Aharon Barak's Revolution

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In recent years, the state of Israel has undergone a constitutional revolution that has remarkably escaped the notice of most Israelis. With the 1992 passage of Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation, the power of the Israeli judiciary has expanded dramatically, to include the ability to strike down Knesset legislation that in the Supreme Court's opinion violates normative human rights guarantees.[1] Although the court has yet to play that particular card, every indication is that even if Israel does not adopt a formal constitution, the day is not far off when laws passed by the Knesset will routinely face the review of a Supreme Court charged with the duty of protecting an entrenched set of superceding legal norms.

The 1992 laws represent a dramatic step towards the constitutionalization of Israeli law, a trend captained by the country's much-admired Supreme Court. Since the early years of the state, the court has proven willing and able to discern, infer or interpret protection of individual rights within the law, despite the absence of explicit statutory authorization to do so.[2] The sudden appearance of the 1992 statutes, overtly welcomed by an activist court, meant that for the first time the judiciary could anchor its protection

of rights in the solid ground of black-letter law which, it has taken great pains to show, is also constitutional in nature.

Leading the charge of this judicial vanguard is Aharon Barak, a Supreme Court justice since 1978 and the court's president since 1995. Prior to the 1992 Basic Laws, Barak consistently and successfully challenged the traditional legal doctrines limiting the court's purview, and encouraged the court's intercession in an ever-growing range of issues. The laws' passage and Barak's ascendance to the presidency have dramatically improved his ability to champion the constitutional revolution. Considering that his stewardship of the court is to last for another decade, Aharon Barak may well be the single most influential person in Israeli public life today.

Barak has famously portrayed the legal and judicial system as an orchestra of different musicians, with the Supreme Court as the conductor who assures synchronization and coordination.[3] If so, Barak is the undisputed conductor of conductors. Over a judicial career spanning nearly twenty years, Barak has developed and implemented a radical judicial philosophy based on the application of legal criteria to an unprecedentedly wide array of circumstances—with the result that today virtually every controversy of Israeli public life ends up, sooner rather than later, in a courtroom. The Supreme Court's unprecedented power to shape the ideological debate in Israel demands a closer look at Aharon Barak's judicial worldview, and in particular his views on the role of the court in a democratic society and on the new Basic Law provisions enshrining the values of Israel as a "Jewish and democratic" state.

Aharon Barak was born in Kovno, Lithuania in 1936, survived the war in the ghetto there, and immigrated to Israel in 1947 with his parents. Intellectually precocious, his curriculum vitae is a spectacular array of accomplishments, which have earned him praise as "the law's first genuine superstar."[4] He completed his first degree at the Hebrew University law faculty at age 22, received his doctorate in law there at 27, and by 32 rose to

become a tenured professor. In 1974, at age 38, Barak was appointed dean of the law faculty at Hebrew University, and the year after was awarded the Israel Prize for law. Having reached the pinnacle of Israeli legal academia, Barak was appointed attorney-general, a post he held from 1975 to 1978. In that capacity, he made his mark by boldly prosecuting senior figures including Asher Yadlin, head of the Kupat Holim Clalit health fund and a leading candidate to head the Bank of Israel; Avraham Ofer, the minister of housing; and Leah Rabin, wife of then-Prime Minister Yitzhak Rabin.

During the talks leading up to the Camp David accords in September 1978, Prime Minister Menachem Begin invited Barak to join the Israeli negotiating team. Highly esteemed by both Begin and Jimmy Carter (the latter was so impressed with Barak that he jokingly offered him a seat on the U.S. Supreme Court), Barak played an important role as legal adviser, drafter and intermediary. When Begin resisted adding the term "legitimate" to the phrase "rights of the Palestinian people," it was Aharon Barak who convinced him by arguing, "Can there be any rights which are not legitimate?"[5] In 1978, Barak was named to Israel's Supreme Court, and became the court's deputy president in 1993. When Meir Shamgar retired in 1995, Barak succeeded him as Supreme Court president, a post he is slated to hold until he reaches the retirement age of seventy in 2006.

Barak's legal philosophy begins with the belief that "the world is filled with law." This idea, which Barak describes as his defining vision, portrays law as an all-encompassing framework of human affairs, from which no action can ever be immune: Whatever the law does not prohibit, it permits; either way, the law always has its say, on everything.[6] The notion recurs inevitably, in some form or other, in most of Barak's writings and decisions on the role of the court in society. As he expressed it in a 1992 article,

> In my eyes, the world is filled with law. Every human behavior is subject to a legal norm. Even when a certain type of activity—such as friendship or subjective thoughts—is ruled by the autonomy of the individual will,

> this autonomy exists, because it is recognized by the law.... Wherever there are living human beings, law is there. There are no areas in life which are outside of law.[7]

Barak's doctrine of the ubiquity of law guides his formulation of other bedrock principles of governmental and jurisprudential theory, such as the rule of law, judicial review, justiciability and standing, separation of powers and constitutional supremacy. Each of these concepts in turn plays a critical role in building Barak's vision of an enlightened and properly functioning democracy—one in which no person, institution or decision is bereft of the law's embrace.

Yet that embrace is a fleeting one where governments are concerned. Driven by a wide variety of concerns other than law, executives and legislatures often disregard their obligation to work only within its framework.[8] The judiciary's role, according to Barak, is to protect fiercely the rule of law in a democratic society by ensuring the accessibility of the courts, demanding that legislation be clear, stable, general and publicized, and, above all, by keeping the actions of government under its ever-watchful eye. Only then can individual rights—the principal victim of government lawlessness—possess any meaning in practice, defended by the judiciary alone against the executive and legislative powers, who in the name of the public good are forever trampling upon the individual's just claims.[9]

Inasmuch as the courts are the watchdog against government malfeasance, they require the power to enforce their opinion on as much as possible of what the government does. Whatever government actions or decisions are immune from judicial review have, according to Barak, escaped the reach of the law. And where the law does not shine, lives illegality and injustice.

The court's capacity to protect the rule of law, however, is limited by the judge's inherently passive role. No matter how much a government action may offend his sensibilities, a judge can only review a case that actually comes before him in court, and even then only if the complainant has a

sufficiently direct interest in the case, and if the issue at hand is of the sort that courts are allowed to adjudicate. The more cases thrown out of court because they lack one of these prerequisites, the greater the hindrance to the judiciary's ability to police the government via judicial review. It is out of this motivation that Aharon Barak advocates wide open rules on standing, and holds almost radical views with respect to its twin sister, justiciability.

The doctrine of *locus standi*, or "standing," has traditionally dictated that only a party who has some substantive relation to the case—that is, someone who has suffered injury to a right or personal interest—can be heard. This restriction has long been regarded as an important means for courts to protect themselves from being overwhelmed by what the legal literature calls "unnecessary" litigation—cases that really do not require a judicial remedy, whose adjudication only distracts the court from its proper business.

For Aharon Barak, however, the court's workload is less important than its unique role in protecting the rule of law—for "where there is no judge, there is no law."[10] Traditional application of the doctrine of standing, according to Barak, harms the rule of law by opening the door to government illegalities: "When the court does not become involved, the principle of the rule of law is damaged. A government which knows in advance that it is not subject to judicial review is a government which might not enforce the law and might cause its breach—all this under the shadow of the standing doctrine."[11]

In a recent appearance before the Knesset Law Committee, Barak revealed the personal origin of his beliefs on standing. While serving as attorney-general in 1977, he was confronted with a scandal that erupted over an illegal U.S. bank account maintained by Leah Rabin, wife of the sitting prime minister. Finance Minister Yehoshua Rabinowitz informed Barak of his intention to levy an administrative fine as a way to preempt criminal charges. When Rabinowitz admitted that his real concern was for the Labor government's reelection prospects, Barak protested that the fine would never stand up in court. According to Barak, Rabinowitz responded: "No one has

standing—who will go [to court]?" Barak's resultant indignation drove him to a fateful conclusion: "I said to myself, if ever I am able to have an influence, the standing rules must be liberalized; it cannot be that only someone with an interest [can make such a challenge]."[12]

With the passage of time, Barak gained the ability to have an influence, and liberalize he did. The traditional practice in Israel had been that in the area of private law, a suing party had to show that a personal right had been infringed upon, whereas in matters involving a public or governmental body, a petitioner only had to have a personal interest in the matter to be heard. In Barak's view, however, the courts needed not require even a personal interest in such public cases: Anyone seeking a judicial decision on an issue that involved a substantive violation of the rule of law, or in a matter which the court deemed to be in the "public interest," merited standing.[13] As Barak's vigorously-advanced approach gained currency among his peers on the bench, the Supreme Court in effect transformed a petitioner with no personal interest into the bearer of a right—the right of the individual to assure legality in government.

Alongside his liberalization of the rules of standing, Barak also succeeded in whittling away the restrictions stemming from a related judiciary concept, known as "justiciability." Whereas standing determines which *party* the court will hear, justiciability determines which *issue* the court will hear.[14] The justiciability standard is classically used to exclude from judicial consideration a range of policy questions, such as the conduct of foreign affairs, best left in the hands of the executive or legislature. By keeping such issues out of the judiciary's reach, the justiciability doctrine immunizes entire areas of governmental action from the law's watchful eye—a state of affairs deemed intolerable by Barak and his like-minded colleagues.

Over the course of many Supreme Court rulings under the presidency of Meir Shamgar from 1983 to 1995, then-justice Barak's lengthy judgments began to have their effect, and justiciability rules were dramatically liberalized. A significant blow was struck in the 1986 *Ressler* decision—which today serves as a case study in the evolution of court accessibility in

Israel.[15] In 1970, a petitioner complained to the High Court of Justice[16] that the defense minister had abused his discretion in granting exemptions from military service to yeshiva students. The court found that the issue was a "political question" not appropriate for a judicial decision, and that the petitioner failed to establish that he suffered any personal damage; the petition was dismissed.[17] In 1981, another petitioner, attorney Yehuda Ressler, went to court with the same complaint. The court held that the question lacked legal criteria according to which a court could reach a decision, and that it was a public issue the solution of which should be left for non-judicial bodies. The court would not let itself be dragged into a "public and political controversy on a sensitive and stormy subject, on which public opinion is sharply divided."[18] Five years later, in 1986, Ressler tried again and, with Justice Barak and other, sympathetic judges on the panel, the court determined the matter to be justiciable (while denying the petition on its merits).[19] In his decision, Barak devoted twenty-five pages to the issue of justiciability, in which he set forth a philosophy whose implications extended well beyond the confines of the case.

In the *Ressler* decision, Barak delineated two classic categories of justiciability, normative and institutional.[20] Normative justiciability deals with the question of whether authentic legal criteria exist with which the court can decide a case before it; if there be no legal criteria with which to rule, the case is normatively non-justiciable, and the court cannot hear it. Institutional justiciability, on the other hand, deals with whether the subject matter of the case is "appropriate" for judicial decision; a court which invokes this reason for not hearing a case is saying that even if it could find a legal basis on which to rule, it considers some other branch of government the more appropriate venue for making the decision. Aharon Barak is not too fond of either type.

A finding of normative non-justiciability is literally inconceivable in the Barak worldview, because there can exist no legal void. The law can never be silent, and that which is not proscribed by the law is permitted by the law: "There are no acts (of commission or omission) to which the law does

not apply. Every act is caught within the world of law. Every act can be 'imprisoned' within the framework of law. Even the activity bearing the greatest political character—such as making war or peace—is examinable by judicial criteria."[21]

Such a position, however, does not necessarily exclude the argument of institutional non-justiciability, the idea that there are some areas where it is "inappropriate" for a court to intervene because the separation of powers at times mandates judicial deference to executive discretion or parliamentary independence. Yet even here, Barak balks at the prospect of restricting the courts. First, he cites a *prima facie* problem with institutional non-justiciability. Once we accept a legal philosophy that finds the juridical in everything, and which thus grants the court virtually limitless jurisdiction, where does the court draw authority to turn away a dispute tendered before it? The tables are turned: It is precisely the *refusal* of the court to judge an issue of a political nature which would constitute "political thinking," and which is therefore inappropriate for the court. Even in a dispute of a political nature, argues Barak, judges are amply equipped to apply legal criteria.[22] Any time a court declares an issue too "political" and hence "inappropriate" for judicial intervention, the court is essentially granting the government freedom to act outside the law.

By virtually doing away with institutional non-justiciability, Barak challenges the common conception of the separation of powers, in which the essential tasks of governance are divided among the three branches of government in accordance with the perceived strengths of each. Departing from the classic understanding of the separation doctrine, which discourages courts from intervening in political questions best left to more representative branches of government, Barak invokes the separation of powers to justify court intervention in the activities of the legislature and the executive.[23] True, Barak writes, separation of powers places two limitations on the judiciary: It obligates the judge to give effect to the policy behind a law passed by the government, and it bars a judge from intervening in government actions that are technically legal and fall within a "zone of reasonableness."[24]

Nonetheless, the separation of powers does *not* imply to Barak the dictatorship of each authority within its own sphere. Instead, Barak advocates a set of relations that foster "non-dependence by defined mutual supervision."[25] Even the term "separation of powers" is misleading, since between the branches stand not walls but "bridges which supervise and balance."[26] The purpose of this delicate equilibrium is not effective government per se; rather, what ultimately motivates the compartmentalization of power and the harnessing of authority is a desire to safeguard the freedom of the individual.[27] With mutual supervision essential and rights at stake, the Supreme Court, entrusted by society to safeguard the rule of law and protect individual rights, must take a most active role in reviewing the activities of the executive and legislature.

Aharon Barak's dilution of the justiciability doctrine is almost perfect. Only two exceptions remain, both of which relate to the image of the court. First, he recognizes that society may not want the court to tread on certain areas considered best left to political decisionmakers. In certain highly politicized cases such as those involving the Oslo peace process, Barak and the majority of the justices have in fact chosen not to intervene.[28] In such cases, the court should restrict itself to making sure that government action violates no explicit law; if the government feels its discretion is excessively constricted by the law, it can always pass an amendment. The second possibility of institutional non-justiciability, says Barak, is in a case where justice may "seem not to have been done," where court action itself undermines public confidence in the judiciary.[29] Even then, insists Barak, the court must bear in mind its duty to protect the rule of law, and consider the possibility that *non*-intervention may inflict the greater harm to public confidence.[30]

But in the absence of these exceptions, concludes Barak, the courts must be allowed to exercise judicial review on the widest possible range of issues to ensure that every public body acts within the law.[31] Traditional rules of standing and justiciability cannot be allowed to get in the way of judicial review—and indeed, they have not. President Barak and his fellow justices have ruled in recent years on governmental decisions and actions which in

the past were denied review: In *Ressler*, the granting of draft deferrals to yeshiva students; in *Sarid v. Knesset Speaker* and later cases, the procedural validity of Knesset decisions; in *Barzilai v. Government of Israel*, the power of Israel's president to grant pre-conviction pardons; and in *Zherzhevsky v. Prime Minister*, the legality of political agreements.[32] Israeli law on standing has become, according to McGill University law professor Irwin Cotler, "the broadest of any parliamentary democracy in the world," while "the law on 'justiciability' ... is also the broadest of any democracy."[33]

In casting the Supreme Court's net so wide, Aharon Barak has succeeded in attaining a high level of protection of the rule of law. No government official in Israel today is likely to imagine that his actions cannot be brought before the Barak Court; indeed, a sizable number of government moves have already met this fate. Yet the vigorous enforcement of the "rule of law" has gone hand in hand with the dominion by judges over an ever-expanding empire, and has brought with it a number of serious difficulties for the political system, and for society as a whole.

The problems begin in the theoretical realm, with the presumption that "the world is filled with law." This expression should sound familiar to anyone versed in Jewish liturgy: Twice a day in the traditional prayers, the congregation affirms that "the world is filled with his glory."[34] As the Europeans once appropriated the concept of divine sovereignty for the state, Barak fills the world not with God's "glory" but with the law of the land. Indeed, one could easily mistake Barak's application of law to "every human behavior" (including "subjective thoughts") and to "every act of commission or omission"—for a description of the orthodox halacha. As a religious and moral code, halacha is frequently described as a legal system applicable to every aspect of human existence, from the bedroom to the boardroom to the battlefield. Rarely, though, does one conceive of Israeli law in similar terms.[35]

A danger inherent in these maximalist views, and which threatens to grow over time, is the blurring between the juridical and other spheres,

especially the political. Such a distortion begins on the level of theory and ends in a judiciary willing to bring about what Ariel Rosen-Zvi, the late dean of the law school at Tel Aviv University, called the "legalization of life."[36] There is hardly a single issue of national importance in Israel which does not quickly turn up in the Supreme Court. When the latter sits as High Court of Justice, a court of first and last instance, Israeli citizens enjoy the rare luxury of immediate and inexpensive access to the highest court in the land.[37] Domestic policy matters are now taken to the High Court shortly after, or even before, they have been resolved by policymakers. Media coverage of government action invariably includes an extensive report of how petitions against the move are faring, and how the court is likely to rule.

The effect of the legalization of Israeli life goes beyond the specifics of individual court cases. "The arrangement of relationships and spheres of activity in a legal fashion as a substitute for social and moral arrangements," wrote Rosen-Zvi, "introduces a dimension of formalism into life, and causes questions concerning values to be dealt with by formal tools."[38] Rather than allowing the political process to handle problems through consensus-building and compromises, the current system encourages the reduction of value-laden issues to technical legal questions, to be resolved by adjudication. The political process, for all its flaws, is quite adept at balancing the interests of the great bulk of the citizenry and reflecting its values; the decisions it produces are, in the aggregate, likely to satisfy the largest number of people while angering the fewest. The formalized judicial process, on the other hand, is not built to take into account these interests and values, and can easily produce decisions that impose the will of a small minority upon the majority.

But beyond the risk of distorting the public's values, too much intervention harms the nation's political culture. In Israel, government officials have learned to fear public law, rather than the public itself. Judicial micro-governance creates the impression that anything that stands the test of the High Court need not stand the test of public opinion. Citizens find their inclination to police elected leaders numbed, and politicians learn to measure their actions against a jurisprudential yardstick, rather than one of

propriety or voter opinion. In most democracies, by contrast, it is the looming ballot box and not the judiciary which effectively vetoes ill-considered political appointments and serves as the principal check on government wrongdoing. A measure of judicial restraint on certain key issues would encourage government accountability to the people, not just to the bench.

Similarly, the court's tendency to intervene in matters of policy discourages ideological rivals from making an effort to persuade one another, or to rally the support of uncommitted segments of the population. Such advocacy work has the effect over time of building consensus, encouraging compromise among diverse elements of society, and raising the level of debate. The high probability of judicial intervention, however, has left many activists feeling that their resources are better invested in a decisive legal victory than in a persuasive public campaign, or in negotiating a mutually acceptable outcome. Those groups who find their efforts constantly thwarted by the High Court come to despair of the benefits of cultivating public support, and those who frequently merit High Court approval need not trouble themselves with public opinion or accommodation. In this atmosphere, disputes are neither settled nor resolved; they are merely decided, usually keeping one party's rancor, and the other's callous disregard, well preserved.

Proponents of judicial activism are quick to cite its palpable benefits. In large part, the courts are reacting to genuine problems, such as political corruption, which might otherwise go unchecked. As Justice Yitzchak Zamir has noted, Israeli political culture is weak.[39] Norms of adherence to the law and professionalism in government are less developed than in many other democracies. The nature of coalition government tends to produce questionable, if not unsavory, political dealings. The absence of a written constitution, and the substitution of a patchwork of Basic Laws—which can be easily amended or repealed—injects a constant element of uncertainty. Lacking institutional checks and balances, the system as a whole often depends on the court for protection; Barak's approach, shared by other judges as well, helps to guarantee the protection of individual rights, and to assure

at least a modicum of "clean government." In *Eisenberg v. Minister of Housing*,[40] for example, when the government appointed as Housing Ministry director-general a former General Security Service official who had twice perjured himself in agency scandals, the appointment was disqualified in a Barak-authored ruling. Lengthy Barak decisions ordered the investigation of the national police chief on allegations of accepting sizable discounts from hotels,[41] and forced the resignation of Aryeh Der'i as interior minister after he was indicted on charges of corruption.[42] In numerous cases, the courts have defended freedom of expression against both an absence of statutory protection and a governmental disdain for the marketplace of ideas. Without the court, the argument goes, Israel might come to resemble a banana republic.

Yet a philosophy which sees law everywhere is ill-suited for discerning, and therefore staying out of, those cases in which individual rights and the rule of law are not genuinely under threat. In defense of these principles a court can easily substitute its own judgment for that of the elected branches, and its own values for those of the populace. In the name of the rule of law or the principle of "reasonability," Barak and his fellow justices have wandered into a minefield of deeply-held values about religion and society. And in Barak's case, such overreaching is especially problematic, given the sort of normative approach and judicial reasoning he applies to these issues—and in particular, his interpretation of the rights-enshrining Basic Laws of 1992.

In March 1992, the Knesset passed two laws that changed the face of Israeli constitutional law. Basic Law: Freedom of Occupation prohibited restrictions on a person's right to practice any vocation, except if such restrictions be for an appropriate purpose that accords with Israel's values—and even then, only to the minimal degree necessary. Basic Law: Human Dignity and Liberty forbade infringment upon a person's dignity, life, body or property, except again for an appropriate purpose consistent with Israel's

values. These values are addressed in the "purpose" sections of the Basic Laws. For example, Basic Law: Human Dignity and Liberty declares as follows:

> The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.[43]

Athough Israel was widely assumed to be Jewish and democratic prior to 1992, the Knesset's designation of these terms as a reference point for Israel's values accorded them far-reaching significance. Any court asked subsequently to rule on whether a particular restriction on rights accorded with Israel's values would be forced to determine what a "Jewish and democratic state" was. The Barak Court, an activist judiciary waving the banner of individual rights, could expect to face this dilemma repeatedly. Supreme Court justices found themselves under pressure to develop a workable understanding of the phrase.

For decades, Israel's judges had been grappling with the idea of Israel as a "democratic" state. In civil rights cases like the 1953 *Kol Ha'am* decision on freedom of the press, Israeli courts devoted much thought and many pages to the nature of Israeli democracy.[44] But judges had rarely felt the need to spell out the characteristics or implications of Israel as a "Jewish" state.[45] There was, however, one area where Jewish principles forced their way into a statute, and therefore into the judicial debate. In the Foundations of Law Act (1980), the Knesset determined that where gaps, or "lacunae," exist in the law, the court must turn to "the principles of justice, equity and freedom of the heritage of Israel." This two-paragraph statute sparked a judicial conflagration that raged throughout the 1980s. Justice Menachem Elon, the court's deputy president until his retirement in 1993, understood the term "heritage of Israel" to mean the vast jurisprudence of *mishpat ivri* —the traditional Jewish civil law.[46] Barak fiercely opposed this reading, preferring to read the term broadly, to include thinkers like Spinoza. In any event, Barak's method of legal interpretation held that the law almost never

produced any lacunae, and thus the court almost never had to take into account any distinctly Jewish values and legal principles.[47]

In the wake of the 1992 Basic Laws, however, even Barak could no longer avoid addressing the Jewish character of the state. As Elon observed, the new laws placed a *constitutional obligation* upon judges to do so.[48] Soon after the passage of the laws, President Barak noted the significance of the purpose clause and, specifically, the formidable challenge facing the courts in interpreting the word "Jewish": "Extensive case law dealt in the past with the character of the state as a democratic state.... More difficult are the questions of what a "Jewish state" is, and of the relation between the term "Jewish state" and the term "democratic state."[49]

Barak's vivid interpretive imagination, however, was up to the task of balancing these two values—and in a manner which matched his beliefs about their relative significance. In an address he delivered at Haifa University less than two months after the Basic Laws went into effect, he pointed the way to a synthesis with breathtaking intellectual legerdemain:

> The content of the phrase "Jewish state" will be determined by the level of abstraction which shall be given it. In my opinion, one should give this phrase meaning on a high level of abstraction, which will unite all members of society and find the common among them. The level of abstraction should be so high, until it becomes identical to the democratic nature of the state. The state is Jewish not in a halachic-religious sense, but in the sense that Jews have the right to immigrate to it, and their national experience is the experience of the state (this is expressed, *inter alia*, in the language and the holidays).[50]

The solution to the challenge of balancing Israel's Jewish and democratic values is to be found, Barak essentially argues, through legal alchemy—the transformation of the term "Jewish" into a synonym for the term "democratic." Of course, such alchemy begins with a basic understanding of Jewish values. In the same speech, Barak elaborated on the positive meaning of the term "Jewish":

> The basic values of Judaism are the basic values of the state. I mean the values of love of man, the sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of law over the legislator and the like, values which Judaism bequeathed to the whole world. Reference to those values is on their universal level of abstraction, which suits Israel's democratic character, thus one should not identify the values of the state of Israel as a Jewish state with the traditional Jewish civil law. It should not be forgotten that in Israel there is a considerable non-Jewish minority. Indeed, the values of the State of Israel as a Jewish state are those universal values common to members of democratic society, which grew from Jewish tradition and history.[51]

Through a selective reading of the values of Judaism, Barak succeeded in creating a "Jewish" state that could slip quite easily into his understanding of a "democratic" one. Creative abstractions aside, Barak essentially concluded that a state which is Jewish and democratic is a state which is democratic.

While it is certainly legitimate to read "Jewish" as referring to something other than halacha—the drafters of the Basic Laws did not have theocracy in mind—it is hard to accept President Barak's unilaterally picking one of the provision's two competing reservoirs of values and diluting it with the "highest possible level of abstraction" until it is virtually identical to the other. No less difficult is his reference to non-Jewish minorities as a justification: The legislators were fully aware of this demographic platitude, and nonetheless decided to draft the law as they did.[52]

Moreover, Barak's abstraction of the term "Jewish" is not paralleled by any abstraction whatever of the term "democratic." In a sharp retort delivered soon after the publication of Barak's formula, Deputy President Elon charged that when discussing a "democratic" state, Barak does not abstract, but rather refers easily to domestic, Canadian, European and international jurisprudence.[53] Speaking at the 1992 Canada-Israel Law Conference—on the same panel as President Barak—Elon did not mince words:

> One may wonder: How can it be that there is an entirely different standard for each of the two expressions contained in the same statute and in the same clause—"Jewish and democratic"—when both of them come to describe the same thing—the character of the State of Israel.... How can it be that the expression "democratic"—which by the way appears second, *after* the expression "Jewish"—is to be given its full meaning and is to be interpreted according to *the decisions and literature that was written on the subject* inside and outside of Israel, yet the expression "Jewish" must be "abstracted" of all independent and original meaning, to be regarded as an artificial attachment that is subordinate to the concept of "democracy"?[54]

To this one may add a further difficulty inherent in Barak's exclusive focus on "universal" aspects of Judaism: The doctrine implies that the only relevant Jewish values are those adopted by non-Jewish systems and, moreover, that one learns these Jewish values not from their original sources but from the foreign societies which have subsequently adopted them.

In subsequent writings, Barak gives the impression of backtracking somewhat, adopting a position that does less apparent violence to the Knesset's intention without really changing the practical implications of his conceptual balancing act. His modified position was set out in his 1994 book *Interpretation in Law,* in which Barak rebuts Elon's critique and sets out to clarify his own views. There Barak stresses that Israel's "Jewish" values are indeed learned from sources internal to Judaism.[55] He also lends the word "Jewish" a measure of theoretical substance, finding two particular aspects of the word that are relevant for the interpretation of the Basic Laws' purpose clause, Zionism and halacha. Both fashion the image of Israel as a Jewish state, he writes, pointing respectively to the mark left by the Law of Return, and the application of halacha in the sphere of family law[56]: "Zionism and Jewish law have a decisive—if not exclusive—influence in forming these values.... Both of these form the 'heritage of Israel' as a national-Jewish-Zionist heritage, and they are an expression of the State of Israel 'as a Jewish state.'"[57]

In a two-paragraph section entitled "Jewish State," Barak also lists—without elaborating—a number of features of his idea of a Jewish state. Israel's Judaism, writes Barak, distinguishes it from other states and constitutes its raison d'être. Barak cites Israel's Declaration of Independence ("the natural right of the Jewish people to be masters of their own fate ... in their own sovereign state," "the realization of the age-old dream for the redemption of Israel"), and makes reference to Jewish settlement, remembrance of the Holocaust, Jewish culture and Jewish education. Barak is willing to accept Elon's references to "the world of Judaism" and "the heritage of Israel" to the extent that they are not exclusively limited to halacha, but cover also an "aggregate of values" which includes those of a "general-Zionist ('heritage of Israel')" nature.[58]

Barak's interpretive goal is still to reconcile the two concepts. The judge, he contends, must look for that which is common and unifying between "Jewish" and "democratic," rather than that which distinguishes them. And in the later rendering, he ostensibly applies this criterion to both principles: When applying or interpreting concepts from Judaism, the judge should choose the universalist concepts over the particularist, and with democracy, that approach to religion and state which will sit well with halacha.[59] Abstraction at a high level remains essential for achieving the goal of harmony between potentially competing values.

Yet on closer examination, it turns out that in forcing a harmony between "Jewish" and "democratic," Barak's admixture still winds up heavily democratic and hardly Jewish. He is careful to point out that "values" do not include particular rules, and that the reference is to "the principle behind the rule" but not the rule itself, to the abstract rather than the concrete—presumably addressing equally the Jewish and democratic values of Israel.[60] But when President Barak asserts that the Basic Laws "did not come to entrench specific laws," it is clear in the context of this and other Barak writings—where he has consistently fought attempts to require reference to Jewish laws—that his concern is with regard to the specifics of Jewish, not democratic, law.[61] Barak has never shown any compunction about citing

dozens of specifics from, for example, Canadian cases, statutes or articles when elaborating upon the Basic Laws. Regarding Jewish law and principles, by contrast, he is virtually silent.

By downplaying the significance of Jewishness as a source of the state's values, Aharon Barak is doing far more than thwarting the intention of the legislators. He is essentially redefining Israel's values, not only in theory but in practice as well. For if the court makes its decisions with little reference to particularist Jewish values, then such principles, in area after area of Israeli life, come to matter less and less. An Israeli court which rules on the basis of the same set of ideas as that of its American, Canadian or German peers cannot sustain the particularist Jewish laws and framework set up by Israel's Zionist founders. And, given the centrality of the Supreme Court in Israeli life, the idea that Israel's Jewish character ought not influence its decision-makers is likely to be adopted by other branches of government, and by a growing segment of the citizenry as well.

President Barak's tendency to minimize the state's Jewish values is exacerbated by his creative championing of the "enlightened community" as a juridical device for resolving "hard" cases. In cases of the sort Barak refers to as "easy," the law is unequivocal and readily apparent: The speed limit is ninety kilometers per hour, and there is no ambiguity. In "intermediate" cases, a judge must work a bit to find the legal norm, but eventually he finds that here, too, there is really only one lawful solution. In "hard" cases, however, a judge must exercise "judicial discretion" to choose among a number of lawful options. It is in the context of this discretion, and in particular with respect to the interpretation of values, that Aharon Barak refers to the "enlightened community."[62]

In Barak's perspective, the Jewish-democratic harmony of abstraction sometimes falls short, and there are cases when the two value systems remain unalterably opposed. Judges are then forced to act on their own discretion:

> When the attempt fails, and the values of the State of Israel as a Jewish state cannot be reconciled with its values as a democratic state, there is no escape from the need to decide. This decision must be made, in my opinion, according to the views of the enlightened community in Israel. This is an objective test, which refers the judge to the full set of values which shape the character of the modern Israeli.[63]

Recourse to the "enlightened community" is Aharon Barak's method of dealing with a situation in which synthesis fails, and the judge needs somewhere to turn for guidance in tipping the scales. Barak's "enlightened community," it turns out, is not a community at all, but really a metaphoric representation of a certain set of values. Its principal task, Barak writes, is "to emphasize the vitality of judicial objectivity,"[64] that is, to remind the judge to rule not from his own personal views and predilections, but on the basis of the "full set of values which shape the character of the modern Israeli."

As a vehicle on the highway to objectivity, Barak's metaphoric community carries with it a heavy normative payload. It possesses values "which mold the whole cultural world" and expresses the "general public's conscience" and the "normative convictions of society" with respect to proper behavior. The beliefs of the "enlightened community" are the product of the principal values which make society democratic. "[T]he 'enlightened community,'" concludes Barak, "is but a personification of normative considerations."[65]

But which basic values are personified? Barak's writings are frequently contradictory on this point. One the one hand, the enlightened community's values are those reflected in "the existing social consensus in a given society, at a given time."[66] Values are constantly in flux, cautions Barak, and the judge must be vigilant in referring to the "enlightened community" not of the past nor of the future, but of his own time. At the same time, however, Barak warns against the populism and social hysteria that accompany transient, "fleeting moods."[67] The metaphor therefore also represents the judge's

obligation to keep his distance from such pressures—in essence to serve as a bulwark against the impulsive and fickle mob, whose potential for caprice has long troubled democratic theorists. Not for nought are judges granted personal and institutional independence, writes Barak. "The absence of the need to stand for new election every once in a while allows the judge to reflect the basic credo of the nation, even if, in light of the events of the hour, society is not faithful to this credo."[68] Thus the judge must draw only upon the enduring national values which have crystallized within the consensus, those which have survived "the melting pot of societal recognition"—even if these values "are not accepted by the great majority of the public" at the time.[69]

While Barak distinguishes the "enlightened community" from the general public, he vacillates on the question of whom, if anyone, the term is actually describing. On the one hand, Barak affirms that the symbol "directs attention to a part of the general public," "reflecting the community whose values are universal," which is "enlightened and progressive," and part of "the family of enlightened nations."[70] On the other hand, Barak insists that the concept describes the "basic attitudes of the legal system" which may run contrary to attitudes held by a majority of the public, and "should not be identified with one stratum or another of the Israeli public."[71] It is "neither the religious community nor the secular," and "it is neither a Jewish nor a non-Jewish community."[72]

Whether the community is only a metaphor or describes an identifiable set of people (recognizable, Barak's critics say, by postal zip code, social affiliation and party loyalty), the implications of the term are unavoidable. The "enlightened community," by dint of its identification with values of universalism and progressivism, will unfailingly direct the judge towards the defense of individual rights and equality, values which Israel shares with democratic states around the world, and never towards the unique demands of a Jewish state. Especially telling is Barak's reference to an enlightened community that is "neither a Jewish nor a non-Jewish community"—which means that its Jewishness is irrelevant. Our enlightened hypothetes, asked

to choose in a hard case between Israel's Jewish and democratic values, will unflinchingly pick the latter. Having been defined as universalists with no particular sympathy for Judaism, the community's hapless citizens are left with no choice. This is true even if the majority of the Israeli public would prefer Jewish values in a given case, for the truly enlightened community upholds universal values even when "the great majority of the public" does not accept them, and it is this community, Barak insists, which the judge must follow.

Thus, the "objective" standard of the enlightened community ends up pushing the judge in precisely those directions—more democratic and less Jewish—in which Barak is in any case predisposed to encourage him. Dan Avnon, a lecturer in political science at the Hebrew University in Jerusalem, points out that despite the concept's claim to objectivity, "in practice it expresses a liberal worldview, acceptable to a part of the Jewish public in the State of Israel. Given the fact that the Knesset did not explicitly rule that liberal values have preferred status in the political system of Israel, interpretation of the purpose clause in light of the 'enlightened community' test will necessarily be received within the wider community as an expression of a subjective worldview, acceptable [only] to parts of the Jewish public in Israel."[73] Though Barak's implementation of the metaphor clearly places the Supreme Court on one side of an ongoing ideological debate in Israel, the concept suffers from a chronic ambiguity that impairs any serious discussion of its implications. It is difficult to know which values are to be deemed "fundamental," and which "fleeting." On the one hand, the judge is to reject transient views and refer to "the long-term beliefs of society," "the basic and substantial," and to reflect the "basic credo of the nation"; on the other hand, "fundamental values may change over the years," "the basic outlook of the 'enlightened community' is not set and static" but "in constant flux," and woe be unto the judge whose values "reflect the enlightened community of the past." The result is that any serious attempt to critique the idea is met with a wall of conceptual clouds that frustrates all efforts to pin down the term.

In the elusive quest for a residual source of law, Barak is not alone. After all, judges of the English and French tradition have long struggled to elucidate and apply vague normative concepts like "public policy" or *ordre publique*. Barak's "enlightened community" purports to offer "a compass for the right direction of judicial decision." And it may indeed contribute to Israeli jurisprudence, if it prompts judges to look beyond themselves and into the fundamental values of their society. At the end of the day, however, one is left with the sense that a judge who searches for the values of the "enlightened community" is likely to find them inside himself—and then use the metaphor to justify his subjective conclusions.[74]

The Basic Laws of 1992 involved a departure from the past that went well beyond the recognition of Israel's "Jewish and democratic" values. The new laws also "entrenched" certain rights, binding all subsequent legislation to the standards set by the new laws. In this regard, they were unlike any previous Basic Laws, which established or regulated important institutions, or enshrined national symbols (e.g., Basic Law: Jerusalem Capital of Israel), but did not purport to bind future legislation.[75]

Prior to the laws' passage, Aharon Barak had worked to expand the court's role through the case-by-case erosion of doctrines, such as standing and justiciability, that had traditionally limited judicial activism. Occasionally, Barak suggested additional quantum leaps in the court's privilege, as in his famous statement in the *Tnu'at L'or* case, in which he hinted at the court's capacity to strike down Knesset laws even in the absence of any statutory license to do so.[76] Nonetheless, even Barak stopped short of arrogating such authority, and as a result, Israel's highest court still shied from asserting the power to review and annul duly enacted legislation. Any litigant arguing that a state law conflicted with "higher" norms would find the court powerless to provide a remedy.

When in 1992 that power was finally granted to the court by the new Basic Laws—albeit implicitly[77] and with numerous structural flaws and

anomalies—it was Barak who immediately proclaimed a "constitutional revolution." Barak boldly seized on the limited enactments—carefully smoothing out their bumps and methodically covering their defects—in order to win for the Israeli Supreme Court the sort of power enjoyed by its counterparts in the United States or Canada, despite the fact that unlike the latter, Israel had never actually undergone any serious constitutional adoption process. In a 1992 manifesto entitled "Constitutional Revolution," Barak celebrated the Israeli judiciary's acquisition of the ultimate weapon:

> If up until now judges were given "conventional weapons" to deal with legislation by way of interpretation and the creation of Israeli common law, now judges have been given "nonconventional weapons," which allow nullification of legislation which does not observe the Basic Laws' criteria.[78]

Three years later, in the landmark 1995 *Bank Mizrahi* ruling interpreting those Basic Laws, Barak and his fellow justices translated the revolutionary implications of his earlier essay into the language of a judicial decision.[79] The opening paragraph of Barak's 139-page opinion in that case summed up the new normative hierarchy:

> With legislation of [the new Basic Laws] a substantial change occurred in the status of human rights in Israel. They have turned into constitutional rights. They have been given supra-legal constitutional status. A "regular" law of the Knesset cannot change them. Regular legislation cannot infringe a protected human right unless the demands set out in the Basic Laws are met. Nonobservance of the constitutional demands turns the regular statute into an unconstitutional statute. This is a statute which bears a constitutional flaw. The court can declare its invalidity.[80]

In short, Israel's courts, spurred on by Barak's interpretation, acquired the ultimate power to strike down acts of parliament that fail to live up to the civil-rights obligations enshrined in the Basic Laws.[81]

Israeli courts have yet to nullify a Knesset statute under the new Basic Laws, but the constitutional revolution is well under way. The 1992 Basic Laws are already cited in a great many cases that are brought before the High Court of Justice. Precisely because of their constitutional status, they are accorded greater weight than other, "ordinary" laws, and often form the basis for rulings on government actions or the interpretation of existing laws. Even though Basic Law: Human Dignity and Liberty was injected with an explicit grandfather clause meant to immunize all pre-1992 laws, the Supreme Court employs a variety of interpretive techniques to circumvent that limitation and—often sacrificing the plain meaning of the text or the original intent of the legislators—applies the statute regardless. But perhaps the most significant outcome is that in the face of potential Supreme Court review, Knesset legislators are loathe to pass laws which, in their judgment, a Barak-led court would likely overturn. In effect, Barak's "constitutional revolution" has effected a far-reaching judicial preemption, the consequences of which differ little from those of actual judicial review.

To understand what might be in store for Israel once the Supreme Court crosses the Rubicon of review, it is instructive to look at the experience of Canada since it underwent a similar constitutional transformation with its 1982 adoption of a Charter of Rights.[82] The Canadian experience is especially relevant because its Charter of Rights served legislators in Israel as a model for some of the key provisions in the new Basic Laws.[83] This in turn has given rise to acute Israeli interest in Canadian judicial and academic interpretations of the Charter, with several Israeli judges—Barak the first among them—increasingly referring in their decisions to Canadian constitutional jurisprudence.[84]

Prior to the Charter's adoption, no law in Canada could be challenged on the basis that it violated a human right. The Charter, however, gave the judiciary the authority to strike down laws which infringed on fundamental rights. Now courts must first determine whether a law entails a *prima facie* violation of basic rights, and then decide whether the infringement can nevertheless be upheld as a "reasonable limit," which is "demonstrably

justified" in a "free and democratic society."[85] As a result, courts in Canada find themselves sifting through complex socioeconomic evidence and weighing the pros and cons on a range of broad policy issues, to determine whether proposed limitations on rights are justified. Canadian federal and provincial legislatures must now conform to constitutional norms as interpreted by the judiciary, or find their legislative product nullified.[86] A typical example is the recent legislation enacted by Canada's federal government limiting the advertising of tobacco products. After weighing civil rights against state objectives, the Supreme Court found that the law constituted an unjustified limitation on freedom of expression as protected by the Charter of Rights, and was therefore null and void.[87]

This complex act of balancing rights with societal benefits has changed the very nature of what Canadian courts do. The chief justice of Canada's Supreme Court, Antonio Lamer, discussed this transformation in an article in the *Israel Law Review*:

> Courts are now routinely receiving a good deal of what can be referred to as social fact evidence.... Particularly where the question is whether certain laws are justified in a free and democratic society, debate in the Courts sometimes resembles proceedings before a House committee in that the benefits and burdens of the legislation and its alternatives have to be weighed in light of the best available information about the needs of society and the nature of the problem addressed.[88]

In short, courts that exercise judicial review over actual laws quickly come to resemble their country's legislatures, both in the kinds of issues they discuss and in the arguments they bring to bear.

The court's new role in Canada raises a number of problems. Canadian judges inevitably must make many of their decisions on the basis of arguments for which their judicial training has given them no special preparation. In cases such as the limitation on tobacco advertising, justices must draw conclusions about the link between advertising and tobacco use, the physical harm caused by smoking, and related matters which are fre-

quently the subject of scientific dispute. Moreover, courts must weigh the trade-offs between the benefits of a particular statute and the harm it does to the values of Canada as a "free and democratic" society. The inevitable result is that the courts are deluged with a mass of (often highly technical) expert testimony which they must sift through in order to weigh and consider policy costs, benefits and alternatives—largely duplicating the vast efforts already undertaken by the innumerable committees and subcommittees supporting the executive and legislative branches. In Israel, the burden placed upon an already overextended judiciary—and upon the taxpayer as well—would be enormous, and possibly untenable.

Yet it is precisely this set of challenges which Aharon Barak looks forward to when envisioning the impact of judicial review on Israel's courts. In the *Bank Mizrahi* case, President Barak quoted the above passage from Chief Justice Lamer's article describing the effects of the Charter of Rights on Canada's judicial system, and continued: "As the courts and lawyers in Canada are up to this task, surely we too will be capable."[89] Capable and, no doubt, eager.

Once judicial review of legislation becomes part of day-to-day Israeli life, it is not hard to imagine what kind of issues the Barak Court will face, or how it will handle them. As in Canada, any Israeli law found to infringe upon one of the enumerated guaranteed rights will have to pass a justificatory test in order to survive. It will have to be "enacted for a proper purpose," "befit the values of the State of Israel," and impair the right "to an extent no greater than is required."[90] Each element of this test provides ample room for judicial interpretation. While Canadian judges must grapple with the relatively simple task of determining the meaning of a "free and democratic society," President Barak and his Supreme Court colleagues will face the more daunting task of squaring their decisions with Israel's values as a "Jewish and democratic state."[91] Israel's judiciary will, to an even greater extent than it does today, be called upon to make politically controversial decisions that will no less than define the character of the state and its society. Given Barak's unique interpretive approach and judicial worldview, the

decisions emerging from his court are likely to neutralize the "Jewish" side of the equation, while causing ever-greater alienation of those "unenlightened" segments of the population who hold such values dear.

The implications of Barak's philosophy have already begun to play themselves out. His doctrine that "the world is filled with law" has resulted, through its translation into the court's zealous guardianship of the "rule of law," in the whittling away of the doctrines of standing and justiciability. The consequence is that the Supreme Court's docket has been swelled with the most critical public issues being addressed today.

Other parts of Barak's legal worldview, such as the severe imbalance between the state's "Jewish" and "democratic" aspects, have yet to manifest themselves in their full enormity. While later Barak writings pay tribute to the word "Jewish" in the Basic Laws' purpose provision, it is evident from his colossal corpus of decisions and articles that "democratic" ideas dominate his thought. Even his modified approach to Jewish values is severely mitigated by his assertion that irreconcilable conflicts between "Jewish" and "democratic" values must be resolved by reference to the "enlightened community," which in turn refers us to "the aggregate of values which form the image of the modern Israeli"[92]—and not just any modern Israeli, but those with membership in that section of the public "whose values are universal," which is part of the "family of enlightened nations." Barak leaves little room for doubt about the identity of the "enlightened community" with the system of liberal democratic beliefs.

Aharon Barak's approach to the balancing of values can therefore be reduced to the following: Faced with a conflict of values, a judge must try to find a synthesis between democratic and Jewish systems (preferably through abstraction of the latter), and if this fails, democratic values prevail. The automatic result, of course, is that the more such cases are adjudicated by a Barak-inspired court, the less "Jewish" Israel is likely to become, and the harder it will be to distinguish it from venerated secular democracies such as Canada and the United States.

Barak's coupling of judicial activism with the creative abstraction of Jewish values will ultimately be joined by a third element, the regular review of Knesset statutes. This power, which stands at the core of the "constitutional revolution," has become an integral part of Barak's judicial philosophy, if not yet of the Supreme Court's activities. But gaps between Barak's theory and the court's practice tend to be measured in time, and it is likely that Barak's court will come to match his writings—and sooner rather than later. Skeptics on this point would do well to realize that between Barak's 1977 realization that standing laws must be liberalized, and the series of rulings in the mid-1980s doing precisely that, stood less than a decade—and then he was a junior justice, not the court's president.

Israel has long prided itself on having a "professional" judiciary spared from the complications wrought by politicization.[93] But recent developments have eroded this tradition, and make its utter dissolution seem inevitable. Rejoicing over the new Basic Laws, Aharon Barak waves his "nonconventional" weapon of judicial review which, together with a hefty conventional arsenal of wide-open standing and justiciability rules, threatens the Israeli public with an unprecedented centralization of power among a handful of like-minded judges. As President Barak himself has written, there is a zone where "the decision is made according to the personal worldview of the judge…" and "his outlook on society, law, judging and life is what directs his path."[94] Israelis may have good cause for concern in discovering that this subjective zone—and with it the politicization of the court—is likely to grow apace, an inevitable result of the Barak approach.

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Notes

1. Though both Basic Law: Human Dignity and Liberty (*Sefer Hahukim*, p. 1391; amended in *Sefer Hahukim,* p. 1454) and Basic Law: Freedom of Occupation (*Sefer Hahukim,* p. 1454) are "substantively" entrenched—meaning their human rights guarantees are protected from any later Knesset statutes which violate the Basic Laws' substantive criteria—Basic Law: Human Dignity and Liberty is not formally entrenched, meaning it can be amended without the need for a special Knesset majority. See David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" *Israel Law Review* 26 (1992), p. 242. Whether the Basic Laws have inherent constitutional ("supra-legal") status depends on whether the Knesset has authority to sit as a Constituent Assembly. See Aharon Barak, "The Constitutional Revolution: Protected Human Rights," *Mishpat Umimshal* 1 (1992/3), p. 9. In the past, the Supreme Court refused to treat a Basic Law as inherently superior to other laws. See *Bergman v. Minister of Finance* (HCJ 98/69), in *Decisions of the Israel Supreme Court*, vol. 23, section 1, p. 693; *Bergman v. Minister of Finance* (HCJ 231/73), in *Decisions*, vol. 27, section 2, p. 785; *Kani'el v. Minister of Justice* (HCJ 198/72), in *Decisions*, vol. 27, section 1, p. 794; *Ressler v. Elections Commission* (HCJ 60/77), in *Decisions*, vol. 31, section 2, p. 556; *Mi'ari v. Knesset Speaker* (HCJ 761/86), in *Decisions*, vol. 42, section 4, p. 868; *Tnu'at L'or v. Knesset Speaker* (HCJ 142/89), in *Decisions*, vol. 44, section 3, p. 529. Recently, however, the Supreme Court concluded that Basic Laws do have "supra-legal" status, with President Barak relying, in part, on his finding that the public considers the Knesset authorized to draft a constitution. See *United Mizrahi Bank v. Migdal Cooperative Village* (CA 6821/93, 1908/94, 3363/94), in *Decisions,* vol. 49, section 4, p. 221 (an English summary can be found in *Justice*, vol.10, Sept. 1996, p. 22).

2. See the landmark case of *Kol Ha'am v. Minister of the Interior* (HCJ 73/53), in *Decisions,* vol. 7, section 1, p. 871.

3. Aharon Barak, "Judicial Philosophy and Judicial Activism," in *Iyunei Mishpat* 17 (1992), p. 497; cf. *Ressler v. Minister of Defense* (HCJ 910/86), in *Decisions*, vol. 42, section 2, p. 477.

4. See, for example, *The Jerusalem Post*, August 18, 1995. See also chapter 35 of Yechi'el Gutman's book *The Attorney-General Versus the Government* (Jerusalem: Edanim Publishers, Yediot Aharonot edition, 1981). [Hebrew]

5. Attorney-General (and former Camp David negotiator) Elyakim Rubinstein, lecture at Hebrew University Law Faculty, May 7, 1997. For a detailed description of Barak's influential role throughout the negotiations see Gutman, *The Attorney-General*, pp. 335-342.

6. Barak, "Judicial Philosophy," p. 485.

7. Barak, "Judicial Philosophy," pp. 477 and 485.

8. Barak, "Judicial Philosophy,"p. 491.

9. See Barak, "Judicial Philosophy," p. 491; see also *Barzilai v. State of Israel* (HCJ 428/86), in *Decisions*, vol. 40, section 3, p. 505.

10. Barak, "Judicial Philosophy" p. 487; *Barzilai*, p. 505.

11. *Segal v. Minister of the Interior* (HCJ 217/80), in *Decisions*, vol. 34, section 4, p. 441.

12. Protocol of the Knesset Law Committee meeting, Oct. 22, 1996.

13. Barak, "Judicial Philosophy," p. 488.

14. The concepts are interrelated *inter alia* in that if, on a given issue, the court grants standing to no party, that issue becomes, de facto at least, non-justiciable. (By contrast, courts may find an issue justiciable, yet dismiss a particular petitioner for his lack of a sufficient interest in the case.)

15. *Ressler v. Minister of Defense* (HCJ 910/86), p. 441.

16. In addition to serving as Israel's highest appellate court, the Supreme Court also serves as a court of first and last instance for anyone with a grievance against the government. When sitting in this capacity, it is referred to as the High Court of Justice.

17. *Becker v. Minister of Defense* (HCJ 40/70), in *Decisions*, vol. 24, section 1, p. 238.

18. *Ressler v. Minister of Defense* (HCJ 448/81), in *Decisions*, vol. 36, section 1, p. 89.

19. The court found in part that the Defense Minister did in fact have authority to issue the deferrals, and that this discretion was not exercised unreasonably.

20. *Ressler* (HCJ 910/86), p. 474; see also Barak, "Judicial Philosophy," p. 485.

21. Barak, "Judicial Philosophy," pp. 477 and 485. Similar words were previously expressed in the 1986 *Ressler* decision, pp. 477-478.

22. Barak, "Judicial Philosophy," p. 486.

23. Barak, "Judicial Philosophy," p. 494.

24. Barak, "Judicial Philosophy," p. 495.

25. Aharon Barak, "On Powers and Values in Israel," *Hapraklit* 42:3 (March 1996), p. 447; Barak, "Judicial Philosophy," p. 496.

26. Barak, "Judicial Philosophy," p. 496; see also *Kach Party v. Knesset Speaker* (HCJ 73/85), in *Decisions*, vol. 39, section 3, p. 158.

27. Barak, "On Powers," p. 448.

28. In *MK Rechavam Ze'evi v. Knesset Speaker* (HCJ 6124/95), the former complained that not enough time had been given for Knesset members to examine the maps of the "Oslo II" Interim Agreement. Justice Barak held that the case did not call for the court's intervention in the Knesset Speaker's discretion. In *MK Hanan Porat v. Knesset Speaker* (HCJ 4064/95), an MK tried to force Oslo II to be debated in the Knesset plenum. Justice Barak remarked that unless the democratic fabric was being injured, the court would not intervene in internal Knesset affairs. In *Dor-On v. Prime Minister Rabin* (HCJ 2456/94), a petitioner wanted the court to declare the invalidity of the Israel-PLO Declaration of Principles, in part because the PLO was still a legally declared terrorist organization. Justice Barak held that the petition was completely of a political character and no legal cause of action was found. In *Katz v. Government of Israel* (HCJ 1403/91), where the father of an MIA sought a court order instructing the government to adopt measures toward locating his son, Justice Barak found that the nature and substance of the subject was one of great sensitivity, that the government must be allowed room to maneuver in issues of foreign policy and security.

29. Barak, "Judicial Philosophy," p. 491.

30. Barak, "Judicial Philosophy," p. 487. That courts enjoy public confidence is vital for Barak: "Courts have neither purse nor sword. They can operate only within an atmosphere of trust and confidence." See Barak, "Balancing Rights and Principles," in *Chartering Human Rights* (collection of papers from the 1992 Canada-Israel Law Conference), p. 22.

31. Barak, "Judicial Philosophy," p. 486.

32. *Sarid v. Knesset Speaker* (HCJ 652/81), in *Decisions*, vol. 36, section 2, p. 197; *Barzilai v. Government of Israel* (HCJ 428/86), in *Decisions*, vol. 40, section 3, p. 505; *Zherzhevsky v. Prime Minister* (HCJ 1635/90), in *Decisions*, vol. 45, section 1, p. 749.

33. *The Jerusalem Post,* December 28, 1992.

34. Cf. Isaiah 6:3.

35. In the hands of a different practitioner, such a maximalist view of law's domain could lead to the intrusion of law into the personal sphere, into the realm of decisions generally left to the individual. However, Barak's approach has generally been directed toward limiting government in favor of the individual, and not vice versa.

36. Ariel Rosen-Zvi, "Culture of Law," *Iyunei Mishpat* 17 (1992), p. 701 [Hebrew]. In this Israel may again be following the Canadian path: See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1992).

37. See note 16 above.

38. Rosen-Zvi, "Culture of Law," p. 701.

39. See Yitzhak Zamir, "Court and Politics in Israel," *Public Law* (Winter 1991), p. 535.

40. *Eisenberg v. Minister of Housing* (HCJ 6163/92), in *Decisions*, vol. 47, section 2, p. 229.

41. *Suissa v. Attorney-General* (HCJ 7074/93), in *Decisions*, vol. 48, section 2, p. 749.

42. *Amitai v. Yitzhak Rabin* (HCJ 4267/93), in *Decisions*, vol. 47, section 5, p. 441.

43. Basic Law: Human Dignity and Liberty, section 1A. A parallel clause appears in Basic Law: Freedom of Occupation, section 4. For an analysis of the purpose clause see Aharon Barak, *Interpretation in the Law* (volume 3 of *Constitutional Interpretation*; Tel Aviv: Nevo Publishing, 1994), p. 347. See also Menachem Elon, "The Values of a Jewish and Democratic State in the Light of Israel's New Civil Rights Law," in *Chartering Human Rights*, p. 20. President Barak argues that the clause provides a central purpose (protection of the right) and a subsidiary purpose (entrenchment of values). With respect, it seems to me that one purpose need not be considered inferior to the other: Protection of the right could be regarded as the *immediate* purpose, and entrenchment of values the *long-term* purpose (which is accomplished through the means of protecting the right).

44. *Kol Ha'am v. Minister of the Interior* (HCJ 73/53), in *Decisions,* vol. 7, section 1. Cf. Aharon Barak, "The Constitutional Revolution: Protected Human Rights," in *Mishpat Umimshal* 1 (1992-1993), p. 30.

45. Menachem Elon, "The Basic Laws: Their Enactment, Interpretation and Expectations," in *Mehkarei Mishpat* 12:2, p. 258.

46. See *Zherzhevsky*, p. 828.

47. See Aharon Barak, "Foundations of Law Act and *Moreshet Yisrael*," in *Shnaton Hamishpat Ha'ivri* 13 (5747 [1987]), p. 279. See also *Hendels v. Bank Kupat Am* (Rehearing of Civil Appeal 13/80), *Decisions*, vol. 35, section 2, p. 797.

48. See Menachem Elon, "Constitutional Values of the State of Israel as a Jewish and Democratic State in Light of Basic Law: Human Dignity and Liberty," in *Iyunei Mishpat* 17 (5753 [1993]), pp. 667-668. Cf. also Elon, "The Values," pp. 26-27; and Elon, "The Basic Laws," pp. 254, 258.

49. Barak, "The Constitutional Revolution," p. 30.

50. The lecture was subsequently published as an article. See Barak, "The Constitutional Revolution," p. 30.

51. Barak, "The Constitutional Revolution," p. 30.

52. Elon, "Constitutional Values," p. 686.

53. Cf. Elon, "The Values," p. 20. See also Elon, "Constitutional Values," p. 686.

54. Elon, "The Values," p. 29. Emphasis in original.

55. Barak, *Interpretation in Law*, p. 331.

56. Barak, *Interpretation in Law,* p. 330.

57. Barak, *Interpretation in Law,* p. 331.

58. Barak, *Interpretation in Law,* p. 334.

59. Barak, *Interpretation in Law,* p. 339.

60. Barak, *Interpretation in Law,* p. 330.

61. Barak, *Interpretation in Law,* p. 330.

62. See Aharon Barak, *Judicial Discretion*, trans. Yadin Kaufmann (New Haven: Yale University Press, 1989), pp. 36-41; Barak, "Human Dignity," p.286; Barak, *Interpretation in Law*, p. 231 and p. 345; Aharon Barak, "Basic Law: Freedom of Occupation," *Mishpat Umimshal* 2 (1994), p. 208. The phrase in Hebrew, *hatzibur hana'or*, has been translated by some as the "enlightened public." My choice of "enlightened community" matches the translation used in the English-language list of publications on the curriculum vitae of President Barak.

63. Barak, "Basic Law: Freedom of Occupation," p. 208.

64. Barak, *Interpretation in Law*, p. 231.

65. Barak, *Interpretation in Law,* p. 232.

66. Barak, *Interpretation in Law,* p. 232.

67. Barak, *Interpretation in Law,* p. 234.

68. Barak, *Interpretation in Law,* p. 234.

69. Barak, *Interpretation in Law,* p. 235.

70. Barak, *Interpretation in Law,* p. 235. This last phrase is adopted by President Barak from the words of Justice Vitkon in *Riesenfeld v. Yakovson* (CA 337/62), in *Decisions*, vol. 17, section 2, p. 1026.

71. Barak, *Interpretation in Law*, p. 235. Cf. *Suissa v. Attorney General*, p. 781, where President Barak insists it is only a metaphor.

72. Aharon Barak, "Human Dignity as a Constitutional Right," *Hapraklit* 41 (1994), p. 287.

73. Dan Avnon, "The Enlightened Community: Jewish and Democratic or Liberal and Democratic?" *Mishpat Umimshal* 3 (1995), p. 419.

74. Although President Barak is quick to cite precedents for his employment of the "enlightened community," a close reading of precisely those cases reveals the Barak approach to be a visible departure from the way courts once used this concept. In the 1968 *Shalit v. Minister of the Interior* ruling (HCJ 58/68; in *Decisions*, vol. 23, section 2, p. 477), a majority of the court held that the child of a Jewish Israeli father and a non-Jewish mother could be registered as a "Jew" under the Population Registry Law. Justice Moshe Landau, in a dissenting opinion, argued that the state's lawbook offered no explicit answers. "Without any statutory indication," asked Landau, "where else can a judge find guidance when matters involving beliefs and opinions come before him?" *Shalit*, p. 520.

Landau's answer referred to the ruling in the *Zim v. Maziar* case (CA 461/62; in *Decisions*, vol. 17, section 2, p. 1335), which suggested that in such situations, the court must never "adjudicate according to the personal outlook of the judge," but instead "faithfully interpret the views of the enlightened public amongst which he lives." Justice Landau went on to argue that social consensus was a *sine qua non* for making use of this test: "Since we have not yet come to a consensus of opinion, not even among a decisive majority of our community, on these fundamental questions, [the judge] can only bring forth dissonances, and the depressing result is that the court, as it were, abandons its proper place above the disputes which divide the public, and the judges themselves descend into the arena." Landau's conclusion was that the court "must resist with all the force at our disposal being dragged along this path." The judge must not try to resolve controversial cases through recourse to the enlightened community, because in such cases the enlightened community is itself divided. In Barak's outlook, however, the "enlightened community" is by definition never divided, even on a publicly controversial issue; a judge need only divine what its views are. To Barak, the enlightened community is precisely that vehicle through which the court must resolve such arguments.

75. An exception was section 4 of Basic Law: The Knesset. See note 81 below.

76. *Tnu'at L'or v. Knesset Speaker* (HCJ 142/89), in *Decisions*, vol. 44, section 3, p. 529.

77. Cf., for example, former Supreme Court President Moshe Landau, "Giving Israel a Constitution through the Supreme Court's Decisions," *Mishpat Umimshal* 3:2 (July 1996), for a forceful statement of the position that the Basic Laws did not give the court such authority.

78. Barak, "The Constitutional Revolution," p. 34.

79. *United Mizrahi Bank v. Migdal Cooperative Village* (CA 6821/93, 1908/94, 3363/94).

80. *United Mizrahi Bank*, p. 352.

81. In the past there existed only a few isolated instances where the Israeli Supreme Court exercised authority to invalidate statutes, and then only by

invoking strictly formalistic grounds, i.e., lack of a required Knesset majority. The first time this occurred was in *Bergman v. Minister of Finance* (HCJ 98/69; in *Decisions*, vol. 23, section 1, p. 693), where a party-financing bill (which favored established parties) was challenged as a violation of the "equal elections" clause in section 4 of Basic Law: The Knesset, with that clause only allowing derogations if they were passed by a majority of Knesset members. Justice Landau found that the statute indeed violated the equality guarantee and, as it was passed without the required majority, was therefore not to be given effect. Highlighting the attorney-general's choice not to contest the court's power to declare a statute invalid, Justice Landau stressed that his decision could not not be taken as establishing any constitutional precedent.

82. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. An important distinction exists, however, between the manner in which the two countries adopted their respective constitutional rights. Canada's adoption of the Charter was preceded by lengthy national debate, politically approved by nine out of ten provinces, and finally received with great fanfare. In contrast, Israel's two new Basic Laws were passed with most members of Knesset not even in attendance, by undistinguished votes of 32-21 and 23-0.

83. Concerning the method of balancing rights with justifiable state objectives, compare Section 8 of the Basic Law: Human Dignity and Liberty with Section 1 of the Canadian Charter. Concerning the power of the legislature to enact a law which overrides a guaranteed right, by inserting an explicit clause such that the law applies notwithstanding the guaranteed right, compare Section 8 of the Basic Law: Freedom of Occupation with Section 33 of the Canadian Charter. For a survey of Israeli reliance on the Canadian experience, and on the similarities in legal culture and history between Canada and Israel, see Hillel Neuer, "Why Israeli Judges Read Canadian Cases," *Canadian Lawyer Magazine*, May 1995. See also Barak, "Balancing Rights and Principles."

84. In Barak's 1994 textbook *Constitutional Interpretation* (see note 43 above) the chapters dealing with the new Basic Laws—the most systematic, detailed, and authoritative academic analysis of the subject—cite and discuss so many different Canadian decisions, extensively and often exclusively, that the author virtually imports the whole of Canadian Charter law into Israel.

85. Canadian Charter, Section 1.

86. Theoretically, by resorting to the Section 33 "notwithstanding clause," both the provincial and federal legislatures have the ultimate power to override a number of the basic rights guaranteed in the Canadian Charter. Yet such resort is generally considered illegitimate, and rarely used. The exception to this attitude is found in the French-speaking province of Quebec, the only province not to assent to the 1982 constitutional package which included the Charter. Quebec has resorted to the Section 33 override to safeguard French-only language laws from the

Charter's freedom of expression guarantee. In addition, for several years following the Charter's adoption the provincial government—in a symbolic effort to demonstrate its political rejection of the 1982 constitutional deal—systematically enacted the override in every Quebec statute. It is interesting to note that in Israel, too, the sector of the population which has made prominent use of the override—the religious (e.g., in ensuring kosher-only meat imports)—also felt alienated from their country's "constitutional revolution." Evidently, such alienation, either among Canada's Québecois or Israel's religious, appears to produce a sense that the illegitimacy lies not in using the override, but in the constitution itself. To be sure, if Canada's constitution remains tainted or even doomed by the significant absence of Quebec's assent, Israel's bold attempts toward constitutional reform will no doubt suffer the same fate unless any such major legislative or judicial advances are preceded by achieving consensus with the religious.

87. *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), *Dominion Law Reports*, vol. 127, section 4, p. 1; *Supreme Court Reports* [Canada], 1995, vol. 3, p. 199.

88. Antonio Lamer, "Canada's Legal Revolution," *Israel Law Review* 28 (1994), pp. 582-583, cited in *United Mizrahi Bank*, pp. 440-441.

89. *United Mizrahi Bank,* p. 441.

90. See section 8 of Basic Law: Human Dignity and Liberty, and section 4 of Basic Law: Freedom of Occupation.

91. See section 1A of Basic Law: Human Dignity and Liberty, and section 2 of Basic Law: Freedom of Occupation.

92. Barak, "Basic Law: Freedom of Occupation," p. 208.

93. Reviewing Martin Edelman's *Court, Politics and Culture in Israel*, Adam Dodek sums up the author's view of the traditional situation: "In Israel, the Supreme Court is widely viewed as the guardian of the 'rule of law.' [T]his has led to the Court's insulation from political pressure, as evidenced in the non-political nature of the appointments process, which emphasizes technical legal expertise over questions of immediate political relevance. Unlike the United States, Israeli Supreme Court judges are almost completely divorced from partisan politics. They are drawn from the ranks of the practicing bar, the academy, or the bench, rather than from the political world, as has often been the case in the United States. Public opinion reflects the belief that the members of the Israeli Supreme Court are independent, objective, and impartial decisionmakers in an otherwise politically partisan governmental system." *Harvard International Law Journal* 36, pp. 572-573.

94. Barak, "Judicial Philosophy," p. 484; Barak, "Constitutional Law Without a Constitution," in Shimon Shetreet, ed., *The Role of Courts in Society* (Boston: Martinus Nijhoff, 1988), p. 464; Barak, "Balancing Rights and Principles," p. 23.