case is submitted, and the latter 1.25% after the pre-judicial had ended) or a fixed price pursuant the judicial remedy desired. Further, due to developments in both standing and justiciability doctrines, which will be explored in chapter four, practically everyone can petition to the HCJ regarding everything.

[35] Although the same judges sit in both appeals and petitions, a different queue is designed for the HCJ. Petitions are usually considered more quickly. Important or burning matters are heard as first priority. If a

The Supreme Court advances these aspirations. It supports the rule of law, overrules arbitrary government decisions or scrupulously probes the administrative machinery on the one hand, as it remains reluctant to interfere with security considerations or security-oriented decisions on the other. The Supreme Court thus enables Israelis to expand their democracy without endangering their own existence; to add liberal components to its democratic system, yet limiting these components to the groups that do not imperil the overall legal order; to *remain* the only *democracy* in the *Middle East.*

The Court, along with the IDF (Israeli Defense Forces) and with the State Comptroller[36], enjoys the most public trust according to surveys[37]. These institutions are perceived to contribute more to the state than the Knesset, the Government or the political parties. Seen together, these three bodies enable Israelis to control and criticize their state's leaders yet love and cherish their country. As one satirist has recently stated: "We have a beautiful country, too bad the State is ruining it[38].

The first chapter will set out a theory of the relationship between state and civil society to provide a framework for the Israeli example. I will posit a 'regime change'

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petition seem to contain a chance, a decree nisi is usually ordered, asking the relevant respondents to submit written material within thirty days.

[36] Israel's State Comptroller is the institution which has the authority to control and scrutinize the actions of governmental bodies. Each year it presents an annual report regarding its findings. In the last ten years, Miriam Ben-Porat, former Supreme Court judge, was Israel's State Comptroller. She acquired the reputation of a brave, anti-corruption fighter ready to probe every governmental decision and the People's delegate in making sure the administration functions properly and justly.

[37] On this point see broadly on chapter four.

model in the interrelations of state and civil society: a transition from relations through which each bolster each other, to relations that weaken and undermine each other. The discussion will focus on the Supreme Court's growing function as an intermediary between state and society in the context of this transition. Of particular interest is the Court's expanding use of its judicial review power in public law litigation.

The second chapter will consider some specific court cases, starting in the late 1960s, in which the Court interfered with the Knesset and Government authorities. These cases reveal a pattern acted upon a wide range of important issues. By default or by design, both the Knesset and Government did not resist judicial intervention even though there was a question as to whether the Court had the requisite authority. Again and again, they abstained from asking the Court to step back. By conceding the function of judicial review to the Court, the Court could decide petitions brought before it. Thus, the Court built its new role on the weakness, divisiveness and passivity of the political branches.

By looking at some recent changes within Israeli society, the third chapter suggests three ways in which civil society employs the Court as its mean to cope with state bureaucracy and political paralysis. The halls of the High Court of Justice have become the locus for *protesting* against administrative action or inaction, *communicating* with governmental officials and administrators, and *participating* in the decision-making processes. I propose to see the Court as a public arena in which state and society in Israel meet and address each other. These three functions are the outcome of a politically frustrated society, which is eager to influence its own destiny.

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[38] The words of J. Gefen, a Israeli publicist, as quoted in Haaretz supplement, June 6 1998 at page 22.

The fourth chapter explores why the Court took on itself these functions, as well as the judicial review one, that is, why it did not exercise its discretion to disallow these, as well as other, petitions. To provide a sufficiently broad basis for analysis, I contrast the present extent of judicial review to the state of affairs in the early years of the Israeli Supreme Court, which I characterize as the "Zionist days". The newly developed judicial function has many roots. The discussion makes reference to societal, judicial and political causes and explanations. These suggested causes and explanations will help us deepen our understanding of the position the Supreme Court came to acquire within Israeli society.

In the epilogue, I will analyze two recent decisions of the HCJ against the background analysis provided. Both the reasons these petitions were submitted to the Court, and the Court's decisions and reasoning serve to illuminate the insights offered in this thesis, and to engage the framework for understanding these, and many other, petitions submitted to the Israeli High Court of Justice on a routine basis.

Chapter One

State-Society theory and courts

I Introduction

In the next few paragraphs, I will introduce examples of four incidents in Israeli society, occurring in its first decade, and in its fifth. The examples revolve around the interplay between state, courts and society, and illustrate the profound changes that have taken place. They will provide a backdrop against which to decode state-court-society relations in Israel.

In 1952, Chief Justice Smora from the Israeli Supreme Court sent a letter to the Knesset, asking it to dedicate a session for discussing a recent attack on the judiciary by the Minister of Justice in the Knesset. The Prime Minister, David Ben-Gurion, returned the unread letter to Justice Smora, declaring the letter to be a brutal invasion into the legislative domain.

In 1953, a group of law students spontaneously organized to assist the young Israeli State in absorbing the waves of immigration. After a few months of working in the immigrants' transit camps, the volunteers started criticizing the Labor official clerks and its government leaders, in newspapers and pamphlets, claiming they had witnessed corruption, neglect and discrimination towards the immigrants from state authorities. In response to these accusations, a label suit was instituted against the law students, who were reprimanded by the Supreme Court for turning the court into a political arena and weakening the struggling state.

In 1992, Chief Justice Barak sent a letter to the Knesset's 'Constitution, Law and Justice committee', asking it to consider some of his illuminations on the latest draft of the Basic Law: Human Rights and Dignity. The Minister of Justice dedicated a whole Knesset session to discussing Chief Justice Barak's comments on the legislation 'in respect of the mighty commentator and the important comments'.

In 1992 the Israeli Supreme Court upheld a petition that asked the Court to declare that the Prime Minister must discharge a minister who had been indicted on counts of fraud. The appeal was filed by the 'Movement for Qualitative Government' - a social association which aims at keeping pure morals and clean hands within the authorities branches.

These examples involve the interrelations of three actors: state or government representatives, civil society's figures, and the judiciary. I will refer to and analyze these examples throughout this study in order to fully understand their implications, and the changes they reflect. It is necessary to continue with a definition to these three main concepts, as well as with an introduction to state-society relations as it is upon this theory that I will place the Israeli case study.

II The State

According to Weber's classical definition, the modern state has four formal characteristics; a legal order (that is, an on-going organizational structure which includes the varied executive, legislative and the judicial institutions), a monopoly over the use of

force, a territorial base and a population[1]. This definition is often used as a starting point for further studies concerned with the state. Nettle, for example, adds functional dimensions to Weber's definition; the state is a *collectivity* that combines a set of functions and structures in order to generalize their applicability, as well as an institutionalization of power; it represents a *unit in international relations*, politics and law, thus serving as the mediator between intrasocietal and extrasocietal flows of action; it represents an *autonomous* collectivity, distinct from the arena of society, although the degree of the distinction is an empirical variable that changes from one collectivity or era to another, and it is also a *socio-cultural phenomenon*, organizing common experiences for subjects and functioning as a nation-builder[2].

The third component has received the most attention, and has been the focus of much scholarship. Scholars dispute what belongs to the state autonomous collectivity: some argue that the analysis category of state should parallel that of the government or the administration, while others believe the state arena should be analytically limited to contain the political leadership alone[3]. I do not purport to decide what are, or should be, the state's boundaries or what should be included and excluded from this category, preferring a practical solution. The state, in this paper, encompasses the government, the legislature and the bureaucracy - those people and institutions that translate and implement the abstract notion of a state to an every-day experience. Within the specific

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[1] M. Weber, in: T. Parsons, ed., *The Theory of Social and Economic Organization* (N.Y:Free Press, 1964) at 156.
[2] J. P. Nettle, "The State as a conceptual variable" (1968) 20:4 World Politics 559 at 562-565.
[3] B.A. Rockman, "Minding the State- Or a State of Mind: Issues in the Comparative conceptualization of the State" (1990) 26 Comparative Political Studies, 25.

Israeli context of the first state years, as will later be explained[4], the hegemony of the Mapai party and its leaders over the political system, entails Mapai's inclusion in the state arena[5].

Additionally, scholars, especially in contemporary studies, focus on the questions of state autonomy and state capacity, to wit, the ability of the state to supply different institutions which will fulfill different roles, and the scope of the state's connections and interrelations with the organizations of society[6].

Indeed, states differ in the degree of autonomy they possess and their relations with other societal institutions. Some argue that in societies with an established tradition of statehood, the state itself is the provider of the central administration, carrying tasks conventionally considered to be ones of the political parties. Further, society's sovereignty is identified with the state, and law officials (such as judges) become the state's servants. In contrast, in stateless societies, the states' functions are carried away by autonomous institutions; sovereignty is identified with the law and the legal functions;

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[4] See infra, pages 69-70.

[5] Admittedly, political parties are usually accounted as civil society's pillars. See J. Keane, *Civil Society and the State: New European Perspectives* (London: Verso, 1988) at 19-20. The Israeli context, I suggest, resided political parties, especially the hegemonic Mapai, somewhere within the state sphere.

[6] The question of state capacity has been the focus of a great deal of attention due to the evolving literature on the 'overloaded' states and the 'paralyzed Leviathan' that states had turned to become. Recent studies depict the state as both weak and strong: the expansion of the public sector into numerous fields, spheres and tasks, resulted in a dispersal of power which made it harder for the state to coordinate and control its multiple branches and population. See K. Banting, "Images of the Modern State: an Introduction" in: K. Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) 1. State capacity was also a measure of state power. State power is measured by the degree of state autonomy - that is the range of actions which the state elite is empowered to undertake without routine, institutionalized negotiation with civil society groups and by the degree of infrastructure power - that is the capacity of the state to penetrate civil society, implement its political decisions and coordinate the activities

parties carry a much larger functional weight, enjoying authority and legitimization; law is autonomous, while law officials form a distinct professional caste, fulfilling some of the state's functions (like social change); and different interest groups attempt to impose their own norms on the whole society[7].

This paper will attempt to challenge this last argument by analyzing the case of the Israeli state. By probing into the early years of Israel, when the Jewish society lacked an established tradition of statehood, one will find that, contrary to the above assumption[8], the Israeli state succeeded in providing for the basic needs of its population. The state was able to fulfill its many roles by transferring powers from the political parties that reigned in the pre-state era, to the state's hands, thereby creating an hegemonic parallelism between the State and the Mapai party. Further, the Jewish society's sovereignty not only identified with the state; society's sovereignty materialized only through the creation of the Israeli state. During these first years, the political leadership dictated the norms for the whole society. The State's values also penetrated the levels of law officials[9].

Two decades later, and against all expectations, that tenor changed; the more the state established itself, the more it lost power and functions in favor of societal institutions. The state had difficulties determining society's norms or influencing its law officials' functioning. I believe the Israeli case suggests that even in societies that lack an

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within this realm. See M. Mann, "The Autonomous Power of the State: Its Origins, Mechanisms and Results" in J.A. Hall, (Ed.) *States in History* (New York: Basil Blackwell, 1986) 109.

[7] Nettle, supra, note 2 at 579-588.

[8] On the novelty of the establishment of the State of Israel see the introduction, as well as chapter three, mainly pages 58-61.

[9] In the early days, the Court hailed the state - the Jewish state - as a cardinal and supreme value in the political and social order. See P. Lahav, "The Supreme Court of Israel: Formative Years, 1948-1955" (1990), 11:1 Studies in Zionism 45 at 46. See also on this point in chapter four, pages 92-100.

established tradition of statehood the state can become a powerful force, as long as the society itself identifies with and supports the state[10].

An additional theme shared by the current studies on states relates to the general 'state of crisis' facing modern states: during the past three decades, state autonomy is alleged to have been reduced, resulting in three possible societal reactions - a decline in public trust and confidence in the government, a turning away from normal channels of representative government (to those of street demonstrations or civil disobedience) and a use, by the organized economic interests, of their industrial powers for political purposes (for instance, political strikes)[11]. Israel's relative short history sustains the alleged crisis, yet from different processes and/or developments that are usually referred to as the factors behind the crisis[12]. To the three societal reactions cited above (which can be detected in the Israeli experience as well) a fourth can be added, relevant mainly, although by no means solely, to the case of Israel: petitioning to the High Court of Justice. Street demonstrations, public protests as well as petitioning to the Supreme Court, have become the Israelis' alternative political channels. As will be discussed broadly in chapter three, Israelis, losing the public trust and confidence they once held for their government, found comfort in their High Court of Justice.

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[10] See infra, pages 58-71.

[11] A. H. Birch, "Political Authority and Crisis in Comparative Perspective" in: K. Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) 87 at 88.

[12] Crains, for example, attributes the crisis to recent developments of massive politicization, See: A. Crains, "The Embedded State: state-society relation in Canada" in: K. Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) 53. Others attribute it to the expansion of states' actions and responsibilities along with processes of world industrialization. See Banting, supra, note 6 at 3.

III Civil Society

States' crises have resulted in a theoretical revival of the old concept of civil society, and the kind of interrelations these two spheres constitute.

With its aged, historical roots, the idea of civil society crystallized to its present meaning in the 18th century, and became a core concept in Hegel's *The philosophy of Rights*[13]. For Hegel, civil society - or the civil part of society - was distinct from both the family and the state, and contained the commerce, the market, and all the institutions that are needed for their function and protection. It is a mosaic of private individuals, classes, groups and institutions that are not directly dependent upon the political state itself[14].

Within this sphere of civil society, one finds social movements and voluntary public organizations, independent communications media and cultural institutions, political parties, schools and hospitals[15]. Looking back to the opening examples, we can see that both the Volunteer line and the Movement for Qualitative Government were part of the forces operating within Israel's Civil society[16].

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[13] E. Shils, "The virtue of civil society" (1991) 26:1 Government and opposition 1.
[14] J. Keane, "Remembering the dead: Civil society and the State from Hobbes to Marx and beyond" in J. Keane, ed., *Democracy and Civil Society: on the Predicaments of European Socialism* (London: Verso, 1988) 31 at 46.
[15] C. Maier, "Introduction" in C. Maier, ed., *Changing Boundaries of the Political: Essays on the Evolving Balance between the State and Society, Public and Private in Europe* (Cambridge: Cambridge University Press, 1987) 1 at 9.
[16] On this specific point see chapter three.

An independent judiciary and a free press, reporting freely on the activities of the government, must also exist for civil society to flourish[17]. In addition, rights and their institutionalization are fundamental principles of a modern civil society[18]. Civil society also contains a political-cultural dimension, since it sometimes involves seeking to alter the structures and rules of politics[19], and carrying the idea of citizenship, of citizens that wish to fulfill their right to participate in discussions of and decisions about public issues and the common good[20]. By participating in the public sphere, civil society can find the "innovative forms of limiting...the administrative state"[21].

IV State-civil society relations

Many savants have connected civil society to the Western history of democracy, because of the participatory role civil society plays within the discussions and decisions about public issues[22]. In Western democracies, civil society was perceived as a political community, which consummates the state's mechanisms and stands alongside the state[23]. Civil society has been classically portrayed as bolstering the state, enhancing its legitimacy and its ability to coordinate the diverse tendencies within society[24]. There is both a passive and an active dimension to civil society: passive, in the acceptance of a

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[17] Shils, supra, note 13 at 7.
[18] J.L. Cohen & A. Arato, *Civil Society and Political Theory* (Cambridge, Mass: MIT Press, 1992) at 440-442.
[19] W. Adamson, "Gramsci and the politics of civil society" (1987) 7:4 Praxis international 320 at 320-321.
[20] Shils, supra, note 13 at 7.
[21] Cohen & Arato, supra, note 18 at 472.
[22] C. Calhoun, "Civil society and the public sphere" (1993) 5:2 Public Culture 267 at 267.
[23] C. Taylor, "Modes of Civil Society" (1990) 3:1 Public Culture 95.
[24] J.S. Migdal, "Civil Society in Israel" in E. Goldberg & J.S. Migdal (Eds.), *Rules and Rights is the Middle East: Democracy, Law and Society* (Seattle: University of Washington Press, 1993) 118 at 120.

certain order, and active, in its volitional element, creating, maintaining, and reproducing the moral order through institutions and individual behavior[25].

Yet, in the last decade, mainly in Eastern Europe, an alternative approach to state-civil society relations has come into fashion, challenging the classical understanding. Under this new approach, civil society stands in contrast to the state. While opposing state's apparatus, civil society tries to detach itself from state authority and coercion and develop its own mechanisms and institutions[26]. An autonomous civil society challenges unacceptable actions of the state or the party while offering its own alternative understanding regarding the norms and procedures of public life[27]. In this model, instead of reinforcing the state's ideologies, civil society contradicts them.

This alternative vision of state-society relations, deriving on the Eastern European Communist model, should be refined if one wishes to implement it within Western democracies, where the state's right to rule, as a general principle, is not questioned but civil society's growing institutions affect the overall distribution of power, interfere in formulating the reigned policies, or determining the degree of implementation of state's declared policies[28]. In short, the alternative approach within the Western-democratic context suggests that civil society, while never questioning the legitimacy of the state, erodes state power and disintegrates its authority.

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[25] *Ibid* at 119.
[26] Taylor, supra, note 23.
[27] Migdal, supra, note 24 at 122. See also A. Arato, "Empire vs. Civil Society: Poland 1981-1982" (1981), 47 Telos 23.
[28] Migdal, supra, note 24 at 123.

Both the traditional and the new visions of state-society relations are reflected in Israel. The classical approach befits the first two decades of the Israeli state, whereas the modern approach mirrors the relations subsequently developed between Israeli society and state. In the two decades proceeded the establishment of the Israeli state, civil society components (like free media, interest groups, social movements etc.), were largely absent from the Israeli public domain. The society, the same Jewish society that had yearned and wished for a Jewish state for over two thousands years, celebrated the nascent state and buttressed its struggle against the many challenges that confronted it. The security threat from the outside and from within, the mass waves of immigrations and the economic crisis - coping with all these challenges at once, required enormous resources which the infant poor state did not have. But the Israeli state had one invaluable resource: the people were on its side. By accepting the state's legitimacy, power and authority, even when the steps imposed were painful and harsh[29], different groups within Israeli society supplied the state with the one resource that made it possible to cope with their struggle: public support[30].

Two decades later, the nexus of state-society relations in Israel changed. New civil social elements, mostly lacking in the primeval landscape, sprang up; existing ones expanded. Different parts of civil society, although without attempting to overturn the state's legitimacy, tried to gnaw at the authority of state officials (i.e., the government and

[29] Like the austerity period announced in Israel between 1956-1960 or the heavy taxation imposed on the population in order to finance the absorption of immigration costs.
[30] This idea will be broadly elaborated on chapter three.

the legislature) as the sole or main deciders of various public questions and norms. Several tactics and methods were used by the different groups in the suggested corrosion process. Some groups decided to take the battle to the streets - thus opposing state actions by public protests and demonstrations. Others, took their protest underground, creating alternative institutions to provide their unmet demands (like 'black' medicine, 'gray' education and pirate cable). More and more members of Israeli society challenged state authority in the courts, especially in the Israeli HCJ.

Much of my study explores the reasons for the absence of societal elements in the early years of the Israeli state, and why and how these elements appeared later on. By concentrating on a specific part of civil society - that of the social/voluntary movements - my thesis will explore the methods these groups use while interacting with the administrative machinery. One such method, is petitioning to the Supreme Court. I shall analyze the reactions these groups received from the state, members of society and the Court.

V The Court

State and civil society, locked in multiple embraces and exchanging reciprocal influences, meet in many arenas[31]. One such arena is the court. Courts are considered the third out of the three branches to constitute a democratic structure, belonging to the state apparatus, and symbolized in their institutionalization and enforcement the legal

[31] Crains, supra, note 12 at 53.

order, decided by the legislative and executive.[32] Yet right from the start, courts are also assigned to somewhat depart from the legislative and executive branches of the state apparatus[33]. In modern times, courts became a legitimate supervisor of these other two branches of the state[34]. Courts function in a dualistic fashion, interposing in a dual status: as separate, independent and autonomous agents from the other branches and as intrusive, interventionist, and to a certain degree, controlling these same branches. Inherent to their modern conception, courts are classified as both the state's representatives and supporters but also as the state's critics[35]. They can no longer depart from the political branches per-se[36].

The critical mode materializes by judicial review. It is within this mode that another role of the court is introduced: the role of mediator between the elected and the electorate; between the representatives and the people they are supposed to represent;

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[32] See supra, page 1, as in Weber's definition.

[33] The separation of power model, first introduced by Montesquieu, acquired, in parliamentary systems like Israel, the meaning of separation of the political authority from the judicial one. See F.L. Morton & R. Knoff, *Charter Politics* (Scarborough: Nelson, 1992) at 138-139.

[34] *Ibid.* at 197. The classical approach has developed into an old-new approach, known as the "checks and balances". Old - since the checks and balances conception still holds the idea that the three branches are separate institutions, and yet new - since it acknowledges the need for the different branches to question and supervise each other, as well as for the one to take part to intervene whenever necessary, in the exertion of power given to the other two.

[35] Courts (and constitutionalism) were perceived as one of the ways to fight against the executive and legislative powers. See J. Elster, "Introduction" In: J. Elster, & R. Stagstad, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 1.

[36] "Political scientists were not so naive as to think that the most important political events were played out in parliaments. On the contrary, they recognized that cabinets and bureaucracies, political parties and pressure groups, even courts and armies were important venues for politics". W. Magnusson, "Decentring the state, or looking for politics" in W. Carrol (Ed.), *Organizing Dissent: Contemporary Social Movements in Theory and Practice* (Toronto: Garamond Press, 1992) at 69.

between the legislative or the executive and the public they legislate for or execute over; between state and society[37].

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[37] One example of the mediating notion of the courts can be found in Ackerman's conception of judicial review exerted by the American Supreme Court. Within the American Constitution that begins with the words: "We the People", and by the revolutionary political-public struggle that preceded its crystallization, Ackerman detects the peak moments of American society. In these historical political moments, Ackerman claims, and in others alike, the People raise their voice against the existing political system or government, in order to consolidate their collective identity or to redefine the common good. Between one exceptional historical event and an other, the 'normal' political exists, in which different elected institutions (i.e., Congress, House, President or even Supreme Court) consider themselves to be the true representatives of the People's political wishes, while in fact they only represent the People in a semiotic way (that is, while each representative institution questions and denies the extent to which others truly represent the People, it manifests the mere possibility of representation). Thus, the Supreme Court's task is to ground, preserve and protect the achievements of historical peak moments from an attempt to nibble at these attainments by different governmental bureaucrats who represent and are subject to the pressure of narrow interest groups. Judicial review serves as a mark, by which the Supreme Court signals the People that an attempt to change the rules of the game is taking place:

> "By declaring a statute unconstitutional, the court is discharging a critical dualistic function. It is signaling to the mass of private citizens of the United States that something special is happening in the halls of power; that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility, and that the moment has come, once again, to determine whether our generation will respond by making the political effort required to redefine, as private citizens, our collective identity. In short, the Court's backward-looking exercise in judicial review is an essential part of a vital present-oriented project by which the mass of today's private citizenry can modulate the democratic authority they accord to elected representatives who speak in their name from the heights of power in Washington, D.C."

See B.A. Ackerman, "Neo-Federalism?" in J. Elster & R. Stagstad, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 153 at 192. It is worth mentioning that 'declaring a statute unconstitutional' is just one sort of judicial review that signals 'trouble at the top'. Others may take a form of declaring an act or a decision, taken by a member of the cabinet, as unreasonable, or as contravening basic rules of public administration; or by reversing an administrative decision, nullifying it, etc. To what extent can this approach regarding the meaning of judicial review be applied in countries that do not have a written constitution, or in societies that were not involved in a revolutionary moment prior to the enactment of their constitution or other forms of superior laws? Apparently, Ackerman's argument rests on specific, exclusive events that took place in American history and led to the birth of the Constitution, as well as on the specific language of the American Constitution. Different communities underwent different, unique experiences while crystallizing their principles of jurisdiction or their constitutions. The constitutional language that was picked to symbolize the arrangements societies have reached varies. Thus, can one idea unify all these different socio-political orders? Be it a constitution, a charter, a bill of rights, a basic law - as in the case of Israel - or any other legal pattern, I believe all these special formations contain the idea of one or some laws that are distinct from and unlike the other laws. The distinction may be different: a different procedural or substantive enactment method by different institutions or an assembly, different amendment processes etc. Still they share the concept of the 'normal' politics versus the "abnormal" one; the superior preferred norms that are best protected versus the regular ones. Judicial review, therefore, is one of the mechanisms that enables us to preserve and assure the distinction: "...the supreme court's task is to prevent the abuse of the People's name in normal politics...by designing an institution of judicial review that gives judges special incentives to uphold the integrity of earlier constitutional solutions against the pulling and hauling of normal politics" *Ibid* at 172-173. The court's function as a mediator between the two kinds of laws or rules is thus the same wherever, what so ever. It mediates between present actions and past decisions, but, actually, it mediates between the present representatives and the present People who chose them to maintain the common good; between the state's institutions and society's parts. Whenever an appeal is presented to the Supreme Court by an interest group against governmental clerk or office, civil society challenges the state and asks the court to judge between them. No wonder then, that some, in fact, call

The court's fundamental role is to decide legal disputes[38]. These legal disputes are theoretically unlimited in their content or their future implications. As legal disputes have no inherent boundaries, devices such as justiciability, standing, delay, ripeness, bona fide etc., are created to limit the range of disputes on which courts are required to pronounce[39]. These strategies have the potential to demarcate the scope of the court's mediative role, but cannot entirely bar the go-between role of the courts, which became evident on the Israeli Supreme Court in the 1970s:

> "During the 1970s, the Court's sensitivity to its central constitutional role increased, as it gradually became clear that it was the court that stood as an intermediary between the state and its citizens"[40].

Some questions to be addressed are why and how the Court came to serve as intermediary between the state and the citizens and why the citizens came to the court in the first place, why the court avoided using the devices that could have minimized its interposition or the possible damage to its credibility or future problem-solving capacities[41], and why these changes took place in the 1970s.

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judges "mediators". See Aristotle, *Nicomachean Ethics*, Book Five, Translated by Martin Ostwald, (New York:The Bobbs-Merrill Company, 1962) at 122.

[38] See A. Barak, *Judicial Discretion* (Tel-Aviv: Papirus, 1987) at 242: "Reading in the structural aspect of the judicial proceeding, reveals its most important basic characteristic. The Court is a disputes resolution institution. This is its main function" (In Hebrew, translated by the author).

[39] A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986) at 65-73.

[40] R. Shamir, "Legal Discourse, Media Discourse, and Speech Rights: The Shift From Content to Identity - the Case of Israel" (1991), 19:1 International Journal of the Sociology of Law 45 at 53.

[41] See S. Holmes, "Gag Rules or the Politics of Omission" in J. Elster & R. Stagstad, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 20: "By refusing either to uphold or overturn a governmental action, the court can avoid decisions that might damage its credibility and overtax its limited problem-solving capacities".

Courts, especially High Courts of Justice, act as 'watchdogs' over individual and civil freedoms and rights and serve as the citizens' guardian against state arbitrariness and despotic power. It can well be argued that it is within the courts' halls that civil society's groups can achieve their goals. It can also be claimed that courts virtually implement civil society's aims, by aiding different groups within the sphere of civil society to obtain their goals. Accordingly, and due to the judicial review power of the courts, they can become an arena wherein civil society expresses its views towards the political structure, protesting public issues or decision-making processes, and articulating their criticism upon government actions or governmental officials' performances. While contesting from two sides of the table, courts are the ones placed in the middle, hearing state-society's claims and mediating between their opponent interpretations[42]. In the coming chapters, I explore how the Israeli HCJ became an accepted, even preferable, arena for civil societies' groups to voice their protests and reservations about the government's actions or inaction.

It is not only civil society who greeted the Court's increasing role as a platform to express its interests before the administration. The administrative machinery and the state representatives themselves consolidated and blessed the High Court's interference on various issues. By design or by default, they transferred questions they were reluctant to resolve to the Court, or agreed upon the Court's adjudication even when a petition could have been dismissed without being reviewed on its merits. By so doing, a pattern

[42] In administrative law, the mediating role of the Court is very prominent, as the judge becomes an active side helping the parties' negotiations to find acceptable solutions. See A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harvard Law Review 1281.

of avoidance emerged, which repeatedly signaled the message that the State was ready to acknowledge the Court's role in deciding controversial and serious challenges of general public interest.

This pattern of avoidance and its possible causes and ramifications are the substance of the upcoming chapter.

Chapter Two

The Israeli State - Patterns of Avoidance

I Introduction

This chapter will focus on the first of the three sides of the triangle - the State. It will demonstrate how the Knesset and the Government coped with the first few precedential incidents in which the heart of the matter became the scope of the judicial power of the High Court of Justice. Analyzing cases from both constitutional and administrative law, I will try to understand why, on so many occasions, the political branches had legal bases on which to challenge petitions, but refrained from doing so. By failing to plea non justiciability or non jurisdiction before the hearing, the state's representatives paved the way for judicial intervention. By applying the Court's suggestions or re-enacting primary legislation after the Court's decision, the state approved the intervention. By acting in the same manner repeatedly, it revealed its openness to future interventions. I will attempt to explain the causes for this pattern, as well as its implications.

II The Pattern

a) Judicial Review over entrenched legislation;

Bergman v. Minister of Finance and State Comptroller[1]

Section 4 of Basic Law: The Knesset[2], requires that elections to the Knesset shall be "general, nationwide, direct, equal, secret and proportional". Section 4 and 46 of that

[1] H.C. 98/69 *Bergman v. Minister of Finance and others* (1969) 23 P.D. (1) 693. (Hereafter: "*Bergman*").

same law states that any amendment to section 4 must be approved in the Knesset by an absolute majority. In 1969, a law was passed with the purpose of endowing parties with public funding to support their election campaigns[3]. The elections were scheduled to be held shortly afterwards. According to the new law, which was not passed by an absolute majority, public funding would be granted only to those parties represented in the outgoing Knesset. A Tel-Aviv lawyer petitioned against the new law, arguing the funding provisions were invalid because they granted public aid only to existing parties, thus infringing the equality requirement listed in section 4 of the Basic Law. As the new law was enacted without the required majority indicated in section 46, it should be declared void. The court issued an *order nisi*, inviting the State representatives to answer the petition. After describing the facts, the Court's unanimous decision dealt with the justiciability dilemma. Since the Court was never formally granted the power to review Knesset legislation[4], its authority to decide the case was in issue. Reviewing the case meant the Court would either receive or assume such a power. As the following lines suggest, the Court indeed received and agreed to assume the power to decide the case:

> "This petition raises potentially weighty preliminary questions of a constitutional nature, relating...to the justiciability before this court of the issue... **However, the Attorney-General relieved us of the need to deliberate on the matter by stating on behalf of the Respondents that they "do not take a position on the question whether the legal validity of a legislative enactment is a justiciable matter before this court, since they are of the opinion that the petition must fail on the merits"**. He so stated in his heads of arguments and repeated it in his oral argument... When asked what position he would take if the court found the petition substantiated, he replied that in such event he would put himself at the

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[2] Basic Law: The Knesset (1958) S.H. no 244 at 69. Hereinafter: "The Basic Law".
[3] Knesset and Local Authorities Elections (5730) (Financing, Limitation of Expenses and Audit) Law, 5729-1969, (23 L.S.I. 53). Hereinafter: "The new law" or "The Financing Law".
[4] In Israel, there is no constitution, and the Knesset is the supreme legislature.

> court's disposal to make his submissions... It is therefore up to the court to decide whether it wishes to examine the question of justiciability. We have decided not to do so because, for obvious reasons, the substantive problems raised here require urgent resolution, whereas clarification of the preliminary constitutional questions would entail separate, lengthy deliberation. We therefore leave the question of justiciability open for further consideration... The Respondents have also not disputed the Petitioner's standing to file the petition, so that question also does not arise before us"[5].

The Attorney General argued the petition should be dismissed. Since the new law did not infringe the equality prerequisite, it should not have been enacted by a special majority. Finding that the new law violated the equality principle, the Court suggested:

> "This danger can be countered without causing the inequality that we have found... by promising a new list funding without an advance payment and only retrospectively after it has stood the test of the elections and gained at least one seat... It need hardly be said that in making this suggestion, we in no way presume to encroach upon the sovereignty of the Knesset as the legislative authority. The Knesset accordingly has two courses from which to choose: it can reenact the financing provisions in the Financing Law, despite their inherent inequality, the majority required under section 4 and 46 of the Basic Law is mustered; or it can amend the law... and we have indicated above a possible way of doing so"[6].

The Knesset, in response, did not chose between the alternatives but adopted them both; the Financing Law was amended, following the Court's suggestion, and additionally, was reenacted by the required majority[7]. Moreover, the Knesset never seriously pondered over the significance of the Court's decision, or even partly debated it[8]. It did, however, enact an additional law, by an absolute majority, which retroactively

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[5] H.C. 98/69, supra, note 1, as been translated in *Selected Judgments of the Supreme Court of Israel*, Vol. VIII (Shmuel Press, 1992) at 15-16 (Hereafter: 'Selected Judgments').
[6] *Ibid.* at 20.
[7] R.A. Burt, "Inventing Judicial Review: Israel and America" 10:7 (1988), Cardozo Law Review 2013, at 2045; A. Shapira, "Judicial Review without a constitution; The Israeli Paradox" 56 (1983), Temple Law Quarterly 405, at 412-413.
[8] I. Zamir "Rule of Law and Civil Liberties in Israel" 7 (1988), Civil Justice Quarterly 64, at 66.

confirmed the validity of previous procedural election legislation[9]. By so doing, the Knesset proposed to remove in advance any future judicial review over their validity[10]. By so doing, I argue, the Knesset also expressed that the Court has the power of judicial review to scrutinize primary legislation.

'Agudat Derekh Eretz' et al v. Broadcasting Authority et al[11]

The Elections (Mode of Propaganda) Law, which regulated the free radio and television broadcasting time for parties participating in the elections, was amended in 1981. The amendment decreased the radio and television time allocated to new lists, while increasing considerably the time allocated to parties which participated in the outgoing Knesset. The petitioners, two Ottoman associations which intended to introduce a new party, argued the amendment infringed the equality principle and since it was not passed by the required majority, should be declared invalid. The Court's power to review Knesset legislation was again left unclear:

> "As in the Case of *Bergman v. Minister of Finance*... this time, too, complex constitutional issues could have arisen... There the court refrained from dealing with these issues, and we shall act likewise this time - and in the present case we have before us an explicit written statement on behalf of the Attorney General, in paragraphs 4 and 5 of his arguments in response to the order nisi, that he does not intend to raise those issues since he wishes the court to decide on the merits of his arguments..[12]"

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[9] Election (Confirmation of Validity of Laws) Law, 5729-1969 (23 L.S.I. 221).
[10] H. Klinghoffer, "Legislative Reaction to Judicial Decisions in Public Law" 18:1 (1983), Israel Law Review 30 at 33.
[11] H.C. 246, 260/81 *Agudat Derekh Eretz et al. v. Broadcasting Authority et al.* (1981) 35 P.D. (4) 1. Also Selected Judgments, Vol. VIII at 21. (Hereafter: "*Agudat*").
[12] *Ibid.* at 24.

The Court ruled in favor of the petitioners, finding the amendment law violated the equality principle, and declared the new amendment should not be acted upon, unless the provisions were adopted by the proper majority. At first, the Court handed down its decision without reasoning. Nonetheless, the Knesset retained the inequality provision (with only slight changes) by reenacting the amendment with the majority required, in all three readings which took place on the same day, only two weeks before the elections for the new Knesset took place[13].

The same events, more or less, happened a third time. This time, the petitioners were Knesset Members of a relatively small party, which would be harmed by an alleged lawful amendment, supported by the biggest parties[14]. The Court's decision referred to the justiciability issue, mentioning that as in previous cases, the Attorney General did not raise a plea of non justiciability, and accordingly, the Court would review the petition on its merits. Accepting the Attorney-General's application, the Court added a mere caution;

> "It should be noted, in parentheses, that the more the cases in which this court discusses on their merits petitions involving constitutional issues of the stated

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[13] Klinghoffer, supra, note 10 at 34.

[14] H.C. 141/82 *Rubinstein et al. v. Chairman of the Knesset et al.* (1982) 37 P.D. (3) 141. Also, Selected Judgments Vol. VIII. at 60. (Hereafter. "*Rubinstein*"). While preparing for the tenth Knesset elections, several party groups exceeded the financial electoral campaign limits set on them in the Elections Financing Law, in order to be compensated from the public funding budget. After the elections, the Knesset amended the Financing Law retroactively, raising the limited amounts and reducing the sanctions enforced on party which exceeded its budget. The amendment was passed by an ordinary majority. The petitioners, leaders of a party which adhered to the spending original limits, argued that the retroactive amendment violate the principle of equality in the elections, and as the majority requirement was not sustained, the amendment was invalid. Five justices unanimously accepted the petition. In light of the ruling, some parties which exceeded the permitted spending limits returned some amounts to the Treasury.

kind, the less the prospect that this court will refuse to hear them in the event that the Attorney-General decides in the future to raise 'these and similar questions'"[15].

Three different Attorney-Generals[16] have followed the same approach; avoiding to raise the justiciability issue before the court, and instead, asking the court to dismiss the petitions on their merits. But the Court did not dismiss them: it declared the Knesset legislation invalid and void. The Knesset reacted by re-enacting the statutes. Accordingly, the Knesset accepted the Court's interpretation of the relevant articles. It also followed the Court's prudent suggestions, and did not raise its voice in protest[17]. A potential dialog between the Knesset and the Court turned out to be more of a monologue; the Court declaring its interpretations, the Knesset adopting them by revising the new amendments and removing the 'procedural minority obstacle'. By following the Court's guidelines, the Knesset assented to the Court's justiciability over its legislation. Factually, the Knesset preferred to assent, leaving that decision to the Court. It has chosen this approach twice; first, by evading to evoke the justiciability issue beforehand, thus relieving the court from the need to probe the question, and second, by implementing the Court's suggestions. And the Knesset has chosen this path frequently, even after realizing its consequences.

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[15] *Ibid.* The Court direct 'warning', was circuitously expressed in two decisions given immediately before the *Rubinstein* case; in the first, justice Shamgar mentioned that even thought he was not obligated to address the justiciability issue as the Attorney-General did not raise it, nevertheless he finds a decision on the merits of the issue to demonstrate the Court's own attitude in respect of the justiciability of Knesset's actions (H.C. 306/81 *Flatto Sharon v. Knesset Committee* (1981) 35 P.D (4) 118, at 142-143) (Hereinafter: "*Sharon*). In the second, the Attorney General argued the subject matter was not justiciable and therefore, the Court should forthwith dismiss the petition. The Court, while denying the petition, remarked that the justiciability crux was a discretionary dilemma in nature, since the court probably has the jurisdiction (H.C. 652/81 *M.K. Sarid v. Chairman of the Knesset* (1981) 36 P.D. (2) 192, at 201-202). The petition related to the Knesset Chairman's decision to delay a motion of 'no confidence in the government' vote to a later hour the next day. The petitioner argued the delay was in violation of the Knesset regulations.

[16] M. Shamgar, the *Bergman* case; R. Yarak, the *Agudat* case and M. Shaked, the Senior Deputy State Attorney, the *Rubinstein* case, filling-in for D. Beinish, who also took the same approach at the *Sharon* case.

[17] See Klinghoffer, supra, note 10.

b) Jurisdiction over the Territories and miscellaneous;

The described pattern was not reserved for judicial review over Knesset legislation alone. Many other examples can be found, one of which is the HCJ's jurisdiction over the Territories. Since 1967, Israel has administered the West Bank and Gaza Strip through military governments[18]. Beginning early in 1969, and increasingly during the 1980s, Palestinians from those Territories have petitioned to the Israeli High Court[19] and as early as June 20, 1967[20], the Supreme Court heard the first petition. In that case, the Counsel for the State, Meir Shamgar, declared that he "would not challenge the competence of the Court to review the acts of the military authorities"[21]. Consequently, the right of the inhabitants to apply the HCJ for injunctions has not been questioned by the Court[22]. This strategy became, again, the standard[23]; up until 1973, the Court's

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[18] It is unnecessary to elucidate here the exact legal status of the administrative territories, or to amplify the way the Israeli Governments dealt with this legal status throughout the years. For some observations regarding these issues as well as the international-law aspects see, for example: E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories" (1992), 26 Israel Law Review 24; R. Lapidoth, "International Law within the Israel Legal System" (1990), 24 Israel Law Review 451. It is also worth mentioning that by using the terms 'Administered Territories' or 'Territories' the author of these lines is not taking a stand over this saturated subject. Thus, we will use these two terms simultaneously.

[19] G.E. Bisharat, "Courting Justice? Legitimation in lawyering under Israeli Occupation" (1995), 20:2 Law and Social Inquiry 349. at 355. The petitions covered wide variety of issues, asking the Court to review the legality of various state sanctions or policies, or to determine whether administrative officials exceeded their discretionary powers in their handling of particular affairs: R. Shamir, "Litigation as a Consummatory Action: the Instrumental Paradigm Reconsidered" (1991), 11 Studies in Law, Politics and Society 41 at 47.

[20] About a week after the end of the Six Days-War, started on June 5 1967, that resulted the occupation of these territories.

[21] A. Nathan, "The Power of Supervision of the High Court of Justice over Military Government" in: M. Shamgar (Ed.), *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspect* (Jerusalem: Hebrew University of Jerusalem Press, 1982) 114.

[22] M. Shamgar, "The Observance of International Law in the Administered Territories" (1971), 1 Israel Year Book on Human Rights 262, at 273: "Although according to legal precedents.....this legal procedure (applying to High Court of Justice for orders nisi - g.d.) had been denied to inhabitants of territories under

jurisdiction over the Territories was left 'unsettled' as the Government did not object to its practice[24]. Ten years after the first petition, the Court clearly declared that it formally *had* jurisdiction over the military authorities, independently from the government's concession[25]. Although no legislation explicitly authorized the jurisdiction, and precedents for such jurisdiction were not at hand[26], the Court proclaimed its jurisdiction[27]. Once again, the Supreme Court exercised power which was not given to it by the Knesset and once again, the Knesset did not use its supremacy to put an end to the exertion.

The same methods were used on other occasions, with the *Standing* and the *justiciability* demands. In the *Bergman* case[28], the Court mentioned that the respondents had chosen not to dispute the Petitioner's standing to file the petition. This question, therefore, was not considered. In another case, the Attorney General declared that although he believed the petitioners lacked standing, he would not ask the court to dismiss the petition, recognizing the important issue that petition had evoked[29]. In that particular case, one Justice rebuked the State's representatives for taking this position[30].

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military administration, no objection to these applications has been raised in the Supreme Court by the representatives of the Attorney-General.

[23] H.C. 337/71 *Algamaia Almakasda v. Minister of Defense* (1972) 26 P.D. (1) 574; H.C. 256/72 *The Electricity Company of Jerusalem v. Minister of Defense* (1973) 27 P.D. (1) 124.

[24] H.C. 302/72 *Sheikh Suleiman Abu Hilu et. at. v. State of Israel et. al.* (1973) 27 P.D. (2) 169, at 177. And see also in H.C. 390/79 *Dawikat v. Government of Israel et al.* (1980), 34 P.D. (1) 1 at 14.

[25] H.C. 393/82 *Gamayat v. The Military Commander* (1983) 37 P.D. (4) 785 at 809.

[26] See infra, footnote 40.

[27] The Court has declared its jurisdiction over *any state officials* who *exercise any public functions* by virtue *of law*. See S. Shetreet, "Judicial Independence and Accountability in Israel" (1984), 33 International and Comparative Law Quarterly 979 at 983.

[28] See supra, note 1, at 15.

[29] H.C. 563/75 *Resller v. Minister of Finance et al.* (1975) 30 P.D. (2) 337.

[30] *Ibid.* at 345. In several other cases the Attorney General did not remark on the standing issue, or declared he will not challenge the petitioner's lack of standing, but the Court itself raised the question and dismissed

The same avoidance pattern (that is, abstaining to ask the Court for a motion to dismiss the petition on jurisdictional grounds), was revealed in other cases, in which the Attorney-General did not raise the injusticiabilility of the Court to decide on 'political questions'[31]. Cautious measures concerning prospective 'uncertain' legislation were taken, even when the Court refused to interfere[32]. Time and again the state acknowledged the Court's justiciability over loaded controversies, paving the way for future interventions.

The above mentioned proceedings indicate a pattern used by different State's representatives (Attorney-Generals, State Attorney and Chief Military Prosecutor) - an avoidance pattern. By abstaining to ask for motions to dismiss the cases, the state left the Court to decide its scope of interference. By foregoing its supremacy and sovereignty to legislate as it saw fit, before and after the Court's ruling, it accepted the Court's viewpoints on some of the most fundamental questions regarding the Israeli constitutional and legal regime. Indeed, every now and again the Knesset invoked its sovereign legal

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the petitions on that ground. See, for example , H.C. 394/72 *Franchill Hotel v. Local Committee* (1972) 27 P.D. (2) 332; H.C. 600/75 *Koren v. Minister of Defense* (1975) 30 P.D. (1) 515.

[31] In a petition submitted by an Israeli officer, the question of the Minister of Defense's long-standing decision not to conscript Yeshiva students to the Israeli army forces was raised[31]. The Attorney General did not ask the Court to dismiss the motion due to lack of standing. Nevertheless, the Court so ruled. H.C. 40/70 *Beker v. Minister of Defense* (1970) 24 P.D. (1) 238.

[32] Immediately after the Court's decision, and in spite of the fact that the petition was denied, the Government initiated an amendment of the law as in attempt to face prospective petitions on the same subject. See M. Hofnung, "Ethnicity, Religion and Politics in Applying Israel's Conscription Law" (1995), 17:3 Law and Policy 311. The petitioner claimed the minister has no authority to exempt the Yeshiva students from serving the army due to religious reasons, since the Law used the words: 'similar reasons' after specifying health and security reasons. The Government thus amended the law, replacing the term 'similar reasons' to 'different reasons'. In the first reading, the Government declared such an amendment was necessary in order to provide the Minister with future arguments. See, *Ibid* at page 325.

authority and refused to follow a Court's decision, as in the *Shalit* case[33]. But even then, it was only after the Knesset had at first refused to take the 'hot potatoes' out of the Court's hands[34]. In all those cases, the state acknowledged the Court's power to decide political and societal questions, yet altered unwanted decisions once they have come to the world. Inevitably, the question ensues: *why* did State representatives and institutions (Attorney-Generals and the parliament) accept the Court's jurisdiction in areas which were not regulated by legislation or were not specifically defined as the Court's authority? The following pages will put forward possible answers to the above question.

III Suggested Explanations:

One cannot overestimate the direct, overt confrontation between the legislature and the Court when the latter declares an enactment of the former invalid[35]. The confrontation is especially acute when there is no constitution, or any other basis for the

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[33] H.C. 58/68 *Shalit v. Minister of the Interior et al.* (1970) 23 P.D. (2) 477. (Hereafter: "*Shalit*"). The petition asked the court to order the Registration Officer to register in the petitioner child's religion column as being "Jewish or Hebrew", or to simply leave it empty. The Registration Officer refused to do so, since the child was born to a non-Jewish mother and to a Jewish father, justifying his refusal on the grounds that 'a Jew, in the meaning of this concept accepted by the Jewish people for untold generations, includes only a person whose mother was Jewish or a person who has been lawfully converted, adjoined with him/her not of any other religion. See in *Shalit*, Selected Judgments (Special Volume, 1971) at 35.

[34] The Court, in an unusual step, asked the government to settle the dispute without a judicial decision. The Court "...proposed to the Government that the bone of contention be removed by the only way in which that can be done, namely, removing the very cause of the dispute by deleting the item "national affiliation" from the particulars of registration. We did not ignore the possible objections to this proposal - objections on grounds of theoretical principle as well as of practical considerations. Nonetheless it appeared to us desirable to put up with this in order to avoid more serious consequences. *The Government rejected our proposal out of hand and what we feared, has happened.* The dispute and the split of opinion have been carried into the precincts of the court". *Ibid* at 82. After the decision, the Knesset promptly reacted, amended the relevant law, thus preventing the court to order the Registration Officer a similar decree in a second case. See: M. Hofnung, "The unintended consequences of unplanned constitutional reform: Constitutional Politics in Israel" (1996), 44:4 American Journal of Comparative Law 585. For additional examples, whereas the State accepted and approved the Court's decision, thereupon amended the pertinent law to adjust its initial or later intent see *Ibid* at 598-599.

judiciary to act[36]. These cases bear the potential of drawing the most active or reactive decisions from both the Court and the legislature. How can the Knesset's subordinate reaction to the court's prudent decisions be explained?

Legal and social-science scholars have contemplated in detail the reasons behind the Knesset's implementation of the Court's suggestions in the *Bergman* case as well as on the steps taken after both the *Agudat* and *Rubinstein* decisions[37]. Some point to time limitations. Since both the *Bergman* and the *Agudat* decision were given shortly before the elections took place, there was simply no time to react other then by correcting the impediment[38].

Others argue that, at least in the *Agudat* case, the chronological order of events is significant. The Court's decision, without its reasoning, was handed down only a month before the elections for the new Knesset. Seventeen days later, the Knesset promptly re-enacted the law by the required majority. As the Court published the reasoning behind the

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[35] R. Knopff & F.L. Morton, "*Charter Politics*" (Ontario: Nelson Canada, 1992) at 20.

[36] Like the Israeli case reveal. See R. Gavison, "The constitutional revolution - A Depiction of Reality or a Self-fulfilling Prophecy? (1997), 28 Mishpatim 21-147 (In Hebrew). Yet it has been suggested that even with regards to the most powerful court applying constitutional review - the Supreme Court of the United-States - that power was not granted to the court in any written document, but instead was 'invented' by Chief Justice Marshall in the famous *Marbury v. Madison* case. See A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bat of Politics* (New Haven, Yale University Press: 1962), at 1-14.

[37] As recalled, in all these three cases, the Knesset altered the legislation process, voting again on the amendments, yet this time assuring the required majority.

[38] "...There was virtually no time to ponder the significance of this unexpected judgment (the *Bergman* decision - g.d.) or to contemplate a possible reaction: the national elections were very close and the political parties urgently needed the money for their campaigns...". Thus, the Knesset, "acquiesced with the ruling of the court and quickly amended the statue to remove the inequality". "; Zamir, supra, note 8, at 66.

decision a month after election day, the Knesset simply did not have time to be 'impressed' by the Court's ruling[39].

However, time constraints or chronological limitations were removed after election day, and still the Knesset did not act pursuant to the division of power sketched between itself and the Court. Judicial review over Knesset legislation was introduced into the Israeli legal system by the Court, and yet both the Knessot and governments were silent. On the Territories issue, a concession to the Court's jurisdiction was not at all the obvious outcome: on the contrary, such an approach was neither common nor precedential[40]. Nevertheless, it was the standpoint taken by State officials, and the same position continued to be held even after the Court began to employ the international law customary norms for disputes resolution[41].

Another explanation suggests that state representatives preferred not to be depicted as captious. While the government wished to evade international condemnation[42], or did not want to be pictured as hiding behind the fig-tree of 'technical' argumentation, the delegates did not want to risk their future legal promotions and

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[39] Klinghoffer, supra, note 10, at 34. Although the scholar's argument is that by passing the inequality law correctly the Knesset actually demonstrated no real impression in the court's judgment, I find the argument regarding the chronological order of events to also explain what I call the avoidance pattern.

[40] M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government - The Initial Stage" in *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspect* (Jerusalem: Hebrew University of Jerusalem Press, 1982) at 272-273.

[41] E.R. Cohen, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm" (1986), 24 Columbia Journal of Transitional Law 471. This approach was later on extended to Lebanese citizens under the Israeli administration in southern Lebanon: See H.C. 593/82 *Tsemel v. Minister of defense* (198s) 37 P.D. (3) 365.

[42] Burt, supra, note 7, at 2033.

opportunities (especially, the opportunity to be nominated as a Supreme Court Judge)[43]. Persuasive as it may sound, I do not find the argument to suggest a full explanation as to why the Knesset preferred abstaining from action or chose the Court's decision as its fig-tree[44].

Additionally, scholars pose the intense divisiveness in the Israeli politics regarding the Territories (present as well as future) status as the cause for the Knesset passivity. This argument cannot explain the avoiding patterns used in other issues, however[45].

As for the justiciability and standing themes, commentators held the Supreme Court responsible. Rarely, they claim, did the State's assignees avoid challenging these issues. The court alone was responsible for the erosion in, and the lowering of, such

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[43] It has been claimed that the genuine explanation lays within these expectations of Attorneys-General and State's legal representatives; Since the people staffing these positions expect to become Supreme Court judges one day, they intentionally avoid raising any objection to the Court's jurisdiction. The government and the Knesset actually were left without a shield: their interests were abandoned, their concerns disregarded. See R. Shamir, "The Politics of Reasonableness" (1994), 5 Theory and Criticism 25 (In Hebrew). Indeed, Justices Shamgar, Barak, Beinish and Zamir - were all Attorneys-General or State-Attorney before appointment to the Court. A proper handling of such an argument is beyond the scope of this paper, yet one remark is in place: if the cat could not guard the milk, it could have been restrained. To suggest but just one solution, the Knesset could have regulated the *Attorney-General's discretion* with respect to arguments that *must* be presented before the Court. But it never so did. And this is what is left to be explained.

[44] This point will be broadly dealt later-on. I will only allude here that most of the State's actions within the Territories were approved by the Court. Thus, claims has been raised that the Court served as a legitimizing mechanism for the Israeli policy in the Territories. On this point see: R. Shamir, "Landmark cases' and the reproduction of legitimacy: the case of Israel's high court of justice" (1990) 24:3 Law and Society Review 781.

[45] Burt, supra, note 7, at 2049. Yet, this claim can be discharged from both historical as well as theoretical grounds. First, the controversy over the Territories status has bloomed, at least between 'right' and 'left' only in the 1980s: L.L. Grinberg, in *And Above All: the Histadrut* (Jerusalem, Nevo: 1993)(In Hebrew) claims that the Labor party avoided taking an explicit stand on this issue due to its own internal problems. Second, such an account neglects to explain how, given such divisiveness, the Israeli Knesset positively regulated other Territorial issues by legislation.

demands by rejecting the State's objections[46]. Thus, the Knesset was in fact helpless; its silence was a deferent, reluctant one. It happened within the court terrain, over legal devices[47], on which the legislature hitherto never interfered.

The explanations analyzed hereinabove, seem to concentrate only on one of the three bodies of state, or on cultural features alone. They point at the Court, *or* the Knesset, *or* the Israeli Politics, *or* the personages. They do not sketch a more general reasoning, combining these sectors. Assaying the counter-influences and interrelations between all sectors might generate a more comprehensive, coherent account.

The Israeli Knesset - A Weak Sovereign;

"Jeremiads about the present low estate of parliament and its loss of ground to the executive are no less common in Israel than elsewhere", writes one Israeli scholar[48], but the continuous weakening of the parliament has probably proceeded further in Israel than in any other democratic country.

The Knesset's poor status is a result of a number of reasons. First, the constant fear for the country's survival[49] has generated the need for introducing and applying

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[46] This point will be thoroughly analyzed in Chapter three.
[47] Bickel mentions legal devices such as standing, bona-fide etc., as accounted to the court's weapons in its undesired to deal with 'political' questions. See Bickel, supra, note 36 at 65-73.
[48] S. Sager, "*The Parliamentary System of Israel*" (Syracuse: Syracuse University Press, 1985) at 222.
[49] See the introduction, page 5.

extraordinary emergency measures[50]. On May, 14 1948 a state of emergency was declared and it remains in force to the present. Countries which function under a state of emergency delegate some of the legislative functions to the executive, thereby enabling the immediate and effective action that might be necessary in such a plight[51]. Yet it is in the permanency of the circumstances that Israel is unique: the presence of an unlimited state of emergency, combined with an emergency legislation used regularly, have caused such legislation to become an inherent part of Israel's legal system[52]. It generated a new constitutional order, in which the executive branch of government exceeded the Knesset in its legislative powers[53]. Consequently, the Knesset, divested of some of its powers, weakened[54]. Avoidance to act, or enact, at least with regards to the Territories, can thus be attributed to this new constitutional order[55].

Second, a key feature of the Israeli political system can also offer an answer. Usually, the party to lead and control the Government, leads and controls the Knesset. The separation of powers blurs[56]. Even the Cabinet has occupied a superior position to the Knesset[57] concerning the sway of public agenda or the introduction of private bills[58].

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[50] M. Hofnung, "*Democracy, Law and National Security in Israel*" (Aldershot: Dartmouth Publishing Company, 1996) at 25.
[51] *Ibid.* at 39.
[52] *Ibid.* at 50.
[53] M. Hofnung, "States of Emergency and Ethnic Conflict in Liberal Democracies: Great Britain and Israel" (1994), 6:3 Terrorism and Violence 340.
[54] *Ibid.* at 358. See also Sager, supra, note 48 at 199.
[55] Many of the regulations that are in effect over the Territories are emergency procedures which were enacted by the Government.
[56] G.S. Mahler, "*The Knesset: Parliament in the Israeli Political System*" (N.J: Associated University Press, 1981) 37.
[57] D. Peretz & G. Doron, "*The Government and Politics of Israel*" (Boulder: Westview Press, 1997) at 175.
[58] Mahler, Supra, note 56 at 38. See also *Haaretz*, March 25, 1998 on page10A: 73 out of the 140 laws passed by the Knesset in the current session were introduced by members of the government/cabinet.

Combined together, the Knesset became decidedly weak[59]. Thus, the question which should actually be answered is why did the governments or cabinets avoid reacting to the Court's rulings'? This question will be addressed shortly.

Third, the Israeli political system is characterized as a highly developed party system, while numerous political parties play a significant role in legislative behavior[60]. Knesset members direct all their political activity according to, and around, the party. A strong party discipline prevails[61], leaving a very limited potential for legislators to fulfill their mission as the people's representatives[62]. The dependence of the elected on their parties bears its toll in the cynicism and inefficacy felt by many of them[63]. Cynicism, uselessness and the like, can easily be translated into inaction, passivity, and paralysis[64].

The multitude of political parties lead us to a fourth account - the many-stripes of the Knesset's composition. Through the years, the Israeli Knassot have contain from as many as thirteen to twenty-four different parties[65]. Such an ideological diversity influences both the Government and the Legislature[66]. The need to gather a large number of parties to form a coalition is one side of the coin. The many parties left to cluster a

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[59] S. Johnston, "Party Politics and Coalition Cabinets in the Knesset" (1962) 13 Middle Eastern Affairs 130.
[60] Mahler, supra, note 56 at 103. See also: B. Reich & G.R. Keival, *Israel: Land of Tradition and Conflict* (Boulder: Westview Press, 1993) 93: "Political parties play a central role in the social and economic, as well as political, life of the country".
[61] *Ibid.* at 50. See also M. Edelman, "*Courts, Politics and Culture in Israel*" (Charlottesvill:University Press of Virginia, 1994) at 10.
[62] *Ibid.* at 50.
[63] *Ibid.* at 104.
[64] *Ibid.*
[65] *Ibid.* at 57.
[66] See Reich & Keivel, supra, note 60 at 93.

firm, active opposition is the other. The Knesset's ability to unite and respond effectively to various challenges to its status and power is thus significantly reduced[67].

The Israeli Knesset, although legally and constitutionally the supreme authority in the Israeli legal and political system, is ineffective in 'flexing its legislative muscles'[68]. An example of this situation, in which "the spirit is willing but the flesh is weak", relates to the *Bergman* case mentioned above. In 1971, recognizing the facts born by the Court decision, the Justice department offered two new Basic Laws drafts; one concerning the HCJ (providing it with judicial review over legislation) and the other regarding the legislative process (articulating the way to enact Basic Laws). The first draft made no progress until 1984, when the Basic Law: Judiciary was finally enacted. The second draft was put on the Knesset's agenda only in 1975, but forever remained a draft. Another draft was designed in 1978, but received attention only in one of the Minister of Justice's speeches[69].

Finally, avoiding direct confrontation was not reserved for Court's decisions alone. The Knesset has left some of the most fundamental questions concerning the legal order untouched. Some were inherent to the Constitution controversy[70], others - to

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[67] Sager, supra, note 48, at 218-219. See also S. Wilzig-Lehman, "*Public Protest in Israel*" (Ramat-Gan: Bar-Ilan University Press, 1992) (In Hebrew) at 153.

[68] Sager, supra, note 48 at 186. Statistic show that Cabinet ministers are in no great rush to answer the questions submitted by Knesset members - even thought the Knesset guidelines require that a response will be issued within 21 days. See Haaretz, March 25, 1998 on page 10A. This is but another example to the Knesset's weak performance in checking the government's action.

[69] *Ibid.* at 41-44.

[70] On this see: P. Strum, "The Rode Not Taken: Constitutional Non-Decision Making in 1948-1950 and Its Impact on Civil Liberties in the Israeli Political Culture" in I.S. Troen & N. Lucas (Eds.), *Israel: The First Decade of Independence* (Albany: State University of New York Press, 1995) 83.

national security. Introducing, time and again, new drafts regarding these 'hot' topics on the one hand, yet never completing their enactment on the other, enabled the Knesset to hold the rope by its two ends. Asking the Court to dismiss petitions concerning those 'hot' topics, without formally recognizing or rejecting the Court's authority to decide them was the same pattern masked in a different cloak[71].

If the Court would have been silent in these cases, it would simultaneously have invited the Government and the Knesset to speak out[72], and vice versa: if the court spoke out, the executive and the legislative were exempted from the need to take responsibility over these burning questions: 'in such cases, gag rules institute a division of labor'[73]. Within the Israeli context, the division of labor was as follows: initially, the legislative and the executive preferred to abstain deciding fundamental issues. Later on, the same pattern continued, as they had shirked to declare a firm position regarding those issues before the Court, and finally, as they held on to that preference after the Court spoke-out. Thus, it seems the Israeli Knesset and Government were determined to consign the hard task of deciding problematic issues to the court[74], and the Court alone was left to design the interrelations between itself and the Knesset.

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[71] "Some topics are excluded from the national legislative agenda, only to be consigned..to the courts" S. Holmes, "Gag Rules or the Politics of Omission" In J. Elster & R. Stagstad "*Constitutionalism and Democracy*" (Cambridge: Cambridge University Press, 1988) 19 at 26.
[72] *Ibid.*
[73] *Ibid.*
[74] See S. Shetreet, "Reflections on the Contemporary Trends of Judicial Role in Israeli Society". In S. Shetreet (Ed.) *The Role of the Courts in Society* (Dordrecht: Martinus Nijhoff Publishers, 1988) 158.

The Israeli Government, too, refrained from acting. As mentioned earlier, since no single party can win a majority[75], Israeli governments are constituted by several coalition parties, varying in the number of parties they consist of and their degree of stability[76]. Frequently, coalition parties contained ideological rivals, thus entailing a governmental immobility and inaction on certain areas of concern[77]. Ungovernability, although aggravated during the 1980s, especially during the National Unity Government's days[78], was already present in 1967: ever since then, the Israeli political elite failed to deal with the State's most crucial matters, among them, the future of the Territories[79]. That failure, or reluctance to act, was translated to the stand taken by the State on the question of the Court's jurisdiction over the Territories.

An additional factor relates to the pervasive partisanship that ruled the Israeli political culture[80]: such a partisan culture limits considerably the potential for meaningful

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[75] "The multiplicity of parties, the diversity of views they represent, and the proportional representation electoral system have resulted in the failure of any one party to win a majority of Knesset seats in any of the elections, thus necessitating the formation of coalition agreements". Reich & Kieval, supra, note 60 at 120.

[76] Mahler, supra, note 56 at 55. The least number of parties that have participated in a coalition in Israel's history has been three: the greatest number of parties participating has been six.

[77] *Ibid.* at 51-52. See also Reich & Kieval, supra, note 60, at 121: "The divergent views represented in each cabinet often have had the effect of mutual cancellation and a resultant lowest-common-denominator policy for the government. *Dramatic moves are thus unlikely to result - and generally have not*".

[78] A National Unity Government was in power between 1984-1990. On this point see chapter four, pages 108-109.

[79] G. Barzilai & Y. Shain, "Israeli Democracy at the Crossroads: A Crisis of Non-Governability" (1991), 26:3 Government and Opposition 345 at 346. Reich & Kieval claim that in the late 1960s, the centrality of the founding fathers of the State declined, yet the new leaders did not possess the same power and thus were unable to repeat their former capabilities to determine hard problems. See supra, note 60 at 123.

[80] M. Edelman, "The Judicial Elite of Israel" (1992), 13:3 International Political Science Review 234 at 246. See also L. Roniger, "The Comparative Study of Clientelism and Realities of Patronage in Modern Societies: Israeli and Canadian Trends" in A.G. Gagnon & B.A. Tanguay, *Democracy with Justice* (Ottawa: Carleton University Press, 1992) 174

decisions which should be based on rational decision-making procedures, leading to policy deadlock and governmental paralysis[81].

IV Conclusion

To conclude, Israeli supreme political and constitutional sovereign was in many aspects powerless. By default or by design, the Knesset did not respond to, or contend with, fundamental issues that it should have properly handled. Furthermore, Members of the Knesset themselves, unable to win in their own courtyard, have sought judicial remedies against actions of the executive or the institutions of the Knesset[82]. The executive, even though empowered by the Knesset to take over some of its functions, has sometimes intentionally shifted the onus of decisions-making to the judiciary[83], and failed as well to directly confront the Court's decisions.

The next chapter will illuminate how Israeli society reacted to these developments in the political culture. In many ways, the Israeli society is entirely different from what it used to be fifty years ago. In other ways, it remains very much the same. The next chapter deals with this phenomenon, and considers how these trends in society influenced the Court. It also considers the influence of the Court on society.

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[81] M. Edelman, "The Judicialization of Politics in Israel" (1994), 15:2 International Political Science Review 177, 181.

[82] See infra in chapter three. See also I. Zamir, "Courts and Politics in Israel" (1990), Public Law 523

[83] S. Shetreet, *Justice In Israel: A Study of the Israeli Judiciary* (Dordrecht: Martinus Nijhoff Publishers, 1994) 450.

Chapter Three

The Israeli Society - 1948 to the 1990s

I Introduction

This chapter will use the two contradictory examples introduced in the first chapter as references to highlight the changes Israeli society has undergone in the past fifty years. Through these examples, I hope to illuminate how state-society relations have been transformed from a cozy synthesis to an uneasy division. Suggestions as to what caused the blurred relations during Israel's early years of statehood as well as their transformation afterwards will be presented. I will also propose a new interpretation of the Court's role within Israeli society. I suggest that the HCJ has become a channel of participation, protestation, and communication used by Israelis attempting to influence their government.

1. The Line and the MQG - a corollary;

The Volunteer's Line (hereinafter "*The Line*") was the initiative of 20 young Jerusalem law students who had spontaneously self-organized in order to help the new state in absorbing the waves of immigration coming to Israel during 1952-1955 (through working in the immigrants' transit camps). After a few months of teaching Hebrew and trying to arrange jobs and permanent housing for the immigrants, the volunteers, who had risen constantly in numbers, started criticizing the official clerks and government leaders. Their criticism derived from what they claimed to find during their voluntary duties: governmental corruption, ignorance and indifference to immigrants' basic needs, neglect

and discrimination[1]. These reservations were expressed in newspapers, pamphlets, letters and brochures[2]. After *the Line*'s leaders accused the police commissioner of a scandal[3], a libel suit was instituted against them[4]. The district court found in favor of the plaintiff and set a high quantum of damages[5]. *The Line* appealed. The Supreme Court, while substantially reducing the damages, nevertheless scolded the members for turning the court into a political arena[6]. These political stormy trials, accompanied by slanders, de-legitimization, and condemnation against *the Line* by state representatives (the Prime Minister, the Minister of Police and officeholders[7]) and societal figures (journalists and playwrights[8]), brought *the Line* to its end[9].

The "Movement For Qualitative Government" (hereinafter: "The *MQG*") defines itself as an apolitical movement aimed at ensuring high morals and clean hands within the government. Its inception on March 1990, coincided with an especially stormy political period in Israel: the days of the National Unity Government's rupture. Both the Likud and

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[1] D. Malmon, "The Volunteers' Front: A Case for Improving the Effectiveness of Voice in Israeli Politics". (1991), Research Paper for the Bachelor of Arts in Political Science at the University of Chicago.

[2] Two of these pamphlets, published through The Line's independent publishing firm, were named: "A Danger Lurking from the Inside" and "On Corruption - Who Are the Ones Not Being Judged"? (In Hebrew). They were written by Dr. S. Appelbaum, E. Haeztni, Dr. Simonson and H. Rappoport. The second pamphlet, concerning the suit, started with these words: "This trail is not the trail of four of the Line members against one police officer. This is your own trail, against discrimination, against preference of the privileged, against giving rights to individua!s on public's expense" (Informal translation - g.d.).

[3] Discharging a police investigation that was secretly conducted against some of his favorites.

[4] Civil Case (Tel-Aviv) 113/56 *Amos Ben-Gurion v. Haetzni et al.* (Was never published).

[5] *Ibid.* At paragraph 211 to the ruling.

[6] Civil Appeal 256/57 *Haetzni v. Amos Ben-Gurion* (1960) 14 P.D. 1256.

[7] Moshe Sharet, one of Mapai leaders, published an article in *Haaretz* Newspaper, asking the public to dissociate with the Line, and cease both its moral and economic support of the Line's actions.

[8] Shabtai Tevet had published a series of articles denouncing the Line and its members in *Haaretz* during February and March 1956. This information is mentioned in Malmon, supra, note 1 at 22-25. Igal Mosinzon, a famous playwright, produced a play in 1956 named "Throw a Bone to the Dogs", that scorned the Line's undertaking. Natan Alterman, a celebrated poet who had a weekly column in *Davar* Newspaper, wrote a poem condemning the Line and mocking its members.

[9] Malmon, supra, note 1 at 36.

the Labor parties tried their 'best' (which, as follows, was actually their worst) to constitute a government. Bargaining for the institution of a new government was repugnant[10]. Accordingly, a few reserve army officers began a hunger strike in front of the Knesset, calling for electoral reform. Simultaneously, 200,000 people attended a Tel-Aviv rally, carrying slogans which became the rally's nickname: "Corrupted; We're fed up with you". The hunger strike went on for 19 days, and when it ended, three different new movements were constituted, one of which was the *MQG*[11]. Its most prominent action was to submit public petitions to the HCJ[12], among these: the petition against the late Prime Minister Rabin, for his refusal to use his authority to discharge the Minister of Interior, who had been indicted on charges of fraud[13]; a petition against the Minister of Police, for his refusal to use his authority and commit the Chief of Police to disciplinary proceedings for accepting illegal financial benefits[14]; a petition against the Israeli Government for a wrongful dismissal of the former Civil Service Commissioner[15]; a petition against the National Committee for Planning, for its decision to turn the Jordan

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[10] These days also starkly exposed the malfunctioning of the Israeli system of government and, more than ever before, made most Israelis aware of the problem E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Rienner Publishers, 1993) 1.

[11] I have learned the details from Eliad Shraga, *MQG*'s chairman, when I interviewed him in Jerusalem three years ago. At first, only one movement was established: *The Movement for Electoral Reform*. But after a short while, due to disagreements between its members, the movement was broken down to three small movements: the first, called *The Movement for Electoral Reform*, headed by Avi Kadish, aimed at bringing about an electoral reform. The second, called *Constitution to Israel*, headed by Prof. Reichman, aimed at crystallizing the Israeli Constitution. The third, called *the Movement For Qualitative Government*, headed by Shraga, aimed to meliorate the behavioral norms of public representatives and to ensure pure morals within the public administration .

[12] Other activities of the movement include: the operation of a "Hot-Line" that provides free-of-charge legal aid to citizens who feel they were mistreated by the administration; the employment of a lobbyist to promote full electoral reform; the composition, in cooperation with the Minister of Education, of an educational layout and workshops aimed to promote the ideal of clean hands within the administration.

[13] H.C 3094/93 *The MQG et al. v. The Government of Israel at al.* 47 P.D. (5) 404. See also Selected Judgments, Vol. 10 at 258.

[14] H.C. 7165/93 *The MQG et al. v. Minister of Police et al.* 48 P.D. (2) 748.

[15] H.C 4446/96 *The MQG v. The Government of Israel* (Yet unpublished).

river bed into a tourist site[16]; and a petition against the Labor and Shas parties for what was named the "High Court of Justice's By-passing Agreement"[17]. Some of these petitions were entertained by the Court.

These two examples illustrate different types of relations between the State, civil society and the Court. One preliminary remark is in order - the two examples are not identical. In the first, the Court decided a civil appeal, as the highest court of appeal. In the second, the Court decided the *MQG*'s petitions as HCJ. However, *the Line* case could only have been brought to the 1950s' Court as a civil appeal. At that time this was the only way the Court would probe into *the Line*'s accusations, as it could not evade deciding a civil appeal. Contrariwise, as HCJ the Court has discretionary powers either to hear a case on its merits or to dismiss it altogether. If *the Line* would have been heard by the HCJ, surely it would have been dismissed on standing or justiciability grounds. This dissimilarity between the two examples, then, is not accidental. In and of itself, it reveals some of the changes this chapter broadly discusses[18].

Israeli society has undergone tremendous changes. One of the ways to analyze these changes is to explore state-society relations at different points in time[19]. Briefly, social scientists suggest two models to describe state-society relations in a democracy. While in the first model, civil society bolsters the state, enhances its legitimacy and

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[16] H.C 2324/91 *The MQG v. National Committee for Planing, Ministry of Interior et al* 45 P.D. (3) 678.
[17] H.C 5373/94 *The MQG et al. . Prime Minister Rabin et al.* 49 P.D. (1) 758. For a full description of the Agreement and its destiny see M. Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel" (1996) 44 The American Journal of Comparative Law 585 at 602. This case will be analyzed in detail in the epilogue.

ability to coordinate the diverse tendencies in society[20], in the second, civil society stands in contrast to the state, offering a different image of what is befitting the public sphere[21].

The Line and the *MQG* examples help analyze state-society relations in Israel throughout the years. As both *the Line* and *MQG* are social movements, their different experience with governmental authorities and the Court may cast light on the nexus of state-society relations in Israel at each period[22]. They can also be used to highlight how these relations express themselves in a central public arena - the Court.

The Line was a social movement, a voluntary organization which spontaneously sprung up while thousands of immigrants came to Israel, and as such, was part of Israel's early civil society[23]. *The Line*'s activities in the transit camps were targeted at helping the

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[18] I will return to this specific point later on. See, infra, pages 67-68.

[19] See pages 22-24.

[20] J.S. Migdal, "Civil Society in Israel" in E. Goldberg, C. Kasaba and J.S. Migdal (Eds.) *Rules and Rights in the Middle East: Democracy, Law and Societies* (Seattle: University of Washington Press, 1993) 118 at 120. Both Hegel and Gramsci present civil society as an abutment to the state; according to these scholars, civil society strengthens the predominance and hold of the governing organization by affirming it as the appropriate body to make and enforce society's rules. See: G.W.F. Hegel, *Philosophy of Right* (Oxford: The Clarendon Press, 1942) 122-123, 134-135; A. Gramsci, *Selections From the Prison Notebooks* (New York: International Publishers, 1971) 258. Others conceive state-society relations as requiring a congruence between the dominant values of civil society and those of the political society: A. Stepan, *The State and Society: Peru in Comparative Perspective* (New Jersey: Princeton University Press, 1978) 97.

[21] In this model, civil society is antagonistic to the state; A. Arato, "Empire v. Civil Society: Poland 1981-1982" (1982), 14 Telos 19-48. In this model, civil society is separated from, and disconnected from, the state. It serves as the state's opposition. See C. Taylor, "Modes of Civil Society" (1990) 3:1 Public Culture 95.

[22] State-society theory suggests that any growth in civil society's different components will inevitably effect the nexus of state-society relations. Migdal, supra, note 20 at 123.

[23] Although some variations exist, most definitions of civil society specifically include social movements, interest groups and voluntary organizations. The Line thus is definitely accounted as part of the Israeli civil society. See page 21.

young state in absorbing the masses[24]. These activities were initially financially sponsored by the Governmental Information Center[25], as well as by the Mapai party[26].

The first model seems to fit the relations that have initially evolved between *the Line* (one of civil society's pillars) and the state. By joining forces to aid the state's undertakings, *the Line* stood by the state, supporting its apparatus, and assisting it in coping with its heavy responsibilities. Absorbing immigration, which had resulted in a doubling of Jews living in Israel in less than five years, was certainly a top priority[27]. The rhythm and amount of immigrants arriving on Israel's shores far exceeded the state's facilities and was more than it could have handled alone[28]. Consequently, along the lines of the first model, *the Line* could be considered a socio-political organization which acted as a complement to State's institutions.

Yet, interestingly, after a short while, *the Line* became extremely antagonistic to the establishment of both Mapai and the State. Its leaders discovered what they saw as favoritism, discrimination, and immorality. The discrimination was oriented towards those immigrants who lacked the right 'connections' in Mapai or did not obtain a "Red Notepad[29], and were thus doomed to become unemployed and homeless. It was on this

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[24] These activities included, inter alia, teaching Hebrew; teaching the new immigrants, who mostly came from developing countries, basic hygienic codes; helping in assigning jobs; training the newcomers in self-defense and later on, aiding them to find permanent housing

[25] The Governmental Information Center was established during the first years of the Israeli state, and was aimed to finance projects which the government supported.

[26] Interview, Eliyakin Haetzni, the Line's founder, Jerusalem, 1994.

[27] D. Horowitz & M. Lissak, *From the Yishuv to the State of Israel: Origins of the Israeli Polity* (Tel-Aviv: Am-Oved, 1972) (In Hebrew) 273.

[28] Among others, the State needed to find solutions to the immigrants' housing, employment, and health problems. Cultural difficulties made the task seem even more impossible. *Ibid.*

[29] The "Red Notepad" was the nickname of party members. The 'red' stands for the party's inclination to revolutionary socialism. Whoever was a member of the party, or of its working organization - the Histadrut - received such a notepad. Job assignments, housing facilities, health services etc., were distributed according to party-key. Mapai's notebook, as the ruling party, was the most cherished.

account that *the Line* started to publicly criticize the government[30], addressed students, as well as veterans and new immigrants. Their brochures conveyed a simple message: the State's bureaucracy was soiled; the elite had long ceased to serve as an example, trading their status for personal favors and benefits. The rule was "Scratch my back, I'll scratch yours". In contrast, *the Line* presented an alternative which considered the public good of primary importance. Needless to say, because of the public criticism levied by *the Line* against the establishment, Mapai and the government were furious, and immediately cut all financial support.

From then on, the second model seemed to better fit state-civil society relations. *The Line* suggested a normative alternative to the corrupted norms it found be in control of public life. It offered a distinct alternative. It created an opposition. Its members separated and contrasted themselves against officeholders and State's bureaucrats[31].

Why did *the Line* experience a 'regime change'? Is its experience, especially at the second stage, representative of the state-society nexus of the early state's years? Apparently not.

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[30] The line printed its accusations in its own publishing firm, called: "Shlomi - The Volunteer's Line publication". Shlomi was established in 1953 and closed down in 1956. It published the Line's pamphlets and their brochures.

[31] "*We* will expose...*their* vile actions". This quote is taken from: "A page to the Volunteer", page 6, 1954.

II State-society symbiosis - Israel in the first decades:

As stated, in Israel's early years, state-society relations remained within the first model's boundaries. *The Line*'s attempt to consolidate an independent civil society as an alternative to the state was the exception to the rule of state-society symbiosis[32].

Up until the late 1970s and early 1980s, an effective civil society was undeveloped in Israel[33]. Instead, a high degree of convergence between state and society prevailed[34]. This convergence is the product of three main factors: the Zionist undertaking, the absence of civil society's crucial features and Ben-Gurion's Statism policy. I will discuss each of these three factors in turn.

1. The Zionist Project

The Zionist project - creating the State of Israel - developed as both a social and political undertaking[35]. The pre-state Yishuv was *civil society per-se*, as the Mandate granted self-autonomy to the Jewish community[36]. The organized Yishuv contained self-structuring free associations and family-like organizations[37]. It also generated a 'state-in-

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[32] D. Maman, "Institutional Linkages Between the Economic Elite and the Political and Bureaucratic Elite in Israel 1974-1988. (1995), A Ph.D. Thesis, Department of Sociology, Hebrew University at Jerusalem (In Hebrew) at 25.

[33] D. Peretz & G. Doron, "The Government and Politics in Israel" (Boulder: WestView Press, 1997) at 68: "If by default rather than design, the foundations of an effective civil society were laid down during the mid 1970s and have continued to expand ever since".

[34] Y. Ezrahi, "Democratic Politics and Culture in Modern Israel: Recent Trends" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Reinner Publishers, 1993) 255 at 262.

[35] B. Kimmerling, "State Building, State Autonomy and the Identity of Society: The Case of the Israeli State" (1993), 6:4 Journal Of Historical Sociology 396 at 399.

[36] *Ibid* at 400. This self autonomy was granted to the Arab community in Palestine as well.

[37] *Ibid.*

the-making' structure, providing all essential services, such as defense, administrative machinery, education, welfare, health, employment, etc.[38]. Under such circumstances, the

> boundaries between 'state' (i.e. the central political institutions) and 'society' (non-political institutions) were completely blurred and internal social control and surveillance were intensified by the political organizations and leadership of the Jewish community[39].

Thus, when Israel was born in 1948, centers of power were located in societal institutions. Shortly after 1948, these same institutions became the State's institutions[40]. Scholars characterize Israeli society's course of development as a development from an ideological movement (Zionism) to a community (the Yishuv) and from a community to a State[41]. The Zionist revolution, the five Aliyot[42] , the conclusion of the British Mandate and the establishment of the state of Israel were all stages in a socio-political institution-building[43]. The Yishuv's leaders, institutions, codes and rules of the game became, after 1948, the State's leaders, institutions, codes and rules of game, with but very few modification[44]. They were also the leaders, institutions and the codes of additional power

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[38] *Ibid* at 401.
[39] *Ibid* at 402.
[40] *Ibid.*
[41] D. Horowitz & M. Lissak, *Trouble in Utopia: The overburdened Polity of Israel* (Albany: State University of New York Press, 1989) at 17.
[42] The five Aliyot were the five big waves of immigrating Jews coming to Palestine between 1882-1948.
[43] Horowitz & Lissak, supra, note 41 at 7.
[44] A fascinating example can be found in the agreement reached between Ben-Gurion and Rabbi I.M. Levin in 1947. At that year, Ben-Gurion wrote a letter to Rabbi Levin of Agudat Israel (the religious party), in which he sketched the principles of maintaining the status quo in religious affairs. In the letter, Ben Gurion guaranteed the maintenance of the religious principles that were in force in 1947 in the areas of personal status, Sabbath observance and Kushrut after the establishment of the state. Years later, the various governmental coalitions did not debate the status quo principle itself but only its interpretation. For a chronology of events see, Horowitz & Lissak, *Ibid*, at 62. Additionally, these scholars specifically argue that "the dominant political culture of the Yishuv, had shaped the institutions and rules of the game in the new state". *Ibid* at 15. See also: P. Strum, "The Road Not Taken: Constitutional Non-Decision Making in 1948-1950 and Its Impact on Civil Liberties in the Israeli Political Culture" in I.S. Troen & N. Lucas (Eds.),

centers of that era: the Jewish Agency and the Histadrut (the Workers' Society)[45]. No clear boundaries existed between these two centers of power and the state-in-the-making organizations[46], and Jewish membership in these associations was of high portions[47]. After the birth of Israel the Mapai, the Histadrut and the Jewish Agency shared power and cooperated to create an apparently solid State partnership[48]. Hence, the Zionist project and institutions strove to turn the Jewish exile's society and culture into a state entity. Ergo,

> Paradoxically, since the establishment of the state symbolized for the Jews the revolutionary transformation of their condition, from a state of utter powerlessness and vulnerability to an empowered position culturally and politically, *the state has come to represent to Israeli Jews* not so much an instrument of self-government that can deteriorate and become a potential threat to their freedom as individuals and communities, but *the very idea of individual as well as collective Jewish freedom*. This stands in marked contrast to the Western Liberal-democratic tradition, in which the historical conflicts between the ruling monarch (or

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Israel: The First Decade of Independence (Albany: State University of New York Press, 1995) 83 at 85: "During the early statehood period, the burden was on those people who wanted to alter institutions that had existed in the Yishuv. The basic institutions of the Yishuv - political parties and their bureaucracies, educational systems, health services, newspapers, the Histadrut - remained relatively intact as a community became a state...".

[45] Leadership in these various quasi-state institutions overlapped frequently in the pre-state era, or changed hands within the same elite milieu afterwards. For example, Ben-Gurion, Mapai's leader, was also the Jewish Agency President for a number of years.

[46] Kimmerling, supra, note 35 at 404.

[47] By 1926, 70% of the Jewish workers in Palestine were members of the Histadrut. In the break of the State, about 90% of the Jewish workers were Histadrut members. See J. S. Migdal, The Crystallization of the State and the Struggles Over Rule making: Israel in Comparative Perspective" in: B. Kimmerling (Ed.), *The Israeli State and Society* (Albany, State University of New York Press, 1989) 1 at 16.

[48] The government leadership - which, as mentioned earlier, was composed of these organizations - were all members of the elite, sharing salient sociological characteristics and generating a hegemony over Israeli society. That hegemony was all-encompassing: within the agriculture and industry enterprises, in the creation of a new Hebrew culture, and in controlling and allocating state resources. See Y. Shapiro, *Democracy in Israel* (Ramat-Gan: Massada, 1977) (In Hebrew); D. Willner, *Nation-Building and Community in Israel* (Princeton, N.J.: University Press, 1969). See also P. Y. Medding, *Mapay in Israel: Political Organization and Government in a New Society* (Cambridge, England: University Press, 1972). For further review of how the coalition between Mapai, the Histadrut, the Jewish Agency and the Zionist World Organization was constituted and maintained, generating Mapai's hegemony, see Migdal, supra, note 47 at 16-18.

aristocracy) and the people induced powerful public ambivalence toward the state as a potential enemy of the individual and the voluntary social realm[49].

Indeed, many socio-political groups seek national self-determination. In this light, Zionism is no different. Furthermore, many national communities preceded their nation-states[50]. Fewer identified nation with religion, and less still conceived their national self-determination as a '*return to origins*'[51]. Although the Zionist movement celebrated universalistic ideas[52], its particularity was in its special mixture of both modern and traditional elements, as well as a religious and secular salvation. The suggestion, made before W.W.II, to establish a Jewish State in Uganda was rejected by the Zionist Congress precisely because Uganda bears no national religious meaning to the Jewish people. The Jewish state could only be reestablished in the Land of Israel, to where all of the dispersed Jewish people would return. The development of an independent *civil* society, free of strong inclinations to support the state as its savior, was thus greatly impeded[53].

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[49] Ezrahi, supra, note 34 at 261. See also B. Susser & E. Don-Yehiya, "The Nation v. The People: Israel and the Decline of the Nation-State" (1989), 35:8 Midstream 13 at 15: "In the Western experience, the nation and the people were both contemporaries and rivals...within the Jewish experience, the nation and the people were neither contemporaries nor rivals...Israel understands the state as the institutional incarnation of the nation".

[50] Think for example of the way the United States came into being. It started by a migration of groups and individuals, who sought, for various reasons, a new territory in which to establish their homes. Some of these groups, like the British Puritans, were persecuted in their countries of origin and were looking for a new safe place in which they could freely live according to their beliefs.

[51] Ezrahi, supra, note 34 at 256-257.

[52] Such universalistic ideas were the Zionist early commitment to foster Enlightenment-secular cultural norms and ideologies and universalistic civic rights of national self-determination. For this point see E. Cohen, "Israel as a Post-Zionist Society" (1995), 1:3 Israel Affairs at 203. Also see S. Avineri, *The Making of Modern Zionism* (New York: Basic Books, 1981).

[53] I believe Zionism's commitment to both universalistic and particularistic elements was inherently contradictory. The universalistic ideas of Zionism were not so much the acceptance of the Enlightenment but the rejection of the religious definition of Judaism and the Jewish people. Zionism never fully embraced humanitarian political goals per-se. Its humanitarianism was embedded within the Jewish community. Its salvation was directed to Jews, not to all mankind. Thus, I find that the universalistic notion in Zionism was subordinated to the particularistic one. Under this hierarchy, it was harder to develop civil society's ingredients. Contrasted against Zionism, one can contemplate the "Cannanite" ideology as an example of a possible Israeli civil society. The Cannanite was a movement which took as its model the Hebrew culture of the early biblical period, which was shaped not only by the ancient Israelis but also by *other nations* in the *region*. Yet, the Cannanite was nothing more than a group of intellectuals, whereas Zionism was a

2. Lack of important components for civil society

In Israel during the early years, there was a distinct lack of important components of an active civil society, to wit, a free media, interest groups, independent cultural institutions etc.

Interest groups are an important pillar of civil society[54]. Yet in many respects, interest groups were almost completely missing in Israel's landscape[55]. Instead, Israel was permeated with political parties, subordinating interest groups and shaping all other institutions[56]. Yet, unlike other democratic societies, where parties emerge in an already existing social entity, in Israel the parties were the central factor in shaping the nascent Israeli society[57]. They far exceeded their usual role: they became the most, if not the sole

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comprehensive ethnic-national Jewish movement. For more details see: Y. Shavit, *From Hebrew to Canaanite: Aspects in the History, Ideology and Utopia of the "Hebrew Renaissance"* (Jerusalem: Domino Press, 1984) (In Hebrew); Horowitz & Lissak, supra, note 41 at 100-101, 118.

[54] For that point see Y. Yishai, *Interest Groups in Israel: The Test of Democracy* (Tel Aviv: Am Oved, 1987) (In Hebrew). See also A. H. Birch, "Political Authority and Crisis in Comparative Perspective" in: K. Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) 87

[55] Interest groups are organized groups of persons sharing particular concerns and impacting upon the political process by requiring policy-makers to respond to their demands in some way. See M. Drezon-Tepler, *Interest Groups and Political Change in Israel* (Albany: State University of New York Press, 1990) at 1. Drezon-Temper mentions that when she confessed her intention to study interest groups in Israel, the common response she received was: "but there aren't any". *Ibid.*

[56] Admittedly, political parties are often conceived as civil society - see page 18, footnote 5. They are also conceived as posited between state and society as their middleman. See: B. Kimmerling, "State-Society Relations in Israel" in U.Ram (Ed.), *The Israeli Society: Critical aspects* (Tel Aviv: Brerot, 1993) 125 (In Hebrew); A. Gagnon & B. Tanguay, *Canadian Parties in Transition: Discourse, Organization and Representation* (Scarborough: Nelson, 1989) at 2-11. Yet within the Israeli context, they were actually more affiliated to State institutions - see chapter one, *ibid.*

[57] G. Goldberg, *Political Parties in Israel - From Mass Parties to Electoral Parties* (Tel-Aviv: Ramot, 1992) (In Hebrew) at 16.

influential power within society, leaving other associations powerless[58]. Moreover, the parties, especially Mapai, were oriented to, or identified with, the State. Little space, if any, was left for autonomous groups seeking to achieve private, as opposed to public, objectives[59].

Second, an independent media, reporting freely on the governmental activities, is another feature of a vibrant civil society[60]. However, the Israeli press' early days departs from this model. A number of factors are responsible for that, foremost among which was the Editors' Committee. Initiated by Ben Gurion in 1953, the Committee sought to reach an Informal Agreement between the newspapers' editors-in-chief and the Military Censor[61]. The Agreement - kept by both parties for over three decades - declared that even though the censorship laws grant the Censor absolute discretion, only a limited censorship regarding security matters would ever be imposed on the press -- in exchange for its cooperation[62]. As a result of this cozy relationship, the press saw itself as another arm of the State, and agreed to shelter information considered 'harmful' to national

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[58] See page 6. Also: Drezon-Tepler, supra, note 55, at 1. Not accidentally, Israel acquired the title: "The Etat Partitaire" or the "Partienstaat": B. Akzin, "The Role of Parties in Israeli Democracy" (1955), 17:4 Journal of Politics 607.

[59] Yishai, supra, note 54, at 37, use professional organizations as an example. Professional organizations are usually perceived as interest groups. The Eretz-Israel teacher's association (Histadrut H-morim Be'Israel) was established not as a vocational institution aimed at caring for teachers' interests but as a national organization which aspired to promote national missions. The respect and prestige of an interest group were thus determined according to its contribution to materializing national-collective ideals. Moreover, since financial resources in those days were scant, most of the interest groups received financial aid from the state. They were thus were compelled to limit their actions to the ones supporting existing policies or practices. See Y. Yishai, *Land of Paradoxes: Interest Politics in Israel* (Albany: State University of New York Press, 1991) at 81.

[60] E. Shils, "The virtue of civil society" (1991) 26:1 Government and opposition 1 at 10.

[61] S. Lehman-Wilzig, *Wildfire: Grassroots Revolts in Israel in the Post-Socialist Era* (Albany: State University of New York Press, 1992) at 92.

[62] P. Lahav, "A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture" (1988), 10 Cardozo Law Review, 529 at 535.

interests by the Censor[63]. Furthermore, up until the mid-1980s the state had a monopoly over radio, and all of Israel watched the State-owned one-channel television[64]. A fighting media, which exposes governmental scandals or critically reports the State's actions, was, to a great extent, absent. In cases when the media did 'dare' to criticize the State's activities and initiatives, it was stringently attacked by State officials[65].

Third, the development and existence of independent art, science and cultural institutions are also considered to account for part of a liberal, democratic civil society[66]. In the Israeli case, context-free art or culture were hard to find. The affinity between the revival of the Hebrew language and the Zionist revolution inhibited the development of

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[63] *Ibid.* Lehman-Wilzig claims that: "The Israeli press in general delivered and publicly supported the government line almost across the board... From the average Israeli reader's perspective, the papers were de-facto part and parcel of the whole establishment" *Ibid.* Supra note 61. See also D. Goren, *The Press in a Besieged Society* (Jerusalem: Magnes Press, 1975) (In Hebrew); R. Kahane & S. Kna'an, *The Behavior of the Press in Security Emergency Situations and Its Influence of Public Support of Government* (Jerusalem: The Hebrew University Press, 1973) (In Hebrew). The Israeli media in early statehood was even named 'the conscripted media' - see D. Caspi and Y. Limor, *The middleman: The Media in Israel* (Tel-Aviv: Am Oved, 1993) (In Hebrew) at 136-139.

[64] In the mid-eighties, pirate cable television was first introduced to Israelis. Lehman-Wilzig, supra, note 61, at 84-95.

[65] The attack on the Supreme Court from the Knesset podium by Ben-Gurion and the Minister of Justice in 1952 (see page 15), was accompanied by an attack on the press, as a result of media's publications regarding the financial problems of the Government. The press was portrayed as a villain obstructing the state's operation. See P. Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy" (1990), 24 Israel Law Review 211 at 244-145. The press has once again been severely attacked when it gave extensive coverage to the 'Shmorak Report' in 1951. The stringent report, composed by the Jewish Agency's Comptroller, exposed financial irregularities and misuse of public money for personal purposes. Shmorak, as well as his report, were scornfully dismissed by the Jewish Agency - Mapai leaders. The Jewish Agency's management decided to stop the publication of the report. Yet, *Maariv* newspaper had already exposed the affair. The press was condemned for providing a public platform for the accusations, and Dr. Smorak was accused in deliberately and prematurely leaking the report. Dr. Smorak, rejecting these accusations, eventually resigned. For further notes on this affair see E. Sprinzak, *Every Man Whatsoever Is Right In His Own Eyes - Illegalism in Israeli Society* (Tel-Aviv: Sifriat Poalim Publishing, 1986) (In Hebrew) at 79-83.

[66] Ezrahi, supra, note 34 at 263; P. Macherey, *A Theory of Literary Production*, trans. G. Wall (London: Routledge Press, 1978). It is also argued that a cultural work should not serve any particular goals or programs in the context of public affairs. *Ibid.*

cultural forms that were distanced from the State[67]. After Israel's establishment, very few Israeli artists managed to avoid the socio-political Zionist realization[68], or escape from political parties' membership[69]. By analog, the scientific academy's early bonds with the Jewish political establishment hampered the institutions' independence from the state or the development of bases for public criticism over governmental actions[70].

Furthermore, public financial support for academic and artistic institutions added other constraints to the development of independent scientific and artistic critical

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[67] B. Harshav, "The Renaissance of Israel and the Modern Jewish Revolution" in N. Gretz (Ed.) *Perspectives on Culture and Society in Israel* (Tel-Aviv: Open University Publications, 1988) 7; D. Miron, "From Creators and Builders to Homeless" (1985), 2 Igra 71. In 1925, when the Hebrew University was established in Giva'at-Ram, a passionate debate concerning the language in which the courses will be conducted enraged the Jewish community. After rejecting claims that 'Physics and Mathematics cannot be taught in Hebrew but only in German' it was decided that everything within the educational palace will be taught in Hebrew. Some scholars contend that the inability of the Israeli artists to criticize the state derived from state censorship and control. See I. Ben-Ami, "Artistic Censorship in Israel: 1949-1991" (1995), 16:1 Contemporary Jewry 3.

[68] I. Even-Zohar, "The Emergence of Native Hebrew Culture in Palestine: 1882-1948" (1981), 2 Studies in Zionism, 167, mentions at 182: "The dilemma of the Israeli writer, is that, unlike the author who writes from within a stable, well-established society, he cannot escape from the revolutionary reality which he confronts". See also D. Miron, *Touching the Matter: Essays on Literature and Society* (Tel-Aviv: Zmora-Bitan Publishers, 1991) (In Hebrew) at 339-382. Miron argues that until 1967 and even more so afterwards, many writers joined the political camps, and were affiliated to one or another political parties' backyards (supra, at 375).

[69] D. Miron, *If There Is No Jerusalem: Essays on Hebrew Writing in a Cultural-Political Context* (Tel-Aviv: Hakibbutz Hameuchad Publishing, 1987) 56-67.

[70] "Like other liberation and revolutionary movements, ideological and political Zionism integrated Jewish and Hebrew scholars, writers, and intellectuals into the collective missions of the revolutionary movement, and so it did not leave much space for the creative critical role of culture and its inherently transformative energies vis-a-vis the political establishment and the official ethos of the state that were brought about by the success of the Zionist revolution"; Ezrahi, supra, note 34 at 261. Indeed, during the last decade a new generation of historians and sociologists (who are also known as the 'New Historians' and 'the New Sociologists') openly rise criticism towards the 'old' generation of academic works, as being in the establishment's service. See, for example, the works of the 'new sociologist' Uri Ram: U. Ram, *The Changing Agenda of Israeli Sociology: Theory, Ideology and Identity* (Albany: State University of New York Press, 1995); U. Ram, "Zionist Historiography and the Invention of Modern Jewish nationhood: The Case of Ben Zion Dinur" (1995), 7:1 History and Memory 91; U. Ram, "Civic Discourse in Israeli Sociological Thought" (1989), 3:2 International Journal of Politics, Culture and Society 255.

thought[71]. Considering all of these factors, it is no wonder the growth of independent civic culture in Israel was delayed[72].

Against this background, *the Line*'s experience becomes understandable. *The Line* first emerged from within Mapai. Its asserted purpose was to help the state. Being a volunteer organization, which was created to support the state's missions and heavy burdens, *the Line* is an exemplar of the fuzzy distinctive feature of the state/civil society boundary in Israel[73]. At first, *the Line* received enthusiastic encouragement from the establishment, the party-in-power and the general public[74]. Yet, immediately after *The Line* sought to divorce itself from that state of affairs, by contrasting its actions with those of the State, the support turned into resentment. While *The Line* wished to implement *civic* control over the corrupt, bureaucratic patterns generated by the State's apparatus[75], neither the state nor society were ready for such criticism. Any criticism against Mapai or the government perceived to be an act of disloyalty to the State and the Zionist endeavor[76]. Buds of civic faultfinding or discontent with the political bureaucracy were doomed to be harshly repressed by the State and the society - i.e., the Chief of Police,

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[71] *Ibid.* See also I. Ben-Ami, "State Patronage or State Control: The Israeli Case of Government Involvement in the Arts" Abstract: The International Sociological Association, 1994.

[72] Ezrahi, *Ibid.* at 262, argues as follows: "Insofar as the separation between the voluntary domain of society and the regulated domain of the state has been structurally necessary to any liberal-democratic order, with science, literature, art, and journalism located mostly in the domain of society, the interpenetrating of the two realms in Israel - associated with the rise of a powerful nationalist collective ethos - has posed a serious obstacle to the evolution of an Israeli liberal-democratic civic culture".

[73] One out of the two most distinctive features of the relationship between the state and 'civil society' in Israel is that fuzziness. See M. Shalev, "Jewish Organized Labor and the Palestinians: A Study of State/Society Relations in Israel" in B. Kimmerling (Ed.), *The Israeli State and Society* (Albany, State University of New York Press, 1989) 93.

[74] Sprinzak, supra, note 65, at 86.

[75] The Line attacked Mapai, its leaders and State's institutions (like the Israeli police and the Attorney-General) for their reluctance to deal with what they thought was incriminating information gathered about persons from higher ranks. *Ibid.*

various Mapai leaders, artists, poets, and, consequently, by the District Court. In its decision on the libel suit against *The Line*, the district Judge said:

> "The defendants *dangerously* exaggerated their intentions to improve the state by fighting corruption. Their way of presenting the problems had *distorted* the *image of our young state* and its heavy struggles with security, building and creation. The defendants *ignored* every *accomplishment* or any *positive side* of the state's efforts[77] (Emphasis added).

The Supreme Court, notwithstanding its criticism of the District Court for its harsh judgment of *the Line*, condemned *the Line* for turning the Court into a public political arena. The Supreme Court seemingly 'lined-up' on *the Line*'s side. Yet, the case was brought before the Court as a civil appeal, and as such, had to be decided. *The Line* did not try to involve the court as HCJ. If it did, most probably it would have failed; the Court would have employed standing and justiciability doctrines, or its discretionary power, to dismiss the case[78]. The Court had indeed revealed its discomfort and reluctance to deal with political cases. In the "Kastner case"[79], the Judges complained that the task of inquiring into Dr. Kastner's activities and intentions during the Holocaust 'had better be left to the historians'[80]. In that case, a Supreme Court judge also mentioned: "in an ordinary libel case, there certainly was no 'escape' for the Judges"[81]. Hence, it is

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[76] Peretz & Doron, supra, note 33 at 78.
[77] Civil Case (Tel-Aviv) 113/56, supra, note 4 at paragraph 201.
[78] According to section 15G of the Basic Law: the Judiciary, the HCJ have discretion as to whether to hear a petition on its merits or whether to dismiss it without further inquiry. The Court could also use the standing and justiciability devices, as in its early days, interpreting these doctrine very narrowly. See the next chapter, pages 92-93.
[79] Civil Appeal 232/55 *Attorney General v. Grunwald* (1958) 12 (3) P.D. 2017. The libel suit involved the reputation of the late Zionist leader, Dr. Kastner, regarding his performance to save the fate of Hungarian Jewry under Hitler.
[80] *Ibid* at 2025.
[81] A. Vitkon, "Justiciability" (1966) 1 Israel Law Review 40 at 43.

reasonable to assume that the Supreme Court's judges would 'escape' a political case, if they could. The hypothetical Line's petition would be just one of these occasions[82]. Further, those days were not very tranquil for the Supreme Court[83]. Dealing with a petition which directly inquired into Mapai's governmental performance or the State's money-allocations priorities certainly would not add tranquillity to Court-State relations.

In fact, the prospects that *the Line* would bring its case before the HCJ were not very high from the beginning. The use of the Court by civil society's groups to advance their interests was not yet acknowledged in Israel. As already stated, the very idea of a possible state/society separation was alien before and after the establishment of the State, as some of the most basic components necessary for the development of a vibrant civil society that stood against State power were missing[84]. These components remained undeveloped after Israel was established, whereas the State took a central role in war mobilization, immigrant absorption and the Arab minority administration[85]. Even when *individuals* brought their individualistic interests before the HCJ, they did not always find

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[82] In another petition (H.C. 45/55 The Arab Committee for the Defense of Land in Nazareth v. Minister of Finance et al. (1955), 9 P.D. (3) 680), an Arab Committee had filed a petition against the Government's measurements of privately-owned Arab land aimed for later land requisition. The Supreme Court rejected the petition on the grounds that the Committee did not prove "locus standi". Additional examples can be found in Z. Segal, *Standing in the Israeli High Court of Justice* (Tel-Aviv: Papirus, 1986) (In Hebrew).

[83] See the next chapter regarding the events taking place before the Basic Law: the Judiciary was enacted on 1953 - pages 96-97.

[84] D. Horowitz, "Before the State: Communal Politics in Palestine Under the Mandate" in B. Kimmerling (Ed.), *The Israeli State and Society* (Albany, State University of New York Press, 1989) 28, at 35, mentions that ideological reasons hardened the development of 'market economy' in the Yishuv and in the state's early days. Higher prices were paid to Jewish workers in the Jewish community compared to Arabs performing the same tasks, and higher prices were paid to Arabs for land purchased by Jews in comparison to their 'market' value. The advocacy of property rights is a central feature of civil society's interests.

[85] Migdal, supra, note 20 at 124.

redress[86], since the Court, as the society in which it adjudicated and the state to which apparatus it belonged, conceived no sharp distinction between the state and the society's interests[87].

3. The Statism policy

A third factor to bind the development of a prolific civil society derived from the statism (Mamlahtiyut) policy, conducted by Ben-Gurion. The statism ideology rested on two elements: citizens' services should be provided by the state alone (not by political parties or voluntary organizations) and state interests should always prevail over other interests[88]. The policy was first and foremost directed at weakening the parties and displacing the power both they and the Jewish Agency yielded[89]. The policy was also directed at consolidating all other foci power into the government's hands[90]. Motivated mainly, although not solely, by the fear of societal cleavages, the statism ideology was announced and implemented. An additional ground supporting statism concerned the Jewish stateless history: doubting the Diaspora Jews' competence for self-governing[91],

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[86] P. Lahav claims that most of the housing expropriations executed during the early years of the state were sustained by the courts, and the Justices preferred not to intervene in the wide discretion vested in the administration. See P. Lahav, "The Supreme Court of Israel: Formative Years, 1948-1955" (1990), 11:1 Studies in Zionism 45 at 61-62.

[87] Lahav, *Ibid* at 62: "The Court conceived the state as neither a liberal entity, neutral, value free, and separated from society, nor as an entity meant to ensure maximum freedom to individuals".

[88] That is, individual, party or non-statial interests. Peretz & Doron, supra, note 33 at 66.

[89] Lehman-Wilzig, supra, note 61 at 22-23.

[90] In the name of statism, Ben Gurion ordered the sinking of the Altalena ship after Begin - the Leader of the Ezel (the National Military Organization who first established in 1939 to fight the British Mandate) - refused to hand over the arms on the ship to the State's army. In the name of the same policy, Ben-Gurion also ordered the Palmach (the militia forces of the Hagana, the underground self-defense organization of the Yishuv) to disband and integrate all its units and equipment with Zahal - Israel Defense Forces.

[91] "Ben Gurion is known, in fact, for his conviction that the Jews were lacking civic virtues and for his conclusion that a special effort to teach them to live in a sovereign state was highly necessary"; E. Sprinzak, "Elite Illegalism in Israel and the Question of Democracy" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 173 at 182.

Ben Gurion believed only the State could foster the development of a well-ordered society[92]. Yet, the result was a deepening of the government's centralization and public dependency on its institutions:

> "Mamlahtiyut... have been perceived by the Israeli public as a meaningless shift of power from one political source [Mapai party] to another [Mapai Government], but in reality in only further concentrated power in the State of Israel's central government..."[93].

In conclusion, under such circumstances, it was unlikely that civil society would flourish. The three factors (Zionism, statism and the undeveloped elements of civil society) illuminate my assumption that *The Line* was an exception in the early Israeli societal scene. Ben-Gurion's philosophy that the Jews were not ready to conduct their affairs independently may have been completely baseless. He may also has been wrong in his confidence that Statism was the best solution to prevent societal cleavages. Zionism may have been mistaken as well in regarding the State as its most important feature. Yet all these factors had generated a strong state in which a weak society was trying to bloom. The blooming had inevitably been postponed until the state would weaken, change or cease to have such a profound impact on its citizens.

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[92] M. Cohen, *Zion and State: Nation, Class and the Shaping of Modern Israel* (Oxford: Basil Blackwell, 1987) at 201.

[93] Lehman-Wilzig, supra, note 61 at 26.

III Israeli Society in the Eighties

The *MQG* functioned in a very different environment than *the Line* had during the 1950s. By the mid 1970s, foundations of an effective civil society were laid down, and they have been expanding ever since[94]. The number of interest groups, the degree of organizational independence they obtained from the political system, their types, methods of activities and goals - all have increased and enhanced considerably in the 1970s and 1980s[95]. Civil protest organizations seemed to mushroom after the 1973 war[96]. Cultural works undermined some official state myths and criticized the Israeli leadership and political system; sharp political satire appeared on the state-owned-one-channel television[97]. The early eighties saw color broadcasts, and in the mid-eighties Israel experienced a telecommunication revolution: a quarter of the households in Israel were now connected to cable television[98]. Local and non-establishment newspapers emerged[99]. The accelerated influence of American culture became evident during the 1980s, resulting in the deepening and strengthening of consumer values and liberal, individualistic

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[94] Peretz & Doron, supra, note 33 at 68. See also E. Ben-Zadok, "Neighborhood Renewal Through the Establishment and Through Protest" in K. Auruch & W.P. Zenner, *Critical Essays on Israeli Society, Religion, and Government* (Albany: State University of New York Press, 1997) 53 at 54: "During the 1970s the relationship between the central government and local governments have been gradually decentralized...the trend toward decentralization and local authority was also characterized by an increasing number of citizen-participation groups, such as local voluntary associations, planning committees and environmental councils".

[95] Yishai, supra, note 54 especially at 69-90.

[96] Migdal, supra, note 20 at 126.

[97] Ezrahi, supra, note 34 at 264. Hanoch Levin, a famous playwright, wrote a sharp political satire called "The Queen of the bathtub". The arrows were directed at Prime Minister Golda Meir, the cabinet and Meir's famous kitchen - the place in which allegedly the most important decisions were decided. The play aroused public outbursts and was brought down from the stage after a number of performances. Additionally, a sharp political satire called Nikuy-Rosh (Cleaning the Head) was shown once a week and became one of the most popular programs. Its - sometimes poisoned - arrows were directed at all of the leading political personalities.

[98] Lehman-Wilzig, supra, note 61 at 88.

[99] D. Caspi and Y. Limor, supra, note 63 at 140, 230-249.

norms[100]. Generally speaking, the economic situation of Israelis improved as well. As the wealth of middle class Israelis was enhanced, they became a powerful factor in society[101]. Within the educational sphere, parental initiatives activated the hitherto dormant right declared in the State Education Law, that allowed parents to determine 25 percent of a school's curriculum[102]. Civil organizations such as '*The Committee of Concerned Citizens*" set up local support groups, circulating petitions and organizing demonstrations to support the writing of a constitution and the changing of the electoral system. A group of law professors organized to draft a Israeli Constitution[103]. The outburst of the Lebanon war in 1982 precipitated an attempt to institute a right of conscientious objection to military service, challenging what has traditionally been the un-challengeable: the state's monopoly over the definition of national security. This challenge enabled individuals to question the terms of their unwritten contract with the state[104], through redefining and reinterpreting the content of citizenship and participation in the public sphere[105].

Although many more examples can be provided, the foregoing examples are sufficient to mark the general, tangible trends that have occurred in Israeli society during its third and fourth decades. Apparently, a boundary was erected between the Israeli State and its society. These two entities, although still coinciding in many regards, had

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[100] M. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel-Aviv: Ma'agalay Da'at Publishing, 1993) (In Hebrew) at 125; Horowitz & Lissak, supra, note 41, at 134-135.

[101] Lehman-Wilzig, supra, note 61 at 50-55. The importance of the middle class, the bourgeois, for the development of civil society was acknowledged by many. See C. Calhoun, "Civil Society and the Public Sphere" (1993), 5 Public Culture 267, at 274.

[102] *Ibid* at 110-111.

[103] B. Susser & J. Schreiber, "We the Israeli People: A Draft Constitution for Israel" (1988), 34:6 Midstream 13.

[104] S. Helman, "Negotiating Obligations, Creating Rights: Conscientious Objection and the redefinition of Citizenship in Israel". Draft. Forthcoming in (1999), 3:1 Citizenship Studies.

developed spheres of separateness and divisions over time. Some claim this alleged boundary was so thin, its real existence was questionable[106]. Yet, the growth of a civil society is not simply a 'black or white' question of whether it exists or does not; it is more a question of the strength or weakness of different pillars of civil society[107]. I argue that civic groups, seeking to better Israeli society and leadership - like *the Line* and its later equivalent, *MQG* - were a fairly weak pillar in the Israel of the fifties. Acting in the public sphere without the mediation of a political party or reliance on the State, was almost impossible. Bypassing the political avenues in an attempt to reach citizens and/or to participate in decision-making, was fated to encounter negative reaction. On the other hand, by the eighties, many such organizations functioned without disturbance[108].

In the next sections, I will suggest that there are three functions that the Israeli HCJ came to hold in Israeli society. These functions, taken together, explain why the HCJ is such a central institution in the Israeli polity of today.

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[105] *Ibid.*

[106] R. Schiff, "Civil-Military Relations Reconsidered: Israel as an "Uncivil" state" (1991), Unpublished draft. Copy with the author. More ambiguously, see Migdal, supra, note 20 at 124: "It is still difficult to read how far society has come in developing participatory civic life outside the control of the Israeli state organization". Kimmerling, supra, note 35, claims that the growth, since 1967, of a 'Jewish nation state' identity threatens a possible expansion of an independent civil-society in Israel. Ezrahi, supra, note 34 at 269-270 concludes that even nowadays, the capacity of art and literature to check the power of ethnic, religious and political nationalism remained limited in scope.

[107] Migdal, supra, note 20 at 137.

[108] "Examples of *generalist lobbying groups* include those that seek to promote electoral reforms, *clean government*, a written constitution, protection of the environment and the nature, consumers' interests, health and the struggle against specific diseases and the like"(emphasis added): Peretz & Doron, supra, note 33 at 172. It is worth mentioning that the MQG was never financially supported by a governmental authority. Most of its budget comes from the NIF (the New Israel Fund) - an American organization collecting Jewish contributions in order to promote voluntary organizations in Israel. This point is an additional feature distinguishing the two examples.

1. Participating through petitioning

Many civil organizations pursue their quests through the Court, the *MQG* being one of them. At first glance, using the Court is not conceived as a direct attempt to engender citizens' participation via civic paths. After all, the Court is part of the State's apparatus. Likewise, using the Court should not be construed as a path to push civil society into a participatory role in the decision-making processes. Traditionally, and to a certain extent even presently, demands for public participation in the decision-making processes were directed at the legislative body or were manifested on the streets. Groups wishing to effect or claim a voice in important decision-making proceedings were expected to lobby the Parliament[109], while public discontent with governmental decisions or acts were expected to be translated in the polls, or into public protests[110]. In contrast, turning to the Court meant raising individualistic claims and seeking rights[111].

Contemplating this issue, I suggest using Habermas' interpretation of the *public sphere* to explain why courts could provide a platform in which demands for participation in the decision-making could be asserted.

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[109] C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns & C. Williams, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 183. Taylor divides societies into two models: the participatory model and the right model. In the first model, social goals are pursued through legislative institutions. In the second, individualistic rights are pursued through the courts (see especially pages 205-222). See also W.A. Borgart, *Courts and Country: The Limits of Litigation and The Social and Political Life in Canada* (Toronto, Oxford University Press, 1994).

[110] S. Lehman-Wilzig, *Public Protest in Israel, 1949-1992* (Ramat-Gan, Bar-Ilan University Press, 1992) (In Hebrew). Public protest includes: spontaneous riot, political strike, street demonstrations, indoor protest gathering, hunger strikes etc.

[111] Taylor, supra, note 109.

According to Habermas, the public sphere should be those arenas in which *deliberative exchange* and *rational-critical arguments determine actions*[112]. Habermas' public sphere, even though it is in the usage of civil society, is also oriented to the state[113]. In such a sphere, a forum is provided for an ideal discourse to take place - that is, a discourse in which economic status or/and class inequalities are disregarded, bear no limitations on, or exclusion from, participation[114]. Further, these ideal discourses are concentrated around politically significant topics[115]. Therefore an appropriate public sphere should provide civil society with an arena for exchanging rational arguments and debating hard decisions which affect people's lives.

Courts, I suggest, are one such arena. First, courts, especially High Courts of Justice, are part of the public sphere. Further, courts are also part of governmental institutions, and so their orientation to the state is clear. Second, courts enable the fair exchange of opinions as two (or more) parties to a case present their evidence and contentions as an equal footing. Third, rational argumentation had long been defended, or criticized, as the very foundation of, or the most important criteria for, judicial adjudication. As rationality and impartiality are our expectations from judges[116] while

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[112] J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1989).
[113] Calhoun, supra, note 101 at 277.
[114] *Ibid.* at 273.
[115] *Ibid.*
[116] From both sides of the fence, rationalism (as opposed to emotionalism) purports to be the way courts arrive at their decisions. For the supporters of rational criteria in adjudication see, for example, R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at 81-130; For the opponents to such a criteria see, for example, J.C. Tronto, "Beyond Gender Difference To A Theory of Care" (1987), 12:4 Signs 644; S. Benhabib, "The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory" in S. Benhabib & D. Cornell (Eds.) *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987) 77. On the impartiality and rationality see, for exmaple, J.B. Weinstein, "Ethical Dilemmas in Mass Tort Litigation" (1994) 88:2 Northwestern University Law Review, 469 at 538.

hearing and adjudicating cases, a deliberative exchange is promoted. Finally, courts' orders, once followed, do determine actions and policies[117].

Applying the above to the Israeli case, I propose to treat petitions submitted to the HCJ by concerned citizens as representing "the potential for the *people*, organized in *civil society*, to *alter* their own conditions of existence, *by means of rational-critical discourse*"[118]. The conditions which are pursued for alteration are not necessarily economical (that is - conditions related to the individual status). Alteration of the political participation conditions (that is - conditions related to the community) as a result of the public discourse are also a desired outcome[119]. Thus, the Israeli HCJ becomes one of the arenas in which state and civil society openly discuss policies and exchange their ideas as to desirable public principles. As the HCJ is relatively accessible[120], it has the potential of disregarding societal differences and of providing a broad arena for debating important political issues. The *MQG* and similar movements, were asking for a Court's ruling in those public political decisions and/or actions for which their participation, according to their view, was not considered.

Research, conducted in Israel in 1994, found that the substantial increase in interest groups' appeals to the HCJ during the 1980's was the result of three cumulative causes: the Court's openness to review the cases, the over-bureaucratization in the

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[117] A. Chayes, "The Role of the Judge in Pubic Law Litigation, (1976) 89 Harvard Law Review 1281.
[118] Calhoun, supra, note 101 at 279.
[119] *Ibid.* at 274
[120] "The Israeli Supreme Court is very accessible to the average Israeli... In Israel, justice is truly accessible to the people" A.M. Dodek, "Book Review: Courts, Politics and Culture in Israel by M. Edelman" (1995), 36:2 Harvard International law Journal 571 at 576.

executive's activities, and a decline in the Knesset's efficacy[121]. The broadening of the usage of the 'petition strategy' by interest groups during the eighties is not particular to Israel, and is also well recorded in the United States[122]. Yet public interest groups litigating in American courts are usually concentrated on the advancement of *civil rights* of specific groups (e.g., the National Association for the Advancement of the Colored People, the Consumer's National League, The League of Woman Voters etc.)[123]. It is almost impossible to find a group equivalent to the Israeli *MQG*[124], that concentrates on advancing socio-cultural *public rights* and norms. These movements have no specific target-group, nor do they have defined issues to fight against. Their target is a 'well-ordered government', and the fight is against all those State actions which seem to deviate from an ethical, qualitative government. Consequently, the impetus motivating these groups to resort to courts is somewhat different, even if some of the tactics they use are the same[125]. Another factor to ponder is the degree of political activism in society: Israeli

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[121] R. Adam, "*The Petition to the High Court of Justice as a strategy of Interest Groups in Israel*". (1994), Submitted as a Thesis in Political Science, University of Haifa, Israel (In Hebrew) (Hereinafter: *"The Petition as a strategy"*) at 134-136. While in 1981, 23 interest groups appealed the Court, in 1990, 56 of them did as such. *Ibid.* at 78-81.

[122] M. Silverstein & B. Ginsberg, "The Supreme Court and the New Politics of Judicial Power" (1987), 102:3 Political Science Quarterly 371.

[123] J.M. Berry, *Lobbying For the People* (New Jersey: Princeton University Press, 1977); L. Epstein, *Conservatives In Court* (Knoxville: University of Tennessee Press, 1985).

[124] The MQG is but one example of similar groups and movements working to achieve more of the same goals. Others are: The Public Committee for a Constitution, Constitution For Israel, The Movement of Concerned Citizens, Amitay - Citizens for a well-ordered administration, Hemdat - the Movement for Freedom of Science, Religion and Culture etc.

[125] Among them are inter-group factors - such as the degree of group cohesiveness, the focused interest of the group, the amount of resources available and the extent to which the interest itself is clear and explicit - and external factors - such as the legal situation, the degree of threat posed on the group, the political atmosphere and public agenda. See J.F. Kobylka, "A Court-Created context for Group Litigation" (1987), 49:3 Journal of Politics 276. A movement like the MQG is a small group, without a well-defined, focused interest, which is not directly threatened by any governmental activity or decision. Yet, the definition of a public interest group does fit the MQG; an interest group is defined as a quasi-middleman between the citizen and the government, which seeks to translate what it perceives as the public will of the voting citizen to clear and explicit policies and objectives (Berry, supra, note 123). Another differential feature between the Israeli interest groups and their American counterparts is the degree of belief in the efficiency in

society is considered to be very political[126]. The voting turnout rate in Israel is among the highest in the Western democratic world[127]. Society's politicization contributes its own share to the uniqueness of the Israeli public petitions: these petitions seek to advance political *communal* or *societal* interests, *values* and *norms* which have been neglected by the government.

The above-listed particular Israeli characteristics - the many socio-political movements which seek to advance public behavioral norms and ideals; the politicization of the society; the motives behind such a tendency - support my contention that public petitions in Israel provide Israelis an arena in which they can meet their government and participate it its decision-making. These petitions are the means through which civil society and the state exchange opinions as to how public decisions should be reached, and as to what these decisions should be. As we see, the Court has become one of the effective channels influencing the decision making processes of the administrative State[128].

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demonstrating: while only 8% of American public interest groups note demonstrations as efficient (Berry, supra, note 123 at 262-263), a majority of Israeli groups subscribe to the idea that public protest is an efficient tactic to achieve groups' interests (Lehman-Wilzig, supra, note 110 at 149).

[126] Sprinzak & L. Diamond, supra, note 10 at 2; G. Wolfsfeld, "The Politics of Provocation Revisited: Participation and Protest in Israel" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Reinner Publishers, 1993) 199 at 200 (Hereinafter: "*The Politics of Provocation Revisited*"); P. Lahav, "Rights and Democracy: The Court's Performance" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 125 at 125.

[127] Peretz & Doron, supra, note 33 at 136. The voting rate average is about 80%: Lehman-Wilzig, supra, note 110, at 110. In comparison, the American voting turnout rate is about 50%.

[128] In his research R. Adam has found that 80% of the petitions submitted to the High Court of Justice between the years 1981-1990 were described by the petitioners themselves as having effective/successful outcome. In fact, one of the most interesting findings of the study was that of the potential threat a petition carries: in many cases a threat alone of petitioning to the Court was enough to convince an administrative body to re-assess or double check its decision. See "*The Petition as a strategy*" at 124-130.

2. Protesting through petitioning

A petition can also substitute for the traditional public protest - the street demonstration. Data strongly supports the contention that Israeli citizens participate much more than citizens in other nations in public demonstrations[129]. Scholars assume that this comparatively broad phenomenon derives from three causes: a difficult social and economic circumstances, a special political culture and social mentality, and a malfunctioning political system[130]. Israelis specify three main reasons when asked why they demonstrate: first, the average citizen does not have enough ways to express his opinions to the authorities[131]. Second, demonstrating is relatively unrisky[132]. Third, the one national televised news program, watched on a daily basis by most of the population, offers protests a great deal of air time[133].

The reasons which motivate Israelis to protest, I argue, can just as well induce them to petition the HCJ: an appeal against a political authority can express the petitioner's opinion regarding the authority's acts/decisions. Additionally, there is actually no risk involved in applying to the Court: the worst that could happen is that the applicant will be charged with the costs of proceedings. Finally, the close connections between the media and the court are well established and documented[134]. An appeal to

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[129] "*The Politics of Provocation Revisited*" at 200; G. Wolfsfeld, *The Politics of Provocation: Participation and Protest in Israel* (Albany: University of New York Press, 1988). Lehman-Wilzig, supra, note 110 at 61.
[130] "*The Politics of Provocation Revisited*" at 200.
[131] S. Lehman-Wilzig, "The Israeli Protester" (1991) 21 The Jerusalem Quarterly 127.
[132] *"The Politics of Provocation Revisited"* at 201. At least with regards to the Jewish-Israeli protester.
[133] *Ibid.*
[134] F.L. Morton, "The Charter Revolution and the Court Party" (1992), 30:3 Osgoode Hall Law Journal 627 at 646-648; G. Strugess & P. Chubb, "*Judging the World: Law and Politics in the World's Leading Courts*" (Sydney: Butterworths, 1988) at 180-186.

Court is closely followed by the Israeli media[135]. And as Israelis are routinely involved in public protest, they also routinely involve their Court in public petitions of which the subject matter is the malfunctioning of their political system. During the 1970s and early 1980s the politics of provocation became the predominant means for ordinary citizens to make demands on the political system[136], and the overall number of protests over political issues (as compared to other issues) increased[137]. Explanations suggest that public protest increased as a result of these trends in the Israeli polity: an increasing sense of political discontent, an increasing need for political expression and a decreasing sense of institutional efficacy[138]. In sharp contrast to this political state of affair, the Israeli Court seems an efficient, legitimate and non-political institution, which contributes to Israeli society[139]. Thus, the same reasons engendering provocation and/or public protest, combined with the Court's willingness to intervene, can very well engender an increase in petitions[140].

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[135] R. Shamir, "Legal Discourse, media Discourse and Speech Rights: the Shift From Content to Identity - the Case of Israel (1991), 19 International Journal of the Sociology of Law 45 at 53. See also regarding the customary routines of media representatives visiting the Supreme Court's secretaryship: *"The Petition as a strategy"* at 61-62.

[136] *"The Politics of Provocation Revisited"* at 199.

[137] Lehman-Wilzig divided the issues of protest into four categories: political (foreign affairs, Territories, political leaders, war and peace etc.), economical (unemployment, taxation, inflation, economical policy etc.), social (education, health, culture, sports, transportation, immigration etc.), and religious (Shabat, archaeological excavations, religious legislation etc.). He also divided the protests into four periods: 1949-1954 - the immigration absorption period; 1955-1970 - the decline in protest period; 1971-1978 - the second-generation protest period and 1979-1986 - the routine protest period. In the routine protest period, the leading protest issue was the political one (especially the Lebanon war and the peace agreement with Egypt). Further, Lehman Wilzig claims that public protest has become a very *'normal'* part of the general political process. Supra, note 110 at 57-60. I suggest describing the protest as an "*established*" instead of a 'normal' one. The resemblance between public protest and public petition is thus striking, since courts are well established institutions.

[138] *"The Politics of Provocation Revisited"* at 199.

[139] See infra, chapter four, pages 114-115.

[140] It is important to note that in the early years of the state 40% of the public protests subjects were economic issues. Political protest was secondary in importance. Lehman-Wilzig named the first protest period of the years 1949-1954 as the "*political consensus era*": Lehman-Wilzig, supra, note 110 at 44. He further explains that during the first years of the state, public protest was not considered as a legitimate tool,

3. Communicating through petitioning

An urgent need for an effective communication channel between citizens and their representatives originated from the electoral system remained in place until 1996. The three most important features of that electoral system are a list system of *proportional representation*, the existence of *one* national constituency[141], and the relatively *low threshold* needed to gain representation in the Knesset[142]. These features have often been accused of frustrating the will of the Israeli electorate[143]. Additionally, before the introduction of the primary elections in 1992, the voters could not 'write in', delete, or change the order in which the names of the candidates appeared in parties' lists, as Knesset candidates were chosen by the central committees of those parties[144]. These characteristics, added to by strong party discipline[145], led to very little, if any, influential contact between Knesset members and their voters. Since a coalition's formation is decided and presented before the people only *after* the elections, the Israeli voters cannot

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due to the fear to risk the state in its first steps, and that up until 1973 a consistent public review over the acts of the authorities was lacking. *Ibid* at 115-117. Such a contention fits my argument that in the early years the society was on the state's side and that political criticism or review was not part and parcel of the population, and can further account for The Line experience.

[141] "Within a county-wide proportional list system", argues Max Weber, only two types of nomination systems and leadership patterns can evolve: "either a charismatic leadership backed by a party machine, *or a nomination system based on manipulation and bargaining by party politicians and functionaries*". Cited at A. Brichta, "The 1977 Elections and the Future of Electoral Reform in Israel" in H.R. Peenniman & D. J. Elazar (Eds.), *Israel at the Polls: The Knesset Election* of 1977 (Washington D.C: American Enterprise Institute, 1979) at 20.

[142] V. Bogdanor, "The Electoral System, Government, and Democracy" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 83 at 84-85. The former 1% of the national vote threshold was changed into 1.5% in 1992. That threshold is still comparatively low.

[143] Bogdanor, *Ibid*, at 83, explains the chronological events leading to the adoption of the Israeli electoral system.

[144] And even then, the voters could only influence the Labor party - the largest political party - list since the Likud party restructured such a reform only in 1996. *Ibid* at 85.

[145] G.S. Mahler, "*The Knesset: Parliament in the Israeli Political System*" (N.J: Associated University Press, 1981) at 103; M. Edelman, *Courts, Politics and Culture in Israel* (Charlottesvill: University Press of Virginia, 1994) at 10.

even securely influence their government's mien[146]. The coalitions are not determined by citizen's wishes, but by the tactical needs of the parties. There is no accountability from the elected to the electorate[147].

Furthermore, no referenda were ever held in Israel: the people were neither brought into the legislative processes, nor taken into the decision-making process[148]. The view that the voters are unimportant to government decision-making prevailed[149]. The masses had no access to the 'high windows', as the Israeli political system was, as it still is, a closed centralist system which consolidates the power at the top of the pyramid, and employs a top-to-bottom paternalistic order of decision-making[150]. Likewise, the Israeli elite is also centralist and tight-knit[151].

Put together, the *absence* of *institutional channels* of redress between citizens and their bodies of government; a *close-knit elite*, added to an increasing sense of *political discontent* from the too *bureaucratic, paternalistic and centralist* polity; a decreasing sense of institutional *efficiency*; and a prevailing sense that *nothing is changing* - had

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[146] Many examples are in presence. To name but one, Moshe Dayan - one of Israel's most prominent Generals - seceded from the Labor party before the 1981 elections to constitute his own party ("Telem"), declaring in his electoral platform he will join a Labor-party headed coalition. After winning two seats in the coming Knesset, he unhesitatingly joined a Likud- headed coalition.

[147] Susser & Schreiber, supra, note 103, claim: "beyond the functional stalemate fostered pure proportionality, a Knesset member has no good reason to feel direct responsibility to his constituents" *Ibid* at 14.

[148] Bogdanor, supra, note 142, at 100-103.

[149] Drezon-Tepler, supra, note 55 at 1.

[150] Lehman-Wilzig, supra, note 61 at 13-33. See also D. Reifen, *The Juvenile Court in a Changing Society* (Philadelphia, University of Pennsylvania Press, 1972) at 28: "Active participation in the policy-making and top-level decisions which determine the way of life of all inhabitants is still confined to the old-guard".

[151] A relatively small group of people constitute the different elite groups, leaving no place for 'outsiders' to become rooted. D. Maman, "The Elite Structure in Israel: A Socio-Historical Analysis" (1997), 25:1 Journal of Political and Military Sociology 25 at 44.

driven Israelis to participate in street demonstrations, mostly in front of their parliament in Jerusalem[152]. Yet, these causes, I argue, had driven other Israelis to take the legal route and petition the HCJ, located merely 200 meters away. These petitions held the potential of allowing citizens to participate in and communicate with the government[153]. The Court provided Israelis an interactive path, while all other paths were blocked. Its accessibility offered an arena in which the people could convey their desires and dislikes to their representatives.

4. Changing the Israeli experience through petitioning

Long-standing political culture also contributed to the multitude of petitions. Prominent among them is what has been named '*Elite illegalism*'. Although formally established on the rule of law principle, the political culture in Israel exposes a behavioral illegalism that far exceeds the normal and expected sphere of disrespect for the legal norms in a democracy[154]. Prevailing from the very beginning of Zionism notwithstanding, the eighties saw the intensification of overtly corrupt political behavior, accompanied with shameless political nominations and brutal scrambles for positions and influence[155]. The NUG days were not any better: Likud and Labor battled between themselves, each

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[152] "*The Politics of Provocation Revisited*", at 199; Lehman-Wilzig, supra, note 61 at 49-59.

[153] Shamir argues that since most of the petitions submitted by the Palestinians in the Territories were rejected, the litigation process becomes an end in and of itself. Such petitions create a channel of communication with the authorities, as other channels of communication are scarce: "In the absence of such mechanisms, the Court becomes a bureaucratic arena where parties to a dispute meet and actually exchange information for the first time": R. Shamir, "Litigation as a consummatory action: The Instrumental Paradigm Reconsidered" (1991) 11 Studies in Law, Politics and Society 41 at 58. The same idea, even if to a different extent, can be attributed to public petitions from the Jewish Israeli collective. Most of the over all petitions to the HCJ are rejected. See Y. Shahar & M. Gross, "The rejections and acceptance of appeals to the Supreme Court" (1996), 13 Legal Research, 329 (in Hebrew). Since communication channels between Israelis and their representatives are scarce or ineffective, "a decision to petition is affected by the possibility to regain one's sense of participation" (*Ibid* at 63).

[154] Sprinzak, supra, note 91 at 175.

trying to outdo the other by obtaining more positions of power. Protectionism, favoritism and clientelism reigned in the bureaucracy.

These old behavioral norms, not noticed or reluctantly accepted in the past, deviated sharply from the new public spirit unfolding in second-generation Israelis. The Yom-Kippur war of 1973[156] led many Israelis to sincerely examine themselves and their leaders[157]. A transformation of symbolic meaning emerged in society, as Protekzia (favoritism), clientelism and the like lost their legitimacy[158]. Heightened disclosures of corrupt practices were uncovered by the police, the press and the legal system[159]. Coalition horse trading, political blackmail and open bribery, and an unprecedented crisis following the NUG rupture in March 1990 shocked the populace[160]. A huge rally called

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[155] *Ibid* at 188-189.

[156] The Yom-Kippur war is considered to be one of Israel's most traumatic wars. It came to be known as The Debacle (Hamehdal). It also became an example of the 'taking-no-accountability' and 'taking-no-responsibility' character of the Israeli government. The political leaders put the then highly respected army high command - David Elazar (Dado) - in the dock, attempting to cover their political backsides! Dado's name was cleared only after Agranat Commission's findings. For more on the Yom-Kippur's war and its ramifications see: S.N. Eisenstadt, *The Transformation of Israeli Society* (London: Weidenfeld and Nicolson, 1985); Y. Levy & Y. Peled, The Utopian Crisis of the Israeli State (1994) 3 Books On Israel 201; C. Liebman, The Myth of Defeat: The Memory of the Yom-Kippur War in Israeli Society (1993) 29:3 Middle Eastern Studies 399.

[157] Sprinzak, supra, note 91 at 187; B. Reich & G.R. Kieval, *Israel Land of Tradition and Conflict* (Oxford: Westview Press, 1993) at 54: "After the Yom Kippur war, Israelis also were more cautious, questioned attitudes and policy more, and were more critical of both the system and the people who ran it".

[158] L. Roniger, "The Comparative Study of Clientelism and Realities of Patronage in Modern Societies: Israeli and Canadian Trends" in A.G. Gagnon & B.A. Tanguay, *Democracy with Justice* (Ottawa: Carleton University Press, 1992) 174 at 183.

[159] *Ibid* at 185.

[160] Sprinzak claims everything that happened on March 1990, had happened before: "In fact, the three-month crisis was unprecedented in only one sense: It starkly exposed the malfunctioning of the Israeli system of government and, more than ever before, made most Israelis aware of the problem. But almost everything that took place between March and June of 1990 had happened before: coalition horse trading; political blackmail and extortion by small extremist parties; shamelessly open political bribery; blatant and obsessive partisanship by the nation's top policy makers; complete disregard for matters of national interest, and cynical and paternalistic attitudes toward the Israeli public. What was special about the 1990 spring crisis was that it happened on a larger and more intense scale". Sprinzak & Diamond, supra, note 10 at 4. The specialty of the March 1990s events was in public reaction: "Israelis...started to ask harder questions about their system of government and its ability to make rational decisions on critical questions...Questions previously asked by a few isolated critics now become the talk of the country...Is the Israeli system of pure proportional representation, which offers little scope for accountability to voters, really democratic?" *Ibid.*

for an electoral reform and condemned the political leaders[161]. Petitioners asked the HCJ to declare that coalition agreements' contents should be published[162]. Turning to the Court seeking for remedies to the ill, malfunctioning political system was an attempt to bridge the gap between the government and the citizens.

An additional cause for appealing to the Court relates to the traditions which influenced the Zionist leadership concepts of democracy. The dominance of socialistic, nationalistic and collectivistic principles, combined with the Eastern European (mostly Russian) origins of the Jewish founders, affected the concept of democracy that was developed in Israel, namely, a *formal procedural democracy*. Such a democracy is interested in voting procedures, but lacks the liberal components of true democracy[163]. Moreover, because of their past - the traditions that prevailed in their motherland - and the necessity of the hour, the founding fathers were not substantially occupied by the idea

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[161] Haaretz, 8th. Of April, 1990 at 1. The spoken rally is the same one which is responsible for the creation of the MGQ - see page 3 of this chapter.

[162] H.C. 1601/90 *Shalit v. Peres* (1990) 44 P.D. (3) 353 (For an English translation see Selected Judgments, Vol. 10 at 204); H.C. 1635/90 *Zerzevsky v. Prime Minister* (1991) 45 P.D. (1) 749. The rally took place on Saturday, April 7th 1990. The *Shalit* case was applied in May 1st 1990 and the *Zerzevsky* case was first initiated on April 19th, yet was announced in February, 2nd 1991. On this point see in the next chapter.

[163] Y. Shapiro, "The Historical Origins of Israeli Democracy" in E. Sprinzak & L. Diamond (Eds.), *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 65. Liberal components of democracy concentrate on guaranteeing individual and minority rights. Indeed, a procedural democracy - as to elect their leaders - was given to the Jewish community in Palestine by both the Ottoman and the British governments. Thus, "when the Jewish community achieved political independence in 1948, procedural democracy was firmly established". *Ibid* at 68. See also: G. Doron, "A Different Set of Political Game Rules: Israeli Democracy in the 1990s" in K. Auruch & W.P. Zenner, *Critical Essays on Israeli Society, Religion, and Government* (Albany. State University of New York Press, 1997) at 30. Doron claims Israel is a Non-Liberal democracy as for the hereinbelow five features: the religious basis of society; the imperative of landownership (that is: only 5% of homes and lands are privately owned and the lands of the country belong to the state as defined by Basic Law: Lands of Israel); the challenge of security; the dominance of politics; and the commitment to a welfare state (and Ben-Gurion's statehood approach). Others attribute the absence of liberal components to a lack of interest in civil liberties on the part of Israel founders: see Strum, supra, note 44.

of democracy[164]. It was not that they opposed the idea, but that the urgent institutional requirements to cope with the numerous difficulties entailed the development of a *democratic centralism* along with *oligarchic* organizational patterns[165]. While such attributes accorded with state-society relations during the first two decades of independence, they became problematic when individuals and groups within society sought to promote somewhat different interests than that of the state, under the existing system and within its enduring institutions. The Court thus became a material body that citizens turn to in the quest for 'liberating', decentralizing and 'democrating' their own democracy[166].

Lastly, the governmental involvement in the economy in particular, and in many spheres of public life in general is considered to be greater in Israel than in any other Western democracy[167]. As Israel vested the government with vast powers in virtually all areas of life, the scope of state intervention is almost unlimited[168]. As a result, the

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[164] M.J. Aronoff, "The Origins of Israeli Political Culture" in E. Sprinzak & L. Diamond (Eds.), *Israel Democracy Under Stress* (Boulder, Lynne Rienner Publishers, 1993) 49.

[165] P. Medding, *The Founding of Israeli Democracy, 1948-1967* (New York: Oxford University Press, 1990).

[166] Andrei Marmor claims that in the last two decades the Israeli HCJ has taken on itself the role of defending the libertarian values. He acknowledged that Israeli society has long forsaken the socialistic ethos to which, at least according to the formal ideology, the early state was committed. He also recognizes the evolving market-economy ideology in Israel of the 1980s. Yet he attributes the fact that a classical, liberal party was never established in Israel politics to the lack of need for such a party, where the Supreme Court itself is the liberal party in Israel. A. Marmor, "Judicial Review in Israel" (1997), 4:1 Law and Government in Israel 133 at 137-138 (In Hebrew). While that may be true in a general sense, it could be argued that a classical, liberal party is not to be found because the Israeli emerging liberal ideology is a variation on the 'classical' 'self-ownership' one - one that combined the yearning for a general liberalism and the specific Middle East context. It could also be argued that neither the Supreme Court nor the Israeli society had gone as far as fully acknowledge the freedoms and self-ownership rights of the Arab population in Israel, for instance. Thus, none of them is dedicated to, or promote, purely libertarian values.

[167] I. Sharkansky, *Policy-Making in Israel: Routines for Simple Problems and Coping with the Complex* (Pitsburgh: University of Pittsburgh Press, 1997) 40.

[168] I. Zamir, "Administrative Law" in I. Zamir & A. Zysblat (Eds.), *Public Law in Israel* (Oxford: Clarendon Press, 1996) 18.

disposition to direct confrontations between individuals (or interest groups) and the state is greater in Israel. Since the HCJ has the original jurisdiction in claims against the state and its organs - this disposition, when materialized, finds its way straight to its halls. Added by the Court's accessibility, the Court turns into a political battlefield.

IV Conclusion

All these causes joined together to prompt Israelis to approach their Court. The Israeli Court has become an affirmative institutional experience for Israelis' bad experiences with their governmental bodies. The involvement of the state in regulating every aspect of life is exhaustive. The political branches did not satisfactorily cope with the various difficulties that the state has encountered over the years. While the State levies a high personal price on its citizens[169], most were left with very few channels through which to address their leaders. Israelis are very political and extremely litigious[170]. Their ability to participate in the policy-making of their own destiny was excessively limited, while the need to take such a part was constantly growing as Israeli society changed. As much as the people want to, but cannot, participate in the policy-making processes, the elected representatives were unlikely to demonstrate accountability. As much as citizens protest, the overly bureaucratic authorities remain indifferent. The Court becomes an avenue through which Israelis participate, a route with which they can force the elected to respond, a low risky way to demonstrate against a

[169] To name but two, which I personally find the hardest of all: the army obligated conscription at the age of 18 and the following Reserve duty and the comparatively high taxation rates the Israelis pay.
[170] Lahav, supra, note 126 at 125.

failing leadership, or to promote interests which have long been neglected in the political debate.

Israel's political culture has stayed the same, more or less, for fifty years; elite illegalism, overt partisanship, favoritism and clientelism prevail. The electoral system keeps distorting the electorate's will. The most problematic decisions never receive their appropriate share in the public debate, but rather are determined by default or behind the closed doors of party hacks. Different patterns of avoidance were taken by the Knesset, as it was never successful in forcing checks and balances over the executive's numerous actions. The Likud party has turned out to be no better an alternative to Labor, which possessed hegemony for almost 30 years. Both were responsible for the non-governability for over an entire decade. Neither leader ever demonstrated accountability. By contrast, the societal sphere has altered in the course of the years, shifting away from the synthesis it used to constitute with the state. Civil society has emerged, looking to promote new interests at the expense of the State's. Interest groups became an important power. The lack of consensus became the consensus itself: everyone agrees the Israeli public does not agree on anything anymore[171].

Against this background, the extraordinariness of the Supreme Court becomes salient. The Court has traditionally been perceived a professional, non-partisan court. Its judges earned the people's respect, while ruling in court and performing public missions outside of it. Its adjudication seemed to hinder arbitrary and unreasonable decisions; its

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[171] Many claim that in fact, there was never a consensus in Israeli society, arguing that is the reason why a constitution was never adopted. See R. Gavison, "The Controversy over Israel's Bill of Rights" (1985), 15 Israel Year Book on Human Rights 113 at 143. Yet, others argue that in the early years of the state, these deep controversies were suppressed to demonstrate an unite facade against the challenges the State of Israel

halls welcome the 'little citizen' and its eye is open to see that the rule of law will be followed. Weary of their political system, culture and leadership - Israelis embrace their Supreme Court and yearn for its intervention. It is to this last actor in our perpetual triangle - the Israeli Supreme Court - that we now turn.

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faced. The labor party's hegemony also contributed to the appearance of consensus within society. See Peretz & Doron, supra, note 33 at 76-80; Roniger, supra, note 158 at 177; Migdal, supra, note 47 at 13-15.

Chapter Four

The Israeli Court

I. Introduction

> "In the course of its forty-five years of statehood, the Israel Supreme Court has come to play an increasingly important role. In 1948 it functioned very much like the House of Lords in the British system; its impact on governmental policies was at the margins. By the late 1980s, however, the Israeli Supreme Court was exercising power akin to that of its American counterpart. It is now an important player in the public policy process[1]".

This statement, initially made five years ago, is even more true today. It seems that the Israeli Supreme Court is willing to "hear and determine a vast range of social and political issues and to closely scrutinize almost all acts of virtually every public institution"[2]. There are "virtually no procedural restrictions on the authority of the HCJ to intervene in, and invalidate the activities of other governmental agencies..."[3]. Standing is being conferred upon everyone[4]. The rights of public petitioners and the concept of the *actio popularis* have been fully recognized[5]. Almost all social or political questions are now perceived as justiciable[6]. In

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[1] M. Edelman, *Courts, Politics and Culture in Israel* (Charlottesvill:University Press of Virginia, 1994) at 31.

[2] A. Barak, "Forward" in: I. Zamir & A. Zysblat, *Public Law in Israel* (Oxford: Clarendon Press, 1996) at vii.

[3] S. Goldstein, "Protecting of Human Rights By Judges: The Israeli Experience" (1994), 38(3) Saint Luis University Law Journal 605 at 613.

[4] So much has been written with regards to the standing issue, so many scholars have reviewed the developments in that area , that there is actually no need for us to re-work the issue. The dominant view, which is very much grounded in the case law regarding standing, is that practically everyone can bring a constitutional or an administrative question before the court. For further information see: Z. Segal, "Administrative Law" in: A. Shapira and K. DeWitt-Arar (Eds.) *Introduction to the Law of Israel* (Hague: Kluwer Law International, 1995) 59-75; S. Segal, *Standing in The Israeli High Court of Justice* (Tel Aviv: Papirus, 1993) (In Hebrew); D. Kretzmer, "Forty Years of Public Law" (1990), 24:3 Israel Law Review 341 (Hereinafter: "*Forty years of public law*"); S. Shetreet "Standing and Justiciability" in: I. Zamir & A. Zysblat (Eds.) *Public Law In Israel* (Oxford: Clarendon Press, 1996) 265-275; I. Zamir, "Rule of Law and Civil Liberties in Israel" (1988), 7 Civil Justice Quarterly 64, at 69-70 (Hereinafter: *Rule of Law and Civil Liberties*").

[5] *Forty Years of Public Law*, at 345; Shetreet, *ibid*, at 270.

[6] Here, too, the standard view is that there is actually no legal barrier to bring any question before the court. See the sources mentioned in the previous note, which also deal with the justiciability issue. In addition, see: S. Netanyahu, "The Supreme Court of Israel: A safeguard of the Rule of Law" (1993), 5 Pace International Law Review 1; I. Zamir, "Administrative Law: Revolution or Evolution" (1990), 24:3 Israel Law Review 357 (Hereinafter: "*Revolution or Evolution*"); I. Zamir, "Courts and Politics in Israel" (1990), Public Law 523 (Hereinafter: "*Courts and Politics*"); I. Zamir, "Administrative Law" in: I. Zamir & A. Zysblat (Eds.) *Public Law In Israel* (Oxford: Clarendon Press, 1996) 18-44.

substance, the doctrine of reasonableness is frequently used to invalidate administrative acts[7]. With the enactment of two additional Basic Laws on March 1992[8], that granted the HCJ the novel authority to exercise judicial review over primary legislation[9], no area is immune from judicial scrutiny. The net of judicial review is cast over all branches of government and over almost all types of its activities[10], turning the Israeli Court into a very powerful institution.

The Court has not always held such wide powers. In addition to the extension of power by legislation, the Israeli Supreme Court gradually broadened its own powers of review in a number of ways. It developed its new doctrines slowly. It changed its scope of intervention. The language it used to reason has been transformed. More important, as its perception concerning its role in society has shifted, its understanding its role with regard to the other two branches of government altered dramatically.

This chapter analyses the changes which took place within the Court's sphere of operation, and suggests some insights into their causes. I will first describe and analyze the Court's early years, and then the Court's performance from the 1970s onwards. I will analyze this change in the Court's perception of its role. Three explanatory categories are suggested: judicial, statial and societal. These explanations will consequently open up my discussion as I will attempt to connect the Court's role to contemporary Israeli society.

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[7] M. Hofnung, "The unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel" (1996), 44:4 American Journal of Comparative Law 585, at 600.

[8] Basic Law: Human Dignity and Liberty (SH 5752 P:102) and Basic Law: Freedom of Occupation (SH 5752 P:114).

[9] Hofnung, supra, note 7, at 588. For a different opinion, claiming the new basic laws did not change the former situation, and thus did not grant the High Court of Justice any new powers see: R. Gavison, "The constitutional revolution - A Depiction of Reality of a Self-fulfilling Prophecy? (1997), 28 Mishpatim 21-147 (In Hebrew). The opinion that the Court received a formal authority to review the Knesset's legislation was adopted by the Court itself in CA 6821/93 *Mizrahi Bank et al. v. Kfar Shitufi et al.* (Yet Unpublished).

[10] *Forty Years of Public Law*, at 342.

II The Israeli Supreme Court's history

1. The early years - The Zionist Court

The majority of scholars believe that the Israeli Supreme Court was, in its early years, a court animated by legal formalism, particularly in its style of reasoning[11]. According to the dominant view, in those days, the Court tended to be restrained and passive, reactive and hesitant[12]. It employed 'strict objectivity', as well as a literal reading of legal texts[13]. It demonstrated judicial deference[14], and in the bulk of the cases judicial review was "timid and limited in scope"[15]. In the area of administrative law, the Court focused on deciding disputes between citizens and public authorities, and on its duty to adjudicate according to law by interpreting and applying the laws. It did not express its opinion on the desirability of the laws[16]. This understanding governed its outlook on standing and justiciability doctrines[17]. Ensuring the protection of individual rights against violation by the authorities, while

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[11] M. Mautner, *The Decline of Legal Formalism and the Raise of Values in the Israeli Jurisprudence* (Tel-Aviv: Da'at Publishing, 1993) (In Hebrew). Mautner identifies four essences to legal formalism: organizing the legal norms as if they had their own internal logic and criteria; detaching the law from its valued dimension; limiting the creativity within the legal reasoning in searching and finding the 'right' one legal norm that should be applied; and ensuring legal predictability. By reviewing judgments from the fifties and the eighties, and by tracing a decline in the existing of these four features, Mautner reaches the conclusion that the early judgments of the Israeli Supreme Court are characterized by a legal formalism point of view, while the judgments of the eighties are characterized by a raise of a value-oriented point of view and a decline in the formalistic approach.

[12] P. Lahav, "Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy" (1990), 24 Israel Law Review 211 at 234.

[13] P. Lahav, "The Supreme Court of Israel: Formative Years, 1948-1955" (1990), 11:1 Studies in Zionism 45 (Hereinafter: "*Formative Years*").

[14] R.A. Burt, "Inventing Judicial Review: Israel and America" (1989), 10:7 Cardozo Law Review 2013 at 2015.

[15] P. Lahav, "Rights and Democracy: The Court's Performance" in: E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Reinner Publishers, 1993) 125-152.

[16] *Forty Years of Public Law*, at 349; Mautner, supra, note 11, at 35; H.C 65/51 *Zabotinsky v. Weizmann* (1951), 5 P.D. 801; H.C 16/48 *Baron v. Prime Minister and Minister of Defense* (1948), 1 P.D. 109.

[17] *Forty Years of Public Law*, at 352.

emphasizing the importance of the rule of law[18], most of the Supreme Court's early rulings were characterized by a "highly formalistic style, narrow interpretations of statues and precedents, adherence to *stare decisis*, and deference to the decisions of the political branches"[19].

It is important to emphasize that even in those early days, some of the Court's most important decisions were not at all formalistic and did not defer to administrative powers. One such case is the *Kol Haam* decision, handed down in 1953[20]. The decision is regarded by many scholars as a powerful break from legal formalism, or as the very foundation for the Court's later activist judicial review[21]. Indeed, using the Declaration of Independence or an American constitutional case test as sources for restricting and limiting the Minister of Interior's absolute discretion, must be seen as an activist judgment. Yet, I believe that this

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[18] *Ibid.*; at 267; Lahav, supra, note 12, at 267; Lahav, supra, note 15 at 125-126; Mautner, supra, note 11 at 33-34.

[19] Edelman, supra, note 1, at 42.

[20] H.C 73/53 *Kol-Ha'am v. Minister of Interior* (1953), 7 P.D. (2) 871. The petition, submitted by the Israeli communist party's daily newspaper, appealed the Minister of Interior's decision to suspend publication of the paper for a period of ten and fifteen days, as a result of two articles' publication denouncing the "anti-nationalistic policy of Ben-Gurion government which profiteers in the blood of Israeli youth". The Minister's decision rested on section 19 of the Press Ordinance, 1933, which read in part: "The Minister...may, if any matter appearing in a newspaper is, in his opinion...likely to endanger the public peace...to suspend the publication for such period as he may think fit". Contrary to a three-week old precedent regarding the same section 19 of the Press Ordinance, 1933 - in which the Court rejected a petition submitted by the same newspaper on the grounds that: "the question whether a certain publication endangers the public peace is delegated under this statue to the Minister of Interior and not to this court" (H.C 71/53 *Kol-Ha'am v. Minister of Interior* 7 P.D. (1) 167) - and contrary to the clear language of section 19, which was calculated to invest wide discretionary power in the Minister of Interior and to exclude judicial interference with his decisions - the Court ruled in favor of the petitioner. Importing the "likely to produce probable danger to the public peace" test from the American case law, and weighing such a probability of danger in the case at hand, the Court concluded the suspension order could not stand. The Court, in the absence of a written constitution, first declared freedom of expression and freedom of the press to be basic principles of Israel's unwritten constitutional law by virtue of Israel's commitment to democracy, and balanced these principles with the "likely" test. Justice Agranat, who wrote the decision, drew these principles from Israel's Declaration of Independence - until then regarded as a solely declaratory statement with no legal ramifications.

case, along with other cases from the mid and late 1950s, demonstrate a kind of activism that cannot be compared, either in substance or in scope, to the judicial activism reflected in the Court's decisions of the late 1970s onwards. In *Kol Haam*, the Court rested mainly on the Declaration of Independence and the State's foundation as democracy. Activist as it may seem, the Declaration was the very document which established the State of Israel and declared its future essence. Constituting Israel as a democracy was, indeed, the vision held by the founders of the Israeli state. Thus, even though interpreting the Ordinance law according to these principles was a new approach, it did not introduce totally new rules or norms lacking any grounding in traditional legal argument. Democracy and freedom of press were linked in important ways. Balancing them against the public interest is a method recognized and employed by many liberal democracies. In contrast, when the Court declared in 1994 that the late PM Rabin must dismiss his Minister of Interior who was made subject to criminal proceedings[22], it grounded its decision on general principles of reasonableness, i.e., the public norms that should govern a well-ordered society, and the need of judicial intervention for constructing proper behavioral public norms[23]. I believe that the activism demonstrated in this decision is very different, in both the scope of review and its reasoning, from the more passive-activism demonstrated by the Court in the early days. This decision, by definition,

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[21] P. Lahav, "American Influence on Israel's Jurisprudence of Free Speech" (1981), 9 Hastings Constitutional Law Quarterly 23 at 51; Lahav, supra, note 15 at 133-139; *Revolution or* Evolution, at 358; *Courts and Politics*, at 533; *Forty years of Public law*, at 354.

[22] H.C 3094/93 *The MQG et al. v. The Government of Israel at al.* 47 P.D. (5) 404. See also Selected Judgments, Vol. 10 at 258 (Hereinafter: "*The Derei case*"). This petition is also described in the third chapter, see pages 53.

[23] All five judges sitting on bench agreed Rabin should have used his discretionary power and dismissed the Minister of Interior. Justice Shamgar claimed the dismissal derived from the general principles of a well-ordered state - see page 421 to the decision. Justice Matza claimed that this extraordinary case obliged the Court to intervene and set the proper public norms that should determine the PM's decision - see page 425 to the decision. Justice Levin mentioned that in order to keep "our enlightened and democratic camp pure", the PM must dismiss the Minister - see page 429 of the decision.

rests on the Court's own interpretation of what should be the proper public norms and values to direct governmental functionaries' behavior, not on balancing tests or principles that can be found elsewhere[24].

Thus, it seems that the formative years of the Court can be delineated as those in which the steering-wheel was mostly in the hands of legal formalism and self restraint[25]. Even when the Court was exceptionally innovative and activist, it was still usually within well-restrained boundaries. What could possibly account for the Court's general deference towards administrative power? The next few pages attempt to offer a few explanations for that Court's performance[26].

The Zionist dream saw its realization on May 1948, while the Zionist ideology, aimed at the liberation of the Jewish people from the conditions of exile, became pragmatic[27]. The Declaration of Independence generated a continuity from the Jewish Diaspora past to the Israeli State of the future. This continuous thread enfolds the Yishuv, of which most members were Zionists. Among them were the first Israeli Supreme Court Judges. Practically all judges of the 1950s' Court were conscious Zionists. Even thought most of them came to

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[24] Either in Israeli legal or quasi-legal documents such as the Declaration of Independence, or in other jurisprudence. It is worth mentioning that the Court, in Derei's case, did not rest on foreign precedents.

[25] Mautner, supra, note 11, analyzes the principles that ruled both in public and private law until the 1970s, and convincingly concludes that legal formalism can be seen featuring in the over-all judgments of the Supreme Court of those days.

[26] Some scholars have characterized the disparity between Court's adjudication within the early days of statehood and its third and forth decade, as an evolution (*Revolution or evolution*, at page 361). Others subscribe the changes to a revolution (*Forty Years of public law*, at 341). For the purposes of this paper it is unnecessary to determine which of these two approaches characterizes better the changes. What is important is that profound changes are pointed to by all of them, at least with regard to administrative law, and concerning issues like standing and justiciability.

[27] See, for instance, one out of many S. Avineri, "The Making of Modern Zionism: The Origins of the Jewish State" (New York: Basic Books, 1981). See also pages 2-3, 58-61.

Palestine before the Nazi regime had cast its terror, they were familiar with anti-Semitism and the meaning of being a Jew in non-Jewish surroundings[28]. Surely, the judges shared the Yishuv's exaltation and excitement about the State's establishment after two millennia in exile[29] and, as they also shared the society's inclination to bolster the new born state, they were keen to assist its first steps as an independent Jewish entity.

Furthermore, all of the first judges were active in the mainstream Zionist movements. Four out of the five founding judges were identified with political parties[30]. Two out of the three Court's backbone were close to Mapai, the ruling party[31]. Thus, as these justices belonged to the establishment, they were not inclined towards radical reforms, and their basic instincts were similar to the norms and ideologies which prevailed in the Israeli society: supporting the young proud State and demonstrating modesty towards its supremacy[32].

Additionally, the Israeli Judiciary found itself in an awkward position while taking its first steps; while the executive and legislature's status were secured by law, the Basic Law: Judiciary was only enacted in 1953[33]. Until then, the Supreme Court had suffered some

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[28] One out of the first five judges who had been nominated was born in Palestine; the rest four were born in Eastern Europe: Lahav, supra, note 12, at 219. After a year two additional Judges joined the bench, of whom only one had a different background: American roots. *Ibid.*

[29] On this point see chapter three, pages 58-61.

[30] M. Hofnung, *Democracy, Law and National Security in Israel* (Aldershot: Darmouth Publishing, 1996) at 20; E. Rubinstein, *The Judges of Eretz Israel* (Tel-Aviv, Schocken, 1980) (In Hebrew) at 551-563.

[31] *Formative Years*, at 51-52.

[32] *Formative* Years, at 53. In fact, Lahav claims that the original group of candidates and the first ones to be selected reflected key-party considerations, and that these ideological considerations which preceded the selection of Justices affected their opinions.

[33] Both the Knesset and the Government were a direct continuation of Yishuv organizations, whereas the Court was established from scratch. The Provisional Council - the *legislative* authority that, according to the Declaration of Independence, should serve until an elected assembly will be convened - was but a different name for the People's Council, an organization that was set up before the establishment of the state. The Provisional Government - set-to-be the executive authority - was created out of the executive arm of the People's Council. These provisional bodies were to have governed until the election of a constituent assembly, which was then to establish a constitution for the new state. However, when the first elected

severe attacks from those who were, in part, responsible for ensuring its position as an independent body[34]. Moreover, the Court's position as equal among equals, namely, as an indispensable part within the body of government, was not at all clear to the political elite. Ambiguity best describes the founders' attitude towards the Court[35]. The Court was at that time concerned with establishing its authority and commanding respect for its decisions. Awareness of the delicate position in which the Court was situated probably pushed it towards a deferential attitude to the decisions of the political branches and to a prudent, ad-hoc, narrow adjudication[36].

Israel's heritage through the British Mandate in Palestine also had an effect on the Court's early decisions. While the first Jewish Court in the new Israeli state was expected to symbolize the revolution of the Jewish community's conditions[37], it leaned on the Mandate's legal foundations, especially in the area of Emergency Regulations[38]. Consequently, the

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legislative authority of the State of Israel convened in early 1949, it decided in its first session that it would act as a full-pledged parliament to be called the first Knesset. The same people who led the Yishuv, led the Israeli State and headed its political branches. Yet, although the Mandatory legal framework was adopted by the State of Israel, the judiciary was constituted anew and the Supreme Court judges were elected by the Provisional Council. While the legislative and executive arms did not need to ground their legitimacy and status, the judiciary was compelled to establish its equal status. This may additionally explain the awkward position surrounded the Judiciary in the early years.

[34] The incident was described in chapter one. The Judiciary was attacked by influential political figures- the Minister of Justice and the Prime Minister. See in detail: Lahav, supra, note 12, at 244-258; Lahav, supra, note 15, at 127-133.

[35] While the government moved to Tel-Aviv, the Supreme Court was settled in the old notorious British's Court building at Jerusalem. Lahav, supra, note 15, at 127; *Formative Years*, at 50-51.

[36] Edelman, supra, note 1, at 42.

[37] In *Formative Years*, at 48-49, Lahav claims the speeches of the Court's founders delineated the expectation that the Court would be revolutionary in that it will symbolize a new beginning in which Jews judge Jews in their own free and independent legal system.

[38] A state of emergency was first proclaimed in Mandatory Palestine in 1937 and was prolonged and renewed both in 1939 and 1945; Palestine (Defense) Order in Council; Emergency Powers (Defense of the Colonies) Order in Council, 1939; Defense (Emergency) Regulations, 1945. The provisional Council adopted all the laws that were in force at Palestine on May, 15 1948. The proclamation of an emergency state on May, 19 1948 entailed the automatic adoption of all former Emergency regulations.

Israeli legal system inherited some repugnant laws from the Mandatory Government[39]. This heritage doomed the Israeli Supreme Court to enforce some undemocratic laws, which equipped the executive with total discretion to limit individual rights[40]. In addition, all Mandatory legislation still in effect on May 14, 1948, was incorporated into the law of the State of Israel; moreover, much of that legal system was left untouched for substantial period of time[41]. The British legal system and case law in those days, especially regarding the administration, erected artificial barriers to judicial review and the courts "avoided high-sounding principles or enduring values during that time"[42]

The British system was an inspiration for the pledging Israeli one in another manner; since both Israel and Britain did not as yet have a written constitution, the Israeli judiciary relied on the UK tradition for guidance[43]. In fact, many statutes included an explicit provision requiring reference to English law, and article 46 of the Palestine Order-in-Council, which was incorporated root and branch into Israeli law, provided for the application of principles of common law and equity in cases of lacunae in the local law[44]. Further, the Israeli legal elite was familiar with the common law, and the first judges had been educated in the British tradition[45]. Hence, the Israeli Court started its new era imbued with British thinking and

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[39] *Rule of Law and Civil Liberties*, at 64.

[40] *Revolution or Evolution*, at 358. For an ambient description of the vast powers vested within the executive see Hofnung, supra, note 30 at 47-54.

[41] Y. Shachar, "History and Sources of Israeli Law" in A. Shapira & K. C. DeWitt-Arar, *Introduction to the Law of Israel* (Hague: Kluwer Law International, 1995) 1.

[42] J. Jowell, "Courts and the Administration in Britain: Standards, Principles and Rights" (1988), 22:4 Israel Law Review, 409 at 410.

[43] Netanyahu, supra, note 6 at 1. See also D. Peretz & G. Doron, *The Government and Politics in Israel* (Boulder: WestView Press, 1997) at 236.

[44] D. Friedman, "Infusion of the Common Law into the Legal System of Israel" (1975), 10:3 Israel Law Review, 324.

[45] J. Laufer, "Israel's Supreme Court: The First Decade" (1964), 17 Journal of Legal Education 43. See also, Friedman, *Ibid* at 326: The first law school in Israel was opened by the British in 1920, and the graduates of the school had an appreciable influence on legal life. Part of the judiciary received its legal or post-graduate education in England.

practice, which generally favored a more deferential, in part subordinate, role for the judiciary in the polity[46].

It should be emphasized, though, that one additional crucial factor prevailed everything else - the security situation. It led to excessive powers being conferred to the executive at the expense of the judiciary and the legislature, and to the absence of adequate constitutional checks and balances. While the Court was never willing to turn a blind eye to clear transgressions of the law based on state security considerations, nevertheless its justices were usually reluctant to interfere with military considerations[47]. Most petitions against land/housing expropriations were rejected if the State used national security needs as the cause for expropriation[48]. The substantive aspects of the Defense (Emergency) regulations were rarely, if ever, questioned by the Court[49]. Since the life expectancy of these regulations was not clear when they were proclaimed, and some hope for an improvement of the security predicament still endured, the early judgments hesitated in dealing with its consequences[50].

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[46] Burt, supra, note 14 at 2015. See also Cr.A. 28/62 Attorney General v. Matana (1962) 16 P.D. 430 at 467.

[47] Hofnung, supra, note 30, at 206. Perhaps the first Justices were aware of the possibility that in the turbulent security situation of their new state, Court orders could be easily evaded if found to be too intrusive. Hence, the early rulings demonstrated deference towards the government's decisions. See Edelman, supra, note 1 at 42.

[48] *Formative Years*, at 61-62.

[49] *Ibid.* See also A. Shapira, "Judicial Review Without a Constitution: The Israeli Paradox" (1983), 56 Temple Law Quarterly 405, 445-446 mentions: "..The Supreme Court has adopted a far more restrained, even submissive, posture when requested to delve into the substantive deliberations of security organs. Generally speaking, the Court has been reluctant to closely examine the merits of the authority's discretion, thus, in effect, providing almost blanket endorsement of the reasoning offered by security officials in justification of the measures taken by them. The Court has invariably been prepared to consider allegations of bad faith, i.e., to inspect whether or not the defense authorities acted in bona fide manner in the exercise of their statutory powers. The Court, however, has been unwilling to carefully investigate the relevance of the purposes and considerations prompting the authority action"

[50] A. Maoz, "Defending Civil Liberties without a Constitution" (1988), 16 Melbourne University Law Review, 815.

To conclude, Israeli society was not the only one to reinforce and aid its state to face difficult circumstances in its early days. As the society in which it adjudicated upon, the Israeli Court "...yielded a legal theory that on the one hand hailed the state - the Jewish state - as the cardinal and supreme value in the political and social order, and on the other prevented gross violations of rights"[51]. It was never isolated from its surroundings.

2. Later developments - the all-embracing Court

The first signs of the coming changes were already detectable during the early 1970s. As mentioned before, the first instance in which the court invalidated primary legislation occurred in 1969, although the court avoided addressing the issue of the petitioner's standing[52]. Due to a series of additional decisions, on various issues, during the 1970s the growing *centrality* of the Court became apparent[53].

Nonetheless, this general trend reached its zenith only during the 1980s[54]. From that time on, the Court entered a more activist phase. Some of its more controversial decisions included: overturning the Minister of Justice's decision not to extradite a person to France[55]; invalidating a confiscation of Arab lands within the Territories, by substantively reviewing

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[51] *Formative Years*, at 46.

[52] The *Bergman* case, see chapter two, page 32.

[53] Particularly with regards to the Territories and the separation of state and religion: R. Shamir, "Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity - the Case of Israel" (1991), 19:1 International Journal of the Sociology of Law 45, at 53. The issue of the Territories as an account for the Court's increasing power is also mentioned by Burt, supra, note 14 at 2018-2026.

[54] Many scholars indicate these years as the 'turning point' in the development of the judicial review scope and essence, with which I tend to agree; See, for example, S. Shetreet, "Judicial Independence and Accountability in Israel" (1984), 33 International and Comparative Law Quarterly 979; Shapira, supra, note 49; M. Hofnung, "Ethnicity, Religion and Politics in Applying Israel Conscription Law" (1995), 17:3 Law and Policy 311.

[55] H.C 852/86 *Aloni v. Minister of Justice* (1987) 40 P.D. (3) 436.

the 'security interests' that were supposed to be the grounds for the expropriation[56]; reversing the Minister of Interior's decision not to announce a 'summer-clock'(i.e., day light-saving time)[57]; scrutinized the Minister of Defense's decision to exempt Yeshiva students from military service[58]; and declaring unreasonable the Prime Minister's decision not to dismiss the Minister of Interior, who was indicted on counts of fraud[59].

These examples demonstrate just how deep the HCJ's interventionist roots had grown, just how wide its scope of scrutiny had become, just how central its role vis-a-vis state and society had developed: "...its central constitutional role [had] increased, as it gradually became clear that it was the court that stood as an intermediary between the state and its citizens"[60].

This development is by no means exclusive to the Israeli Supreme Court. Courts - especially constitutional courts - are becoming powerful, hegemonic forces in many countries[61], and the power granted to these courts to review laws and administrative actions is being used more frequently today all over[62]: the judicialization of politics is now a world wide phenomenon[63]. Yet the Israeli case still seems unique from a few aspects. The Israeli

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[56] H.C 390/79 *Dweilat v. The Government of Israel* (1980) 34 P.D. (1) 1.
[57] H.C 217/80 *Segal v. Minister of Interior* (1980) 34 P.D. (4) 429.
[58] H.C 910/86 *Ressler v.Minister of Defense* (1988) 42 P.D. (2) 441 (For an English translation see: Selected Judgments, Vol. 10 at 1). This case is of particular interest since the petition, although denied, was the third that petitioner submitted to the court, over the same issue. The former two petitions were dismissed due to the petitioner's lack of standing. See H.C 448/81 *Ressler v. Minister of Defense* (1981) 36 P.D. (1) 81; H.C 179/82 *Ressler v. Minister of Defense* (1982) 36 P.D. (4) 421.
[59] H.C 3094/93, supra, note 22 at 404. See also Selected Judgments, *Ibid*, at 258.
[60] Shamir, supra, note 53, at 53.
[61] B. Ackerman, "The Rise of World Constitutionalism" (1997), 83:4 Virginia Law Review 771.
[62] M. Shapiro & A. Stone "The New Constitutional Politics of Europe" (1994), 26 Comparative Political Studies 397; M. Cappelletti, "The Expanding Role of Judicial Review in Modern Societies". In S. Shetreet (Ed.) *The Role of the Courts in Society* (Dordrecht: Martinus Nijhoff Publishers, 1988) 79-97.
[63] See T. Vallinder, "The Judiciaization of Politics - A World Wide Phenomenon" (1994), 15 International Political Science Review 91; P. Arens, "Recent Trends in German Jurisdiction: The Transfer of Political

HCJ has gone further than any other democratic country in judicializing politics[64]. The Israeli doctrines of standing and justiciability are more tolerant of public actions against the government than most of their counterparts[65]. The scope of judicial review in Israel is substantively more generous than in other commensurable countries[66]. Additionally, since Israel has no written constitution, administrative law in Israel is, in a sense, more than just administrative law, as many constitutional principles are engaged[67].

The changes which the Israeli Court has undergone can best be illuminated by considering the way the Court's perception of its own role has altered. Over time, the Court

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and Administrative Duties to the Courts". In S. Shetreet (Ed.) *The Role of the Courts in Society* (Dordrecht: Martinus Nijhoff Publishers, 1988) 97-126. These trends can be attributed to various causes and developments. It can result from the general problem of contemporary governments in facing both the need, and their lack of competence, to reconstruct the democratic institutions as to adjust the changing social practices and rights concepts. Consequently this lack of competence generates a situation in which the Court becomes the default agent carrying out such tasks. See, for example R.M. Unger, *What Should Legal Analysis Become*? (London: Verso, 1996) at 30-33. It can also be ascribed to the central role states have come to play in the economy, and the enhancement of governmental functions, which led in turn to a larger cry for an expanded judicial review, especially in the post-second world war era. See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994) at 84-85. Or, it can be assigned to the 'rights discourse' which masters the legal discourse in specific and the socio-political discourse in general. See, for example, Bogart's criticism on that account. W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life in Canada* (Toronto: Oxford University Press, 1994).

[64] M. Edelman, "The Judicialization of Politics in Israel" (1991), 15:2 International Political Science Review 177.

[65] C.S. Diver, "Israeli Administrative Law from an American Perspective" (1997) 4:1 Law and Government in Israel 1 at 2. See also S. Sterett, "Judicial Review in Britain" (1994), 26:2 Comparative Political Studies 421.

[66] I feel one prominent example would suffice. Political agreements in Israel are justiciable. In two consequent cases, the HCJ ruled that political agreement lay within the public law sphere, and as such are subject to judicial examination: See H.C. 1601/90 *Shalit v. Peres* (1990) 44 P.D. (3) 353 (For an English translation see Selected Judgments, Vol. 10 at 204); H.C 1635/90 *Zerzevsky v. Prime Minister* (1991) 45 P.D. (1) 749. For a summary of this case see (1992), 26:4 Israel Law Review 438. Yet in other political systems, coalition agreements lie beyond the jurisdiction of the Court. See H. Schulze-Fielitz, "Coalition Agreements in the Federal Republic of Germany as a Juridical Problem" (1992), 26:4 Israel Law Review, 544, at 557. The *Shalit* case dealt with the question of the publicity of political agreements. While in Israel, the Court was the one to declare that political agreements must be published, in The Federal Republic of Germany, the need to publish coalition agreements was constituted by the government itself. See Schulze-Fielitz, *ibid*, at 546.

[67] I. Zamir, "Administrative Law" in I. Zamir & S. Colombo, *The Law of Israel: General Surveys* (Jerusalem: The Sacher Institute, The Hebrew University, 1995) 51.

has come to downplay its role vis-a-vis dispute resolution and to emphasize its role as a value advocator[68]. Furthermore, the Israeli Supreme Court has declared time and again that it was solely responsible to guarantee that the rule of law will constrain the action of the political authorities[69]. In many cases, the Court's contention that it is the only institution capable of preserving the rule of law was used as a justification for judicial intervention[70].

Explaining this, and other changes within Israeli administrative law and the HCJ's role is the focus of the next pages. These explanations can be divided to three main categories: legal or judicial accounts, statial accounts, and societal accounts. These accounts provide a comprehensive answer for understanding the role the Israeli Court plays within Israeli society. The Court did not simply take on itself the role of the guardian of the rule of law in Israel; this central and important role was also assigned to it by both the government and the citizens.

III Suggested explanations:

1. Legal explanations

The main legal causes for the change in the Court's performance to be examined are first, the change of the legal orientation and the legal codification of Israeli law, second, the

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[68] Goldstein, supra, note 3 at 613; Shetreet, supra, note 4 at 274; Mautner, supra, note 11 at 52-66. On this account see also J. Smith, "Reductionism in legal thought" (1991), 91:1 Columbia Law Review 68. Smith claims that courts' role had changed from a dispute resolution account, through a coordination account, until reaching the meliorative account. In this last account, courts promote some public norms and values over the others, by deciding cases according to what they believe these norms and values would entail.

[69] "When the Court does not intervene, the principle of the rule of law is impaired". H.C 217/80, supra, note 57, at 441. The same idea to justify the Court's intervention was used in H.C 742/84 *Kahane v. Speaker of the Knesset* (1985) 39 P.D. (4) 85.

development of the reasonableness doctrine, third, the nomination of 'activist' judges and forth, Israel's relatively short legal history.

In the early decisions, the English legal tradition dominated, resulting in a more prudent, self-restrained and narrow type of adjudication[71]. In the course of time, the standard for comparison changed, and the American legal system became the dominant source for Court's thinking[72]. The Court's growing rapport with American concepts led to the infusion and incorporation of a less restrained approach into Israeli public law[73]. Further, the second and third generation of Israeli Supreme Court judges were educated in the American legal tradition, and legal concepts were thus heavily influenced by that tradition[74]. In addition, in 1980 the *Fundamental of Law* statute was enacted, as the last link in the chain of the codification of the Israeli civil law and the detachment from the English tradition[75]. The

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[70] *Forty Years*, at 345-346.

[71] See supra, page 98.

[72] Netanyahu, supra, note 6 at 1; Mautner, supra, note 11 at 125. The comparative dimension was acknowledged and cast into the very first decisions. Perhaps because of a lack of expertise or self-confidence felt by the first judges, perhaps because of the Mandate heritage, or perhaps because of the aspiration to built the young State with an international image, the first judges translated foreign precedents into Hebrew and used them as precedents for their decisions. The same method of using foreign decisions has continued, the only difference being, as mentioned, the orientation of the Court and the legal systems it turned upon for guidance.

[73] Lahav, supra, note 21. At the realm of Free Speech, the American comparison prevailed in 1977, in the case of D.N 9/77 *H'aarez v. Electric Company* (1977) 32 P.D. (3) 337.

[74] Shachar, supra, note 41 at 6; J. Weisman, "The Relevance of the American Experience to Legal Education in Israel", (1980-1982), 5 Tel Aviv University Studies in Law, 55; A. Kirshenbaum, "Teaching Methods in Israeli Legal Education: Some General Remarks", (1980-1982), Tel Aviv University Studies in Law, 50, at 51. See also Lahav, supra, note 21. Lahav claims that the orientation towards the American case law had resulted in the filtration of the Grand Style into the Israeli system. On the concept of the Grand Style, and its incorporation to the Israeli legal system see Mautner, supra, note 11 at 12.

[75] D. Friedmann, "Independent Development of Israeli Law" (1975), 10 Israel Law Review 515. The 1980s law replaced article 46 of the Palestine Order-in-Council, and the British case law was downgraded from its supremacy status.

Americanization of the Israeli legal system brought it closer to the world's most activist, central and influential court[76].

Furthermore, developments in administrative law, especially with regard to the reasonableness doctrine, contributed to the Court's growing role as the institution which was expected to preserve and advance the proper norms of public behavior. Although the reasonableness doctrine was first introduced in the fifties, its salience became evident during the 1980s[77]. It is now one of the most prominent doctrines according to which administrative law in decided by the HCJ. The HCJ's adjudication in the Ginosar case, for instance[78], which was labeled 'a blatant example of judicial activism'[79], was decided on reasonableness grounds, more precisely, on the unreasonableness of the administrative decision. This doctrine is a wide open tool that enables the Court to review administrative actions which could not be disturbed otherwise[80]. As there are no criteria against which the reasonableness of an administrative act is measured[81], the Court, alone, defines and demarcates which behavioral norms are reasonable and which are not. By employing this doctrine, the Court

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[76] It is claimed that the American Supreme Court is the most influential on society, and the one which employed the most profound judicial review. See G. Sturgess & P. Chubb, "*Judging the World: law and politics in the world's leading courts*" (Sydney: Butterworths, 1988) at 28.

[77] The reasonableness doctrine, in short, holds that an administrative act may be invalidated if it is unreasonable. The doctrine derive from the common law, and is similar in some ways to the American Substantive Due Process Doctrine. See Hofnung, supra, note 7 at 600. Also see *Forty Years*, at 346.

[78] H.C 6163/92 *Eisenberg v. Minister of Housing* (1993) 47 P.D. (2) 229. In that case, the Court invalidated the Government's decision to nominate a secret service former officer who was involved in a cover up affair as the Director General of the Housing Ministry.

[79] These labels were attached to this decision since: "...Ginosar (the nominee - G.D.) was never convicted in any criminal proceedings, there was no legal grounds to invalidate the nomination...an executive nomination, issued within the limits of legal jurisdiction, with all the related facts considered and evaluated, was struck down on the grounds of being viewed by the judiciary as unreasonable". Hofnung, supra, note 7 at 600.

[80] *Ibid*, at 586.

[81] The doctrine provided the Court with means to forsake its traditional role as the law's applier, and to situate itself as a participant in deciding the content and values of the laws: *Ibid*, at 601.

can justify its intervention to ensure the *general* legality of public administration[82], and it is this which casts and shapes the public values.

Scholars argue that this doctrine, combined with the Court's broadening of the justiciability and standing doctrines, demonstrate that it was the Court itself that added the meliorative account to its traditional role[83]. This phenomenon is connected to the nomination of activist judges, during the 1970s and 1980s[84]. Two names are constantly and simultaneously brought up; Justice Meir Shamgar and Justice Aharon Barak, both future chief Justices of the Israeli Supreme Court[85]. Their influence on the Supreme Court cannot be overestimated. First, both Justices came to the Supreme Court directly after serving as Israel's Attorney General. Consequently, both had obtained ample experience in the political hallways and behind the system's closed doors and were equipped with an ability to 'stand the heat of political crises'[86]. Additionally, this background naturally contributes to a special dedication in developing both administrative and constitutional law, and a particular

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[82] *Forty Years*, at 342.

[83] See also footnote 68. "In justifying its decision to widen the scope of judicial review...the Court relied time after time on one reason: the need to protect the rule of law...One gets the clear impression that the Court assumes that the principles of law are, and must be, the only constraints on the actions of the political authorities. It is inclined to ignore the fact that there are other controls in the relations between political bodies and other arms of government". *Forty Years* at 345-346.

[84] Hofnung, supra, note 7 at 592; Netanyahu, supra, note 6 at 1; Lahav, supra, note 15 at 141-146.

[85] Justice Meir Shamgar was appointed to the Supreme Court in 1975, and became Chief Justice in 1983. He retired in 1995. Justice Aharon Barak was appointed in 1979, and became Chief Justice in 1995. Chief Justice Barak himself named the former Chief Justice Shamgar an activist judge: A. Barak, "President Meir Shamgar and Public Law", (1995) 3:1 Law and Government in Israel 11 at 26 (In Hebrew).

[86] Lahav, supra, note 15 at 142. After the Yom-Kippur war, Aharon Barak, the "dynamic attorney general, was given a free hand to investigate and prosecute all the corruption scandals involving top Mapay Leaders": E. Sprinzak, "Elite Illegalism in Israel and the Question of Democracy" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress,* (Boulder: Lynne Reinner Publishers, 1993) 173 at 187. Barak's prosecution of the Prime Minister's wife, Lea Rabin, for an illegal foreign banking accounts, ultimately forced Rabin to resign.

commitment to the rule of law[87]. Second, both enjoyed reputations as charismatic, outstanding figures; their dissenting opinions became the source preferred in later opinions, coming eventually to constitute the opinion of the majority[88]. Third, both served as Chief Justices for a substantive amount of time, enabling them to leave their activist endowment on the Court[89]. For instance, many commentators attributed the notion that the new Basic Laws[90] generated a 'constitutional revolution' totally or mostly, to Justice Barak's writings and speeches on the subject[91], and related the Court's activism and its intensified interference to its president.

Lastly, the fact that the Israeli Court was supposed to open a new page in the legal system can also offer a possible explanation to the profound changes which took place in a relatively short time. As the new page symbolized a break from the past, towards a burgeoning future, it facilitated the development of a "mixed" legal system which both absorbed and modified traditional rules and precedents. Indeed, independence of mind and

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[87] Barak, supra, note 85 at 1. One can hypothesize that after serving as an Attorney General, living with the darker side of politics, and learning at first hand how governments really decide and operate, one becomes very anxious, as a judge, to preserve and assure the rule of law. This hypothesis is even stronger in the Israeli context. In fact, Justice Barak admitted that his support in broadening the standing requirement was the outcome of his own experience with the Rabin's government back in 1977, when that government tried to prevent an indictment of Leah Rabin (the PM's wife), due to electoral considerations. Then and there Barak decided to guarantee that no government would ever believe itself free to commit an illegal act just because no one had the standing to take it to Court. See Jerusalem Post, 27.10.96.

[88] Lahav (supra, note 15, at 142) gives the example of the decision in D.N. 9/77, supra, note 73, in which Shamgar's minority opinion (by a margin of 4 to 1), became, after a short while, the opinion being cited more and more with regards to freedom of speech in the 1980s.

[89] The importance of Chief Justices has a number of sources. To mention but two, the Israeli Chief Justice determines which judges will sit on the bench in a petition submitted to the High Court of Justice. He/She also sits as the head of the Judges' nomination committee for all judges in Israel, including Supreme Court Judges..

[90] See supra, note 8.

[91] Gavison, supra, note 9; A. Marmor, "Judicial Review in Israel" (1997), 4:1 Law and Government in Israel 133 (In Hebrew); R. Shamir, "On the Politics of Reasonableness" (1994), 5 Theory and Criticism 7 (In Hebrew). B. Bracha, "Aharon Barak: Constitutional Interpretation, Book Review" (1995), 3:1 Law and Government in Israel 339 (In Hebrew).

innovative solutions typified the decisions of the HCJ, especially in the field of public law[92]. The Court felt free to go far beyond traditional approaches. The Israeli special circumstances hence facilitated the judiciary, usually a somewhat rigid institution, to flex its muscles more easily. These circumstances prompted the Court to become a more flexible, agile actor and adopt to change more quickly. Courts usually progress gradually: the Israeli court was able to advance a bit more swiftly, and soon come up to speed with other national courts in its development of the law.

These explanation, while introducing important characteristics of the Israeli judiciary, cannot, in themselves, offer sufficient explanations of the Court's transformation. Courts do not operate in isolation. Legal doctrines or orientations cannot be insulated from societal developments. Legal change cannot be attributed in total to personnel changes. Understanding legal change necessitates an analysis of the interplay of a broad range of factors:

> Although it may result from personnel changes, it also can be understood, for example, as the product of evolving doctrine, the climate of the times in which cases are decided, the issues thrust upon the court and the configuration of actors framing arguments and pressing claims through the courts"[93].

It is to these factors we now turn.

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[92] *Rule of Law and Civil Liberties*, at 67-68.

[93] L. Epstein & J.F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: The University of North Carolina Press, 1992) at 4.

2. Political - statial explanations

Recall the account of the passivity of both the Knesset and Government since the late 1960s in chapter two[94]. The paralysis increased during the 1980s, when two consecutive National Unity Governments (*NUG*) governed from 1984 to 1990[95]. The *NUG* was almost totally impotent[96]. It created a situation of increasing ungovernability and stalemate[97]. Consequently, except for a few important decisions, mostly regarding the Israeli presence in Lebanon, the Israeli Government was a paralyzed Leviathan for almost an entire decade. Furthermore, the *NUG* also had a derogatory effect on the Knesset, as "the Knesset played no appreciable role in the processes of government"[98]. As the legislative body, it made no independent decisions[99], and as the parliamentary body, it did not oversee the executive[100]. Thus, during the 1980s, while profound changes took place within society, the political sphere demonstrated non-governability[101]. The Court, as a governmental institution, was thus left alone to relieve some of the pressures felt by the citizens;

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[94] See chapter two, pages 31-50.

[95] These NUG were a wall-to-wall coalition, including close to 100 out of the 120 Knesset members. See M. Nisan, "The problems of Policy-Making: Foreign and Security Issues in Israel's 1988 Election" (1991), 39 Political Studies 122 at 134.

[96] S. Lehman-Wilzig, *Wildfire: Grassroots Revolts in Israel in the Post-Socialist Era (Albany: State University of New York Press, 1992)* at 129-136.

[97] E. Sprinzak & L. Diamond, "Introduction" in E. Sprinzak & L. Diamond, *Israel Democracy Under Stress,* (Boulder: Lynne Reinner Publishers, 1993) at 3. The coalition agreements conferred on both parties a mutual veto, enabling each one to block the other's initiatives, and in special issues, extended the veto power to include the religious parties. See Hofnung, supra, note 7 at 593. Although the two major parties were in sufficient agreement to try and work together, they disagreed enough not to be able to resolve the basic differences between them. Due to these agreements, no far-reaching or fundamental political steps were taken and clearly no long-term strategic planning would be undertaken, especially regarding one of Israel's most burning problems: the fate of the Territories. See also Nisan, supra, note 95 at 134.

[98] Nisan, supra, note 95, at 134.

[99] Hofnung, supra, note 7, at 593.

[100] Nisan, supra, note 95, at 134.

[101] G. Barzilai & Y. Shain, "Israeli democracy at the Crossroads: A Crisis of Non-Governability". (1991), 26:3 Government and Opposition 345.

> "This [the Knesset inaction - g.d.] left the High Court of Justice as the only open avenue for making decisions on matters undecided by the two other branches of government. The enormous increase in petitions of organized groups to the High Court of Justice during the 1980s was encouraged by the Court's judicial activism and by its willingness to lower the previous high barriers of justiciability and standing, which prevented petitioners from presenting their cases in the past"[102].

Yet the citizens were not the only ones frustrated by the situation in parliament. Knesset Members (*MKs*) petitioned the Court as well. From either small or big parties, *MKs* marched into Court asking for its intervention in parliamentary decisions. Unlike a reference case, in which the Canadian federal cabinet refers to the Supreme Court a political abstract or hypothetical question[103], concrete, factual political questions were referred to the Israeli Court and concrete, politically-oriented remedies were demanded. The first two petitions were submitted in the early 1980s[104]. They were followed by many others, touching a variety of Knesset decisions[105]. Some of the most sensitive, political questions that were dealt by the Court were brought by *MKs*[106].

This development reveals that the *MKs* shared the public's disappointment and frustration from their own representation. They also shared the public's trust in the Supreme Court[107]. As mentioned in the third chapter, Israeli political history had many turning points since the Labor party first lost power in 1977. Each political turnabout saw promises broken, arrangements ignored, and narrow interests prevailing over political integrity. The *MKs*

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[102] Hofnung, supra, note 7, at 593.

[103] P. Russell, "Judicial Power in Canada's Political Culture" in: M.L. Friedland, *Courts and Trials: A Multi-Disciplinary Approach* (Toronto: University of Toronto Press, 1975) 75. Russell sees in reference cases a procedural rule which enable the court's insertion into the most controversial and burning political issues. Further, Russell feels such cases, being decided by the Court, do not contribute, to say the least, to court legitimacy.

[104] H.C 306/81 *Plato-Sharon v. Knesset Speaker* (1981), 35 P.D. (4) 118; H.C 652/81 *Sarid v. Knesset Speaker* (1982), 36 P.D. (2) 197.

[105] On judicial review over Knesset decisions see M. Shamgar, "Judicial Review of Knesset Decisions by the High Court of Justice" (1994) 28:1 Israel Law Review 43.

[106] *Courts and Politics*, at 530.

acknowledged these characteristics of Israeli political culture. They were also aware of the possibility that they could find themselves on any one of the political fences (to wit, the one that broke a promise or the one of which a promise to him was broken). Thus, they entrusted the Court with the task of keeping their rival's hands clean[108]. They too, believed more in the Court's ruling than in the decisions they or their political counterparts arrived at. Indeed, the first petitions to the HCJ were submitted by *Mks* from the opposition[109]. They were also first submitted by members from small factions[110]. I find this not surprising: Israeli coalition governments traditionally ignored the opposition all together and dismissed its objections as merely petty 'barking'[111]. Israeli opposition parties were never successful in restraining the power of the governing parties, as they were never effective in forcing the executive to adhere to general (as opposed to partisan) principles of political virtue[112]. The Court thus, became an arena in which opposition reservations could be heard. Yet petitioning the HCJ was not reserved for opposition *MKs*, as their concerns were not regarding parliamentary proceedings alone[113]. Nowadays, members from all the political spectrum seek the Court's

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[107] On the public trust in the judiciary see infra, pages 114 onwards.

[108] This could be but another reason why Knassot and the governments refrained from limiting the Court's interference in various areas. See chapter two.

[109] Prof. Zamir suggests, the opposition, "being not content with what they can achieve in the Knesset, approach the court seeking as additional avenue to advance their interests and views". *Courts and Politics*, at 530.

[110] The first case was brought by Platto-Sharon, a single-person-party. The petition concerned a decision of a Knesset committee to suspend from the Knesset, pursuant to a certain law, a member who was convicted of a criminal offense. H.C 306/81, supra, note 104.

[111] Y. Shapiro "The historical origins of Israeli democracy" In E. Sprinzak & L. Diamond, *Israeli democracy under stress* (Boulder: Lynne Rienner Publishers, 1993) 65.

[112] *Ibid.* at 73 . The second petition was brought by a *KM* from the opposition Labor party - the second biggest party in that Knesset. See H.C 652/81, supra, note 104. The petition concerned the decision of the Knesset Speaker (an office traditionally filled by a member of the biggest coalition party) to fix the date for a vote of no confidence. In this case, however, the Court did not intervene. On the cases in which the Court interfered with parliamentary proceedings see, D. Kretzmer, "Judicial Review Of Knesset Decisions", (1988), 8 Tel-Aviv University Studies in Law 95.

[113] The following decade saw petitions from coalition members themselves, for example Refael Pinhasi - a member in the Shas coalition party, and a minister's deputy petitioned the HCJ regarding the proceedings preceded his parliamentary immunity removal: H.C 1843/93 *Pinhasi v. The Knesset* 49 P.D. (1) 661.

intervention in various issues. These appeals demonstrate that all layers in Israeli society - the governed as their governors - are willing to assign to the Court the extraordinary, expansive role of deciding sensitive public controversies[114].

The Knesset as a whole, not just the individuals who constitute it, has also assigned the Court and its judges important duties, and by so doing further deepened the perception that the Court is the sole institution which is competent and worthy to carry out the precious responsibility of preserving the rule of law.

In 1968, the Knesset enacted the Commissions of Inquiry Law, authorizing the Supreme Court's President to constitute an inquiry commission, at the request of the Government, for the purpose of investigating major public matters of the highest national importance. A judge, either from the Supreme or District court, serves as chairman[115]. Although the Commission's final report as well as its recommendations have no binding authority, past practice shows that these reports have often had profound consequences. The Agranat commission, for example, investigated the Yom-Kippur debacle. Its findings led to the resignation of Prime Minister Golda Meir. The Kahan commission probed into the massacre in the refugee camps of Sabra and Shatila, and resulted in the reassignment of Ariel

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Additionally, in a recent case, a member of the NRP (national religious party), a coalition party within the Netanyahu coalition, applied to the Supreme Court. His petition concerned the awarding of '*Israel Price for Cultural Contribution*' to the left-wing writer, Amos Oz.

[114] "Courts may have to deal with problems involving political and social issues where the legislature was reluctant to resolve them... The legislature or the executive may shirk their political responsibilities by passing on such questions to the courts... In a Coalition Government, as in Israel, the political factions may not agree on how to resolve a particular question, and so, by default, the question will be shifted to the courts, hence turning it to a legal issue". S. Shetreet, "Judging in Society: the Changing Role of Courts" in S. Shetreet (Ed.) *The Role of the Courts in Society* (Dordrecht: Martinus Nijhoff Publishers, 1988) 467 at 469; See also Hofnung, supra, note 30 at 295. Similarly, Mandel claims that the Canadian legislature and executive as well as the Court, were responsible for assigning the court extraordinary roles; supra, note 63 at 32-38.

[115] Commissions of Inquiry Law 5729-1968 L.S.I. 23, at 32.

Sharon, then Minister of Defense[116]. These matters constituted some of the most sensitive and explosive public controversies and political or social dilemmas. Heading these commissions with a judge, reflected the prevailing view that only judges, and no other public figures, could ignore political disputes and properly perform such important tasks with independence[117]. Only Judges could conduct such an inquiry with proficiency, credibility and impartiality[118].

That same year, the Evidence Law was amended, allowing the Supreme Court the authority to scrutinize evidence declared privileged by the Minister of Defense[119]. The amendment threw the Court into primary sensitive cases, involving vital security decisions as well. Additional legislation assigned the Supreme Court the task of functioning as a Military Court of Appeals[120].

To conclude, all the above implies that the Israeli state contributed to, believed in, and reinforced the Court's role as the guardian of the rule of law. The political bodies perceived the Court to be the one non-partisan, professional and trustworthy institution capable of dealing with important social and political topics.

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[116] Shetreet, supra, note 54 at 983. The Beisky commission probed the Stock Market collapse in 1983, and its paper led to the commitment to trail of the banks' directors. The Landau commission probed into the interrogation techniques of the Secret Service. The most recent commission, headed by Justice Shamgar, probed the killing of about 40 Palestinians in Hebron by Baruch Goldstein, an Israel settler.

[117] The experience a judge has acquired after years in office contribute to his/hers appropriateness; these commissions are authorized to collect evidence, they are supposed to evaluate these evidence and determine their credibility. The report is expected to be reasoned and convincing. That being said, other figures or bodies could also be considered for the task like an Independent Counsel, the Attorney General or even the State Comptroller. Yet these possibilities were never proposed.

[118] Shetreet, supra, note 54 at 987; Burt, supra, note 14 at 2034; Z. Segal, "Judges as Chairmen of Commissions of Inquiry" In S. Shetreet (Ed.) *The Role of the Courts in Society* (Dordrecht: Martinus Nijhoff Publishers, 1988) 342. After reviewing the English roots of the legislation, Segal concludes by saying at page 351: "the Justices perform a task of vital public importance which could not have been carried out by anyone other than Justices of the highest reputation".

[119] Before that, a piece of evidence that was declared by the Minister of Defense as confidential due to security considerations, was immune from judicial review. See Burt, supra, note 14 at 2034.

3. Societal explanations

Israel's fourth decade was a significant one for Israeli society[121]. While the government was in a deadlock, Israelis began to awake from years of idleness, contemplating their relations with their polity. The appropriate role of the state started to be questioned. The traditional interpretation of the meaning of democracy in Israel was reflected upon. The behavioral norms of the leaders were carefully observed. The trust vested in the political system and institutions was undermined. People's faces, while still directing their look east[122], were now oriented towards their High Court of Justice. Their hands constantly knocked on the Court's door. They knocked and knocked, until they were finally admitted[123]. They were admitted, I claim, as a reward for the trust they rendered to the HCJ. The Court gradually let them in because it was granted, and took on, the power to do so.

The very essence of Court's legitimacy in modern societies inheres in public confidence in the judiciary;

> "Without public confidence the judiciary will not be able to operate... The public confidence is the Judiciary's most precious property. It is also one of the most precious properties of every nation. De-Balzac's saying is well known, that lack of confidence in the Judiciary signals the beginning of any society's end (as cited at

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[120] This amendment, from 1986, granted the Supreme Court the authority to hear appeals on Military Court decisions, concerning legal questions. See Hofnung, supra, note 30, at 205.

[121] The significance of the 1980s was elaborated on in chapter three.

[122] Jews were always turning east, towards Jerusalem.

[123] The three *Ressler* petitions, regarding the religious drafting deferment, can serve as an example. The petitioner was left to stand in the threshold twice before the Court's gates were finally unlocked in 1986. See supra, footnote 58. The first two petitions, from 1981 and 1982 were both denied on the grounds of the petitioner's lack of standing. The third petition, although likewise denied, was decided on its merits.

> Kircheimer, Political Justice (1961) 175). Yet public confidence is not equivalent to popularity. Public confidence means the public's feeling that the judicial decisions are being decided in a decent, objective and, neutral manner[124].

The Israeli Supreme Court is well imbued with Israelis' confidence. Studies repeatedly found Israeli public confidence in the HCJ to be high - both independently and relatively to other Israeli institutions or comparatively to other countries[125]. The Israeli HCJ is perceived by 87.6% of the sampled group to be a legitimate, 'contributing to the state' institution[126]. Further, 85.5% find the HCJ to be a non-political, neutral institution, while 79.4% believe the HCJ is the *'little citizen'*s delegate, defending it from governmental arbitrary[127]. The HCJ is thus appreciated as a non-partisan body that promotes the general will and contributes to the nation-state and to democracy. Although this pioneering survey has its faults[128], still it discloses some impressive findings of how Israelis perceive their HCJ. It also reveals an exceptional fact: Israelis trust their Court much more than any other citizenry: in an international study which investigated the level of citizens' confidence in

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[124] Justice Barak's words in H.C 732/84 *Tzaban v. The Minister for religious affairs* (1986) 40 P.D. (4) 141 at 148-149 (Informal Translation - g.d.).

[125] G. Barzilai, E. Yuchtman-Yaar & Z. Segal *The Israeli Supreme Court and the Israeli Public* (Tel-Aviv: Papyrus, 1994), (In Hebrew)(Hereinafter: *Israeli Supreme Court and Public*). The authors made the first comprehensive study on Israeli public's attitudes towards the Israeli Supreme Court sitting as HCJ. The Book relies on a scientific poll which was conducted by the authors in July 1991, among a representative sample of the adult Jewish population in Israel. The main goal of the research has been to analyze the scope of public legitimacy towards the HCJ. A 1997 follow-up research, conducted by Prof. Ya'ar from the Steinmaz Institute, found that 84% of the sampled group trusted the Supreme Court. See Haaretz, 2.2.1997 at page 13B.

[126] *Israeli Supreme Court and Public*, at 69.

[127] *Ibid.* The authors divided the results into two; those in which the HCJ has been supported by a limited public consensus, to wit, a support of at least 65% of the public, and a broad consensus, to wit, a support of at least 75% of the public. Thus, the results mentioned above belong to the issues around which the HCJ has been supported by a broad consensus.

[128] The most prominent of all is the fact that the sample group excluded Arabs, Kibbuzniks and Jewish settlers in the Territories. Additionally, the ultra-orthodox Jews were under-represented. The Arab population in Israel is about 18%. The Kibbuzniks are about 3%. The ultra-orthodox are about 10%. Consequently, the survey represent only 70% of the Israeli population. Moreover, two out of the three excluded groups are the ones who raise the loudest voices against the HCJ's interference. In these groups

their court system and in the rule of law, Israel ranked number one, ahead of the U.S., British and Italian systems[129].

Interpretations given to these powerful data match the complementary findings regarding the degree of public confidence in the Knesset, Government and the political parties: 57.7% of the sampled group appreciated the Knesset as a legitimate, 'contributing' institution; 51.6% thought that on the Government and only 25.1% - on the political parties[130]. It is worth mentioning that 71.5% and 67.4% supported judicial review over Knesset and Government's decisions, respectively[131].

Attempting to provide an exhaustive explanation to all these figures, the dominant literature came up with the '*No-Vacuum*' physics rule, or the '*transitivity feature*'. If members of the public lost their trust in one or another institution, they will gain it back from a substitutive one. If public trust - as a social power, stimulus or a motivation - in the Government and the Knesset dropped, it must have risen in an alternative avenue, here, the Court[132]:

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the HCJ does not enjoy much legitimacy. That said, still over 60% of the entire Israeli population conceives the HCJ as legitimate, and about 60% believes in its neutrality.

[129] The study, conducted by the International Social Science Program in 1991, in fifteen countries was mentioned in Peretz & Doron, supra, note 43, at 184.

[130] *Israeli Supreme Court and Public*, at 69. Taking into consideration the omitted groups, it is reasonable to assume a further decline in these percentages, at least with regards to the Knesset and the Government. The ultra-orthodox, even though constituting part of most of the Israeli coalitions throughout the years, still find the government and Knesset as presently constituted (i.e., without divine sanction) to be a direct violation to "*Malhut Shamayim*" - the heavenly kingdom assigned to the Jewish people by God. The Arab-Israeli population, being excluded from participating, or even being considered as a legitimate participant, in Israeli governments, would probably further undermine the support registered for these political institutions.

[131] *Ibid.* at 76.

[132] Netanyahu, supra, note 6, at 1: "The change and the new concept of the Supreme Court's openness were caused by combined several reasons:...the disillusionment and loss of confidence of the public in the political institutions...and growing respect and trust in the Supreme Court"; Shetreet, supra, note 54, at 983: "The judicialization has been caused by a constitutional vacuum resulting from the decline in the power of

> "The Supreme Court's openness was caused by...the disillusionment and loss of confidence of the public in the political institutions... and the growing respect and trust in the Supreme Court[133]".

This exposition is indeed very appealing. Yet, taking into account the lack of previous surveys comparing public attitudes towards these different institutions[134], one wonders what is the true connection between the people's confidence in the Court as compared to their insecurity and mistrust in the other bodies of government[135]. In spite of the fact that it could not be scientifically proved, I am inclined to believe public confidence in the Court was always present, while an erosion of trust with respect to the political branches did occur[136]. I thus hypothesize the mechanism to be a little more complicated. Political discontent notwithstanding, I surmise that the Supreme Court can provide Israelis with an answer to a need which the other parts of the government cannot. That need - the next section demonstrates - is to be both a Western democracy and a secured Jewish state.

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the executive which must be filled by another branch of the government"; Goldstein, supra, note 3, at 616: "...intense public dissatisfaction with the other branches of government...has already led Israel to a growing phenomenon of converting questions of governmental policy into legal questions..."; Edelman, supra, note 64, at 184: "The default of Israel's democratically elected leadership has produced a vacuum: and the people have turned to the courts to resolve an ever increasing range of problems".

[133] See Netanyahu, supra, note 6 at 1. For the same account see *Revolution of Evolution*, at 367; Goldstein, supra, note 3 at 616.

[134] Barzilai and Yuchtman-Yaar's survey was the first study to explore the attitudes of the Israeli public towards the High Court of Justice, and compare these attitudes to other leading institutions. See *Israeli Supreme Court and Public*, English abstract, at v.

[135] For example: Did, in fact, public confidence in the Court rise? Did public trust in the Knesset and Government really drop? Is it possible Israelis always trusted their Court and never really trusted their government/parliament and yet it is only now, when they have been liberated from their dependence over the political branches, that they can fully express their attitudes?

[136] G. Wolfsfeld, after analyzing a series of surveys regarding the public content with political institutions during the 1970s-1980s, concludes: "These figures show that the political discontent expressed by the Israeli public is part of a long stable trend". Attributing the starting point of the on-going discontent to 1977, he mentions: "the national unity government didn't help to gain back the people's trust in Israel politics, but rather helped to sustain it". G. Wolfsfeld, "The Politics of Provocation Revisited: Participation and Protest in Israel" in: E. Sprinzak & L. Diamond, *Israel Democracy Under Stress* (Boulder: Lynne Reinner Publishers, 1993) 199 at 203.

VI The Israeli Schizophrenia - the Court's remedy

The HCJ came in third in the 'contributing to the state' Marathon[137]. While 87.6% believed it to be a contributing institution to the state, 94.9% believed the same regarding *IDF*[138] and 91.1% - regarding the State Comptroller[139]. Israelis legitimate and trust, first and foremost, their army, followed by their State Comptroller and then their Court.

These findings are somewhat surprising. In the next pages I will offer an analysis which will relate these findings to the Israeli context, thus illuminating how these three institutions respond to Israelis' most profound needs.

The Israeli army, Comptroller and Court enable Israelis to feel they live in a well-ordered democracy, one that preserves and protects the rule of law, in particular citizens' rights against arbitrary governments, on the one hand, while protecting and preserving their physical survival on the other. Israelis trust the institutions that work to keep them alive, and to improve their lives. *IDF* provides for the first need, and the Comptroller and the HCJ - to the second.

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[137] *Israeli Supreme Court and Public*, at 69.

[138] Israeli Defense Forces. Known also as Zahal.

[139] *Israeli Supreme Court and Public*, at 69. The State Comptroller (Hereinafter: "*Comptroller*") is elected by the Knesset, and is responsible only thereto. Thus, the Comptroller serves as the arm of the Knesset, to ensure the efficient implementation of administrative review. The office is authorized to carry out the inspection of the assets, finances, undertaking and administration of the State, of Government offices, of every enterprise, institution or public corporation of the State, the local authorities etc. It may request any material necessary for the inspection of any administrative body that it audits. The Comptroller's reports are published and discussed by the Knesset's Public Audit Committee. The Government is expected to publish a report detailing its compliance with the reports of the Comptroller. The Comptroller also serves as the Public Complaints Commissioner. More on this issue see: P. Elman, "The Israel Ombudsman: An appraisal" (1975), 10:3 Israel Law Review, 293; H. Klinghoffer, "Israel's Ombudsman" (1972), 4 Mishpatim, 148 (in Hebrew).

Yet, why cannot the political bodies respond to both these needs? Why do Israelis turn their back on the political, representative, elected assemblies, and repose their confidence instead in a handful of un-elected, un-accountable people[140]? After all, the Comptroller is elected by the Knesset, not by the general public. The candidate's name is in fact not known to the public until a few weeks prior to the vote; the candidate is offered by, and accepted on the two biggest parties. Army generals are appointed by the security administration. Supreme Court judges are selected by a special committee, constituted by two *MKs*, two Ministers, two members of the Israeli bar, and three Supreme Court judges[141].

The answer, I propose, lies in the public myths[142] attached to these three institutions, and their competence in fulfilling Israelis' notion of democracy.

First - the myths: *IDF*, the Comptroller and the Supreme Court are perceived as non-partisan, apolitical, independent, fearless, efficient, and influenced by nothing but the rule of law. The *IDF* is defined by the public as *the* non-partisan and apolitical institution[143]. The former Comptroller, Miriam Ben-Porat, a former Supreme Court Justice, who served the position for the past ten years, scrutinized the public administration under both Likud and Labor, and the two parties featured prominently in her reports. The Court, as was mentioned,

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[140] One of the most controversial issues in the recent legal discourse is the legitimacy crisis courts and societies are facing, as a group of unelected judges overrule decisions made by public representatives. See on this point, for example, K. Rainer & F.L. Morton, *Charter Politics* (Scarborough, Ont: Nelson, 1992). Israeli law guarantees the Comptroller confidentiality. Its investigations are secret and the report's decision-making is un-transparent. *IDF* is not subject to the general *'freedom on information'* rules. Further, is almost impossible to impeach the Comptroller, as dismissing a comptroller must be approved by 80 *MKs*. Judges have security of tenure. The way to dismiss *IDF* generals is not known to the author.

[141] The Judges Law 5713-1953, 7 L.S.I. 129.

[142] The term 'myth' signifies a common social belief that gives institutions and actions a symbolic and idealized meaning.

is also defined as non-partisan. The independence of the three is also evident, as reflected in the appointments and dismissal processes of the Comptroller and Supreme Judges. Even though the *IDF* is subject to the PM's authority, its independence derives from the fact that its generals decide how to fulfill the government's general instructions. The three also seem un-influenced by the party-in-power: *IDF* will carry out any task assigned to it by the PM[144], the Comptroller will probe into any facet of the public administration as such and the Court will not a priori refuse or agree to hear petitions on these bases. Additionally, they are perceived as active and practical institutions[145].

These three bodies represent to Israelis everything the political branches of government do not. They stand in contrast to an over bureaucratic, overly partisan, paternalistic, self-interested, at times impotent and unruly, polity[146]. At least, so the people perceive.

Second - one must consider the Israelis' notion of democracy. The democratic state in the Middle East is a particularly complex concept:

> "...The relationship between the emergence of civil society and a democratic state may be more complex in the Middle East than general writings on civil society would lead us to believe"[147].

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[143] *Israeli Supreme Court and Public*, at 69.
[144] Except in rare circumstances, while an order is unlawful in reality.
[145] There is a saying in Israel, that if you want something to be done, you let the *IDF* do it. Further, at least the last Comptroller produced more than one long and thorough report a year.
[146] The main characteristics of Israeli political culture was discussed on chapter three.
[147] S. Migdal, "Civil Society in Israel" in E. Goldberg, C. Kasaba and J.S. Migdal (Eds.) *Rules and Rights in the Middle East: Democracy, Law and Societies* (Seattle: University of Washington Press, 1993) 118 at 120.

This complexity is not merely abstract or theoretical. It is well manifested in the Israel of the 1990s. It is also reflected in the way Israelis comprehend, and in what they expect from, democracy. Israel is cherished by Israelis and the international community at large as the only *democracy* in the *Middle East*. Both wish Israel to *remain* a democracy in the Middle East. The three institutions under discussion allow Israelis to maintain their democracy under perilous circumstances, without endangering their own existence; to value Western public administration rules, but to enjoy the benefits of a strong state; to add liberal components to the system, yet limiting those components to the groups that do not imperil the overall political order.

IDF satisfies the second need. It defends the state's internal and external borders[148]. It assures the people's survival in an hostile, anti-Jewish, Arab environment. The Comptroller looks after the public officials' norms of behavior. This office stands to ensure that the administrative system will duly function. The Court combines both of these demands. On the one hand, the Court, just like the army, adheres to the national Jewishness and security narratives. The Court;

> "is not willing to go into the merits of security considerations except in the most exceptional cases..."[149].

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[148] By internal borders I mean the Territories administrated by Israel ever since 1967. In addition, I mean the past internal borders that used to divide Israel until 1966. Until that year, the Arab population in Israel was subject to a military administration.

[149] R. Gavison, "Forty Years of Israeli Law: Constitutional Law" (1990), 24:4 Israel Law Review, 429 at 445; R. Shamir, "Landmark cases and the reproduction of legitimacy: the case of Israel's High Court of Justice" (1990), 24:3 Law and Society Review 781; *Israeli Supreme Court and Public*, at 41.

On the other, just like the Comptroller, it supervises the public administration and forces it to abide by the rule of law and to follow up what that rule entails.

Democracy in Israel has more to do with the administrative rule of law than with constitutional human rights. The procedural aspects of democracy (that is, the political rights and so forth) were always honored[150]. The substantial aspects of democracy (that is, the liberal human rights to all citizens and/or residents of the state) are not there yet[151]. The rule of law and the public service aspects were poured onto the concept of democracy in the 1980s[152]. From then on, Israelis wanted more from their representatives and their public administration. And since they could not get the administration to change accordingly, they focused their attention on the Comptroller and the Court.

Indeed, these two institutions have a lot in common, at least in Israel. Both attempt to improve the norms of behavior among public service employees[153]. Criticism directed at both of them derives from the expansion of their activities[154]. Finally, the personnel overlapping between the institutions is significant: the former (ten-years-in-office) Comptroller, Miriam

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[150] On this point see chapter three, especially pages 85-86.

[151] *Israeli Supreme Court and Public* at 49. The data reveal Israelis favor the contraction of human rights due to security considerations.

[152] Sharkansky argues that the political appointments in Israel, high by standards of other Western democracies, increased during the National Unity Government: I. Sharkansky, "Israeli Civil Service Positions Open to Political Appointments" (1989), 12:5 International Journal of Public Administration 731.

[153] A. Friedberg, "Norms of Behavior for Public Officials in the Administrative System of Israel" (1993), 16:1 International Journal of Public Administration 57. The rapport between Comptrollers and Courts on administrative issues is not particular to Israel. See D. Oliver, "Parliament, Ministers and the Law" (1994), 47:4 Parliamentary Affairs 630.

[154] Sharkansky claims that Israel's State Comptroller has audited the political behavior of elected officials and private citizens, in what are departure from its own traditions and those of other State auditors: I. Sharkansky, "Pushing the Frontiers of State Audit: Political Auditing by Israel's State Comptroller. (1995), 18:2 International Journal of Public Administration 1841. Such claims regarding the Court are an everyday phenomenon in Israel.

Ben-Porat was the Supreme Court deputy President. The incoming Comptroller, Eliezer Goldberg was also a Supreme Court judge.

Israeli Schizophrenia is clearly manifested when a conflict between those three institutions arise. Public confidence and support in the Court contracts to the extant the Court intervenes in security considerations or decisions[155]. The legitimacy of the Comptroller's harsh criticism stops at the point at which that criticism is directed against the *IDF*[156]. Notwithstanding that public protest in Israel is very common and well-rooted, Israelis do not usually protest against their army[157]. Since Israelis did not yet choose between the two contradictory notions they hold on democracy, they are reluctant to embrace the idea that even their most admirable institutions will prefer one over the other.

VII Conclusion

> "Every theory of administrative law reflects, to a large extent, the image of the political concepts of society, in which it is applied... This is one of the tasks and duties of the courts which review...administrative actions...[to] create an important balance between different, and something opposed needs of a modern technologically advanced society..."[158].

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[155] *Israeli Supreme Court and Public*, at 112.

[156] In a 1995 special report, Comptroller Ben-Porat criticized the army's handling of the gas masks in the Gulf war. According to her report, a great portion of the components in the masks' pack were old and ineffective. *IDF*'s spokesman reacted sharply. Some argue that the Comptroller lost a lot of points in the public's eyes as a result of that report. See Haaretz, Supplement, Friday, June 12 1998 at 12.

[157] Lehman-Wilzig, supra, note 96 at 66: "On the face of it, these low levels (of conscientious objection - g.d.) are somewhat surprising given the general Israeli tendency to protest, and especially in light of the large number of Israelis with serious misgivings regarding Israeli policy in the territories. Why, then, the weakness of this particular grass-roots revolt? *Once again, because it potentially could threaten the very existence of the State of Israel. Any threat to the functioning of the IDF is perceived by the Israeli public as undermining the nation's foundations, given the parlous state of its security situation.*"

[158] M. Shamgar, "The Supreme Court of Israel: Present Trends and Concepts" (1985), 20:1 Israel Law Review, 175, at 181.

Israeli political concepts of society and its needs are somewhat contradictory. They combine democracy with security; nationalism with universalism; statism with liberalism; the rule of law with the state of emergency; visions of western utopia with the Middle East reality. Israel is an overburdened[159] society and also an overloaded state[160]. As the Court mediates between state and society in Israel, it too became overencumbered.

The state shirked some of its responsibilities, throwing them over to the Court. Moreover, time and again the electorate demonstrated its faith in the Court's and its judges' professionalism, impartiality and decency. By enacting laws which trusted important public issues to the Court's hands, they have acknowledged the profound difference between their norms and culture to that of the Court[161]. By guaranteeing a majority of the experts in the Judges' Nominations Committee[162], the political branches apparently declared: 'We leave the Court to the judicial experts as we want it to be left non-partisan'.

The society, dismayed at what it witnessed at the house of representatives and the offices of administration, turned to the Court for relief. Disappointed with the political culture and the malfunction of the polity, it sought to protest against, participate in and

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[159] D. Horowitz & M. Lissak, *Trouble in Utopia: The overburdened Polity of Israel* (Albany: State University of New York Press, 1989).

[160] I. Sharkansky, "The Overloaded State" (1997), 20:5 International Journal of Public Administration, 989.

[161] "In Israel, a fascinating paradox has emerged from the sharp dichotomy between the operating norms of the political and legal cultures...In the highly politicized democracy that Israel is, authority - and a fair amount of political power - has flowed towards its premier non-partisan institution". M. Edelman, "The Judicial Elite of Israel" (1992), 13:3 International Political Science Review, 234 at 246.

[162] As of 1957, and until these very days, the nine-members' Committee, the majority lays within the legal/judicial members; 5 out of the 9 represent the legal system - three Supreme Court Judges and two members of the Israeli Bar association. In 1984 the Knesset amended the law, adding that the Knesset and Bar members will be elected in secret elections. A possible interpretation is that secret elections guarantee that party discipline or political pressures will not be imposed on *MKs* when they elect their representatives in the committee.

communicate with, its representatives through the Court. Confused by its wish to normalize its extraordinary circumstances and its realization that the geopolitical surroundings are indeed exceptional, the society put its confidence in the three institutions that can contain these competing agenda items. It entrusted the preservation of the rule of law to the bodies it perceived to be the ones subject to nothing but the law. The Court provides Israelis with an extraparliamentary avenue to express their '*voice*', in an attempt to force the political system to mend its ways[163].

The Israeli Supreme Court was never insulated or isolated from society. In different times, it responded to a variety of different needs within society. In its early days, it stood by the society, while the latter stood by the state to guarantee the fulfillment of the age-old Jewish dream. Later on, it volunteered itself to provide for the people's various desires and fulfill their aspirations within the state. It reconstructed itself to adjust to the changing social practices, concepts and demands. By so doing, I feel, it was the Court which was Israel's most democratic institution.

[163] By the word "voice" I refer to Hirschman's thesis regarding the citizen's political activity as a mode of behavior. He categorizes three modes of behavior: loyalty, voice and exit. Voice "is just the opposite of exit. It is a far more "messy" concept because it can be graduated all the way from faint grumbling to violent protest; it implies articulation of one's critical opinion...; and finally, it is direct and straightforward rather than roundabout". A.O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

Epilogue

In February 1998, a short decision was given in H.C. 6698/95[1]. It contained a compromise reached by the parties, and proclaimed as follows: "after *discussions*, and in light of *my recommendation*, an effort will be made to find a practical solution to the petitioners' problems". It was signed by the President of the Supreme Court, Justice Aharon Barak.

The petition was submitted by an Arab-Israeli couple, from the Galilee village of Baka-Al-Garbia. The couple had inquired into acquiring a plot of land in the nearby Katzir community settlement (hereinafter: "Katzir"). Their request was straightforwardly denied by the Israeli Land Administration, due to their proclaimed policy that Katzir is a *Jewish* community settlement. Next, the couple asked the Court to declare the policy void as it unlawfully discriminated on nationality grounds. Such discrimination, they argued, was inconsistent with Israel's democratic nature.

The respondents were the Israel Land Administration, the Ministry of Housing, the Local Council, the Jewish Agency and Katzir. Their position was that Katzir was established in accordance with Zionist values and the Jewish Agency's projects. The Jewish Agency argued that its articles of association mandated the establishment of Jewish settlements. Furthermore, as most of the Agency's money used to establish these communities originated in Jewish donations, the Agency's policy was lawful[2].

On the day of the hearing, discussions were held between the petitioners' representatives, State representatives and the five Justices sitting on the bench. During

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[1] H.C. 6698/95 *Kaadan v. Israel Land Administration, the Ministry of Housing et al.* (Yet unpublished).

these discussions, Justice Barak mentioned that it was his, as well as his colleagues' preference to abstain from a judicial decision on this case[3]. He further said: "*We* are not *yet ripe* for *such* a judicial resolution"[4]. In addition, he claimed that the case was one of the hardest and most complex judicial questions he had ever encountered[5].

Why was this one of the most hardest and most complex judicial judgments the Israeli High Court of Justice was ever faced with? Why was the adjective "rare" attached to Barak's statements[6]?

I believe the case illuminates the role the Court has grown to play in Israeli society. It has become the governmental institution which responds to the complementary, though at times contradictory, needs of Israeli society. In this case we see the democratic aspirations to confront the Jewish identity of the state and the survival necessities of Israel in the Middle East.

This case would have forced the HCJ to choose one Israeli aspiration over the other. It would have obliged the Court to conclude which of these two visions was to prevail in Israeli society. It would have compelled the Court to renounce its role as providing comfort to the Israeli Schizophrenia: on the one hand (or heart) - the Israeli *democratic* state; on the other- the *Zionist*, *Jewish* State of Israel. These two images of the State clash

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[2] Haaretz, 18.2.98 at 10.
[3] Ma'ariv, 18.2.98 at 16.
[4] *Ibid.*
[5] *Ibid.*
[6] Haaretz, 29.3.98 at 7.

in this petition. A decision to allow an Arab family to build its house in Katzir would inevitably privilege the democratic element. A decision not to allow Arabs, just because they are *Arabs*, to live in Katzir would inevitably elevate the Zionist, Jewish ingredient.

It is my belief that neither the Israeli Court, nor the society it services, is yet ready to take a stand on that collision. This is why, I assume, Justice Barak claimed: "*We* are not *ripe* yet for *such* a judicial resolution". Given the Court's role within society and the conflict between the inconsistent hopes and expectations, the Court and the society are not ready for a clear cut decision.

Discussing the appropriateness of the Court's role as described above is beyond the scope of my project. On that account, my work is more functionalist than Marxist: this case was introduced to exemplify the Supreme Court's role as was illuminated on in this paper. These events demonstrate that the Court acknowledges that the Israeli democracy needs to somehow accommodate the different challenges it faces[7].

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[7] In another recent case A.A. 10/94 *So and So v. The Minister of Defense* (Yet unpublished), Justice Barak wrote: "Indeed, we are a defending democracy. It would be a mistake to review the political and security situation between Israel and the Terrorist organizations as in peace times and to crystallize the scope of human rights and the protection they receive with no connection to the reality in which we live...We cannot ignore the fact that Israel is in an emergency state and in such situation, the infringement of basic human rights is sometimes obliged". (Free translation - g.d.). This case involved a petition by detained Lebanon citizens, who have been held by Israel as bargaining chips to secure the release of Israeli prisoners of war and absentees. The petition, asking the Court to order their release, was denied. Justice Barak's words, I argue, acknowledge explicitly the Israeli democratic dualism and the Court's role in providing a reasonable answer to the different notions of democracy.

In October 1994, the Labor and the Shas parties signed a coalition agreement to guarantee Shas' continued support for Rabin's coalition[8]. The agreement contained an explicit article specifying the methods that would be used to limit future interventions of the HCJ in religious matters. Section 3 of the agreement declared that, if the status quo with regards to religious affairs was violated as a result of a Court's decision, the government guaranteed to reverse the violation through a legislation aimed at restoring the previous state-of-affairs. This article received the doubtful title "*The By-passing HCJ's Article*".

Ten petitions were submitted to the HCJ, asking the Court to annul the agreement, or to order the parties not to sign the agreement or to abstain from fulfilling it[9]. Among the suppliants were: The *MQG*; Amitai - Citizens for Clean Government; Tzomet - a right wing political party whose platform, inter alia, was fighting against religious concessions; The Israeli Reform Movement; The Woman's League; Hemdat - The Association for Freedom of Science, Religion, and Culture, and some private lawyers.

The respondents claimed the agreement was legal, thus leaving no room for the Court's intervention. Nevertheless, the Minister of Justice himself, who was one of the respondents, submitted to the Court a letter on his behalf announcing his reservations regarding the agreement.

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[8] Shas, the Sephardi Torah Guardians, is an ultra-Orthodox party which was constituted by former Sephardi Chief Rabbi Ovadia Yosef in 1984. In those elections Shas won four seats. In the 1988 and 1992 elections, it gained six seats. When it was clear that the Labor party would constitute the next Government, it joined Rabin's coalition.

[9] H.C. 5364/94 *Velner et al. v. Labor party et al.* 49 P.D. (1) 758.

By a margin of three to two the Court refused to intervene. That fact alone is not relevant for us. What is relevant is the harsh criticism expressed by all the Judges, naming the agreement a 'political eclipse', an 'unprecedented immoral act', a 'total embarrassment for the political system'[10], and so forth.

These judges who were reluctant to interfere based their reluctance on the alternative ways open to deal with, or react to, such an agreement. President Shamgar, for instance, mentioned the election 'judgment day'. Justice Heshin called the Labor members and their electorate to raise the revolt flag and prevent the fulfillment of the agreement by threatening to cancel their support for the Labor party, should it adhere to the agreement. In contrast, the Judges who preferred a judicial determination claimed that there were no reliable alternatives to prevent the agreement's realization. Justice Or, for example, claimed that party and coalition discipline, regularly enforced on Knesset Members, would preclude any possibility for a breach of agreement.

The variety of the petitioners, their types, the direct reference to alternative avenues for reaction, the blunt criticism of the agreement - all imply this petition, as the many others, was not merely a dispute between citizens and their government brought before the Court for adjudication, but much more.

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[10] *Ibid.* at 776, 780.

This agreement suffers from all the malaise attributed to Israeli political culture throughout the thesis: it was signed *after* the elections results were known, and after the Labor party constituted a government with Meretz - the second biggest party in the coalition, and the third biggest party in Israel - which engraved on its flag the freedom '*from*' religion[11]. It was signed two years after the basic coalition agreements to constitute the Labor government were created, and after the Labor government had functioned for nearly two years. The inability of the voters to shape their government is thus obvious. The case exposed the lack of political accountability in Israel in the deepest problematic manner. It also reflected the weakness of the Israeli Knesset opposition[12].

The petitions against the agreement symbolize the public discourse, in which Israelis protest against governmental decision-making. They also reflect attempts to participate beyond and outside the once-in-four-years elections. They provide a method of conveying the people's deep loathing of the agreement to their political representatives who were about to sign it. The very fact that the justices assay the alternatives ways to cope with the agreement, other than a petition, points to the possibility that the petition itself is but one possible mode of reaction[13].

By petitioning, various social movements, interest groups and individuals expressed their contempt for the government's acts. It provided an extraparliamentary

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[11] In fact, on this specific point, Tzomet, one of the petitioners and Meretz share a mutual political objective, to limit the religious parties' bargaining power and to avoid submission to their political blackmail.

[12] Tzomet, the political party to petition, was part of the Knesset opposition.

[13] Accepted on two justices, yet dismissed by three.

avenue for raising their voice, in an attempt to influence the public sphere. Thus, I believe this petition, one of many, is an *alter-politics* means, that is used when the normal parliamentary activity (usually voting) has proved ineffective. If public protest in Israel is considered a conventional alternative politics, so should the public petition be considered. As much as lobbying and rioting are, respectively, parliamentary and extraparliamentary ways to demonstrate political action, petitioning to the Israeli High Court of Justice is a middle ground. By petitioning, the people prefer to apply one governmental body - the Court - over the others, as they prefer the legal, established path over the street. Thus, I conclude, petitioning is a legal path, open to those Israeli groups and citizens who wish to participate in shaping their democracy, to communicate with their representatives and protest against the ways these representatives play out the Israeli democracy.