Towards a Constitutional Counter-Revolution in Israel?

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I. Introduction

In 2007–2008 then Minister of Justice, Daniel Friedman (Kadima), waged a campaign to curb the power gained by Israel's Supreme Court (SC) since the 1980s. On the first of April 2009, Friedman congratulated his successor, Yaakov Ne'eman, one of Israel's leading private lawyers, on his appointment, saying he was sure that Ne'eman "will work to advance matters of judicial importance."[1] Friedman was not joking: he knew very well that Ne'eman, like him, wished to carry out reforms in the judicial system in order to diminish its power. Ne'eman – who has no official affiliation with any political party but was appointed on the quota of *Yisrael Beitenu*, Yvette Lieberman's extreme right-wing party – may turn out to be a greater reformer than Friedman. His appointment signaled that Friedman's campaign had not been the whim of one person, but rather the beginning of a new era in the relationships between the executive and judicial branches.

In this essay, we analyze the social-historical context of this offensive against the judiciary, which enjoys the support of a significant cross-section of Israeli society and its political class. We argue that while this campaign constitutes a reaction against the "rights revolution" and the "constitutional revolution" that had taken place in the 1980s and 90s, it does not mark a revolutionary change in the relations between the political and economic elites, on one side, and the SC on the other. These relations had been showing signs of tension already since the outbreak of the first Intifada in 1988, but have deteriorated significantly since 2000 due to changes in both the security sphere – the outbreak of the second Intifada and 9/11 – and in the political economy of Israeli society – the progression of privatization, and of neo-liberal economic policy in general, that has resulted in much greater concentration of wealth and enhanced the symbiotic relations between government and big capital.

On the most general level, the conflict can be conceptualized as one between two strands of liberalism: a J.S. Mill-inspired strand, espoused by the SC, whose utilitarianism is tempered by universal values and concern for minority rights, and a strict utilitarian strand, represented by Friedman, that believes in majority rule as the best and only way of discovering the greatest good for the greatest number. Similar conflicts exist in the political and legal cultures of other capitalist societies as well, but the Israeli case is particularly poignant due to the country's peculiar situation as a deeply-divided, highly developed capitalist society, engaged in a protracted frontier-type struggle with the Palestinians.

At issue in the current phase of the conflict is a clash between the value-activism of the SC, a legacy of former Chief Justice (CJ) Aharon Barak, manifested, *inter alia*, in concern for the rights of the Palestinians, both citizens and non-citizens, and in a firm stand against political corruption, on one side, and Friedman's and Ne'eman's legal positivism, the executive's neo-conservative policy towards the Palestinians, and the business-government symbiosis, on the other. The conflict can also be conceptualized in terms of the famed dispute between Lon L. Fuller and H.L.A. Hart on the nature of law.[2] On one side stands Barak who believes, with Fuller, that law and morality cannot and should not be separated. On the other stand Friedman and Ne'eman who, like Bentham and Austin, distinguish law as it is from law as it ought to be. It is still too early to predict how the conflict will be resolved, but we

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can confidently state that profound changes in the interrelations between the three branches of government, possibly amounting to no less than a constitutional counter-revolution, are eminent.

II. Historical Background

When Likud came to power in 1977 it was committed to undo "the system of 1948" – the corporatist social-economic-political system that was the basis of the Labor Zionist movement's historically dominant status in Israeli society.[3] Likud's economic liberalization program turned out to be a great debacle. But in 1985 a national unity government, in which Likud and Labor shared power, instituted a drastic and very successful liberalization program that had set the stage for Israel's economic policy to this day.

The "rights revolution" of the 1980s and the "constitutional revolution" of the 1990s were important elements in the transition from a corporatist to a neo-liberal economy. Not only did this economic transformation require a new emphasis on the individual, as opposed to the collectivity, but these "revolutions" also shifted power from elective, majoritarian institutions to professional, non-elective ones, primarily the SC. This move could be crucial for the success of the economic transformation, in case the opposition to liberalization (coming from bodies such as the *Histadrut*) succeeded in mobilizing masses of voters to its cause.[4]

An important political aspect of liberalization was the Oslo peace process between Israel and the Palestinians, designed to enable the Israeli economy to integrate successfully into the process of economic globalization.[5] In the context of the peace process and a generally liberalizing atmosphere, Israel's judicial system, and especially the SC, began to show signs of greater respect for the rights of the Palestinians, citizens and non-citizens alike. When the Oslo process failed in 2000, to be replaced by the second Intifada, liberal opinion within Israel, including the powerful business community that had emerged since the onset of liberalization, lost patience with the Court's concern (such as it was) with the rights of Palestinians.

More importantly, perhaps, what came to be seen as the Court's obsession with the rule of law and individual citizenship rights had become an irritant for major elements within the business community. Once the corporatist economic order was a thing of the past, they looked for a much more flexible and understanding attitude on the part of the Court. Failing that, their interest became to weaken the Court and return power to the elective branches of government.

We will present our argument in five historical steps:

1. In the period between 1977–1992, the SC established a rights regime that, in the absence of a formal written constitution, was based in part on principles of natural law. This move was supported, initially, by the Liberal Zionist camp – some leaders of Likud, chief among them Menachem Begin, some elements within the Labor Party and small Zionist parties to its left, and a segment of the business community.
2. During the second half of the 1980s, the Labor Party and some members of the business elite began to resist the further empowerment of the SC. The constitutional revolution of 1992 was an effort to institutionalize the liberalization achieved during the 1980s, against countervailing forces. These countervailing forces included no lesser figures than both Prime Ministers that served in the 1990s – Yitzhak Rabin and Benjamin Netanyahu.

3. Following Ehud Baraks' tenure as PM (1999–2001), the outbreak of the second Intifada, and the 9/11 terror attacks, the interests and worldviews of certain elements within Israel's business elite led to the crystallization of a new Neo-Conservative power center around Ariel Sharon. In the form of Kadima, the political party formed by Sharon to promote his political program, this group now holds the center of the political arena. Its main publicly stated concerns have been the narrowing discretion allowed the security forces by the SC in their fight against the Palestinians (although this limitation has been largely symbolic), and the new emphasis placed by the Court on the rights of Israel's Palestinian citizens. These have been challenged in the name of majority rule and national security. But the value activism of the Court has also grated on this group's economic concerns, because it threatened to infringe on the freedom of action of the business class.
4. The current period (2007–2009) is characterized by persistent attacks on the legacy of retired CJ Barak, by attempts to modify the system through which judges, primarily SC Justices, are selected, by the (unprecedented) appointment of lawyers in private practice to the SC, and by efforts to limit the Court's power of judicial review. These moves, we argue, are meant to force the Court to retreat from its policy of value activism and limit itself to a positivist-formalist judicial policy.
5. Under circumstances in which the preferences of the majority mesh with state interests and with the interests of the economically powerful, a retreat to a purely positivist judicial outlook could lead to a situation in which yesterday's legal and moral exception becomes today's norm.

III. A Semi-Democratic Regime Without a Liberal Constitution

Israel's Declaration of Independence, adopted on May 14, 1948, stipulated that "a Constitution [would] be drawn up by a Constituent Assembly not later than the first day of October 1948. . ."[6] Due to the war that followed, the Constituent Assembly was elected only in January 1949. Instead of adopting a constitution, however, two months later it declared itself to be the First Knesset.[7] On June 13, 1950, the Knesset adopted MK Yizhar Harari's proposal to indefinitely postpone the adoption of a formal written constitution, and allow instead for its gradual construction through the legislation of Basic Laws.[8]

The debate leading up to that decision pitted advocates of a liberal conception of citizenship against those seeking to promote an ethno-nationalist or republican conception. The former called for a legislature and an executive constrained by constitutional limitations, hence, necessarily, by the judiciary; the latter sought freedom of action for the political branches.

The most formidable opponent of the constitution was David Ben-Gurion himself. Arguing in terms of the majoritarian principle of democracy and the need for the state to have maximum freedom of action, Ben-Gurion objected to any self-limitation on the power of the Knesset, whether through laws entrenched with privileged majority requirements, judicial review of legislation, or a bill of rights. His claim was that such limitations would impede the ability of the state to act decisively, an ability that was crucial for a state whose demographic and territorial composition was still in flux. To illustrate his point, Ben-Gurion reminded his adversaries of the conservative role played by the US Supreme Court in trying to block the progressive social legislation of the New Deal. Ben-Gurion was joined by the Jewish religious parties, who argued that Israel did not need a man-made constitution, since it already had a God-made one, the Torah.

Ben-Gurion's arguments against a bill of rights were particularly telling, since they revealed his commitment to the republican conception of citizenship. In a free country, he argued, where the people rule, there is no need for such a bill, because the citizens' rights would not be threatened by their own democratically elected government. What there was a need for, on the other hand, was a bill of *duties*. This was particularly true of Israel, a free and democratic country that "will not be built, will not be defended and will not fulfill its mission in Israeli [i.e. Jewish] history – without intensified *chalutziyut* [pioneering], and *chalutziyut* means accepting the burden of duties."[9]

Since 1950, a number of laws designated "basic laws" have been passed, but with few notable exceptions, none of them were entrenched by either formal or substantive requirements, and none were given the power to override other, non-basic pieces of primary legislation. One exception was the clause in Basic Law: the Knesset (1958) that established the electoral system as national, equal, direct, secret and proportional and could be changed only by a majority of members of the Knesset (61 votes). In 1969, the SC forced the Knesset to amend a new law providing for the public funding of political parties, arguing that it violated the equality clause of the Basic Law by favoring political parties already represented in the Knesset. Because it was passed by fewer than 61 votes, the new law could not override the equality provision of the Basic Law and had to be amended. This case, known as the *Bergman* case, set a precedent and established the right of the Court to exercise judicial review over primary legislation. That right, however, had rarely been used until the "constitutional revolution" of the 1990s.[10]

IV. The Liberal Turn

IV.1. 1977–1992: Liberalization as Democratization?

In the Knesset elections of 1977, Likud, defying the predictions of most experts, gained a plurality of the seats in the legislature. For the first time in its history, the historically hegemonic party, Mapai (then called the Labor Alignment), was unable to form a government and had to cede the primacy to a political party it considered to be dangerously populist and ultra-nationalist. Menachem Mautner, who analyzed the effects of Likud's victory on the status and policy of the SC, called the 1980s "the anxiety years."[11] Looking back, we can conclude that this anxiety, while understandable, was uncalled for.

Menachem Begin, who served as PM from 1977 to 1983, was a firm believer in the rule of law and was not about to allow his campaign promises, or the preferences of his constituency, to dictate government policy. He also believed in a non-partisan civil service and denied his party, to its chagrin, the benefits of political patronage.[12] As soon as he took office Begin agreed to return the Sinai peninsula to Egypt in return for peace, a necessary move if Likud was to be true to its economic principles and try to liberalize the economy. Begin's attitude towards the SC, and especially towards its future CJ and guiding light, Aharon Barak, should be seen in this context. He was the first PM to invite the Attorney General (who functions as both the government's head legal adviser and as head of the state prosecution) to attend cabinet meetings on a regular basis. The AG at the time was Barak, and in the short interlude between his retirement from that position and his appointment to the SC, with Begin's support, Begin appointed him special counsel to the delegation that negotiated the peace treaty with Egypt. Begin supported the Court even when it ruled (rarely and in a very mild manner, it must be admitted) against his policy of settling the West Bank.

In the course of his twenty-eight years on the SC, eleven of them as CJ, Barak changed the face of Israeli law in a way no one had done before him. (John Marshall and Earl Warren are the American counterparts that come immediately to mind). He turned the Court into an activist institution and his rulings have affected every sphere of the law and practically all spheres of social life. Until very recently his teleological method of legal interpretation was uniformly adhered to by judges, lawyers and legal scholars alike. Barak's legal philosophy, we contend, was the perfect instrument for the transition from the old corporatist order dominated by Labor Zionism and its umbrella labor organization – the *Histadrut* – to a neo-liberal social-economic order. The dominant interests in society, unsure of their ability to control the elective organs of government during this transition, were more than happy to allow the SC (and other non-elective institutions, such as the Bank of Israel) to encroach upon the powers of the political branches.[13]

As formulated by Barak, the program of judicial activism, that he considered essential for defending democracy and the rule of law, had two key elements in it:

1. Relaxing the standing requirements that plaintiffs had to meet in order to appeal to the High Court of Justice (HCJ) (such as showing direct material interest in the case).
2. Reducing the number of issues that are deemed to be "unjusticiable."[14]

Comparing the Court's demeanor in the 1950s and the 1980s, Mautner found that in the 1950s the Court had relied primarily on formal legal arguments, while in the 1980s it resorted much more openly to the language of values. Mautner's explanation was that in the 1950s the Court's liberal values made it a "cultural alien" in a society whose values he characterized as "collectivist." Because of this divergence of values, the Court had to rely on formal arguments in order to justify its decisions. By the 1980s, the Court's liberal values had come to be shared by a significant segment of the society, the so-called "enlightened public," so that the Court no longer had a reason to hide its liberal values behind a formalistic facade. The values of this "enlightened public" (our Liberal Zionist camp) were increasingly referred to by the Court as a source of legitimation for its decisions.[15]

IV.2. 1992: The "Constitutional Revolution"

The "constitutional revolution," we argue, was meant to institutionalize the rights regime established in the previous decade, in view of the growing skepticism displayed towards that regime and towards the SC by the Labor Party and by segments of the business elite. As Defense Minister during the first Intifada (1988–1993), Rabin had already complained that the SC was undermining the security forces' efforts to suppress the Palestinian uprising. Rabin had a personal gripe against Aharon Barak as well: as AG during Rabin's first tenure as PM (1974–1977), it was Barak who made him resign his post for violating the foreign currency regulations then in force.[16]

The animosity that parts of the economic elite were developing towards the SC in this period can be explained through the *Ganor* case in which the SC overturned a decision by the AG to refrain from indicting Israel's leading bankers, who had caused their banks to collapse through illegal manipulation of their stocks in the late 1970s and early 1980s. Following the court's decision, a number of prominent bankers were charged and convicted for fraud and other criminal offenses.[17] Thus, the SC was seen as beginning to threaten the freedom of action enjoyed by the economic elite that was, at that time, closely related politically to Labor. Shortly before the 1992 elections, which Labor was expected to win, a liberal

coalition in the Knesset, made up of members of Likud and Shinuy, a small liberal party, was able to affect the passage of the two human rights laws that constituted the "constitutional revolution."

The trigger for this action was the "dirty plot" of 1990 – Shimon Peres's failed attempt to extricate Labor from the national unity government it shared with Likud since 1984 and establish a new coalition government headed by himself. The new business elite, that was emerging since the 1985 economic liberalization plan, Peres's brainchild, was frustrated with the failure of the national unity government to pursue peace with the Palestinians, which they deemed essential for Israel's successful integration into the global economy.[18] They therefore supported Peres's attempted parliamentary coup. In order to affect that coup, however, Peres needed to rely on the support of Shas, a political party that the "enlightened public" considered to be corrupt and unenlightened (and that at the end betrayed Peres and caused his scheme to fail).

This political crisis demonstrated the fragility of Israel's procedural democracy and led to a public outcry and calls for radical change. Building on the disaffection of the "enlightened public" with a political system it considered corrupt and too easily manipulated by small, primarily religious parties, Liberal Zionists were able to mobilize hundreds of thousands of people in support of their "Constitution for Israel" campaign.[19] The campaign failed to bring about the adoption of a written constitution or a bill of rights, but succeeded in transforming Israel's political and constitutional system in two important respects: between 1996 and 2001 the PM was elected directly by the electorate rather than by the Knesset, and two basic laws protecting human rights, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom, were enacted. These basic laws were described by Aharon Barak, then an associate justice of the SC, as a "constitutional revolution."[20]

The revolutionary nature of these laws did not lie in the introduction of rights discourse into Israel's political and legal culture. This had been done already by a body of judicial decisions that had established the basic liberal freedoms. It lied, according to Barak, in that the Knesset for the first time limited its own power to interfere with certain fundamental human rights:

> The fundamental rights now obligate the legislator himself. Israel can no longer be said not to have a "written constitution" (formal and rigid) in the sphere of human rights. The new legislation took Israel out of its isolation, and placed us in the large camp of countries in which human rights are grounded in a "written" and "rigid" constitution, that is, in a document possessing normative priority or superiority.[21]

The extent to which the Knesset indeed intended to limit its own power to change or contravene these two laws is not that clear, however. Of the two, only Basic Law: Freedom of Occupation was entrenched, rather weakly, with a stipulation that it could be amended only by another basic law enacted by a majority of Knesset members. Basic Law: Human Dignity and Freedom, that protects the rights to life, liberty, honor, the integrity of the body, private property, privacy, and movement in and out of the country, was not entrenched in this way because of its possible implications for Israel's religious legislation. Furthermore, the rights guaranteed by the two laws can be infringed upon by subsequent primary legislation, provided that such legislation is consistent with Israel's values as a Jewish and democratic state, is enacted for a worthy purpose, and the infringement is proportional to that purpose (the so-called "limitation clause"). In addition, all existing legislation is immune forever to scrutiny for its accordance with Basic Law: Human Dignity and Freedom.[22]

The two basic laws do not provide explicitly for judicial review, but the limitations they place on future legislation have laid the ground for the SC to intervene in cases where conflicts were claimed to exist between such legislation and the basic laws. The Court acted to establish this right for itself in the *Mizrahi Bank* (or Gal Law) case, where the majority (of 8:1) argued that the Court had the right to nullify a statute it found to contradict Basic Law: Human Dignity and Freedom (although the Court did not make such a finding in that particular case).[23] In a later case, the Court did act to nullify a clause in a statute it deemed to be in contradiction with Basic Law: Freedom of Occupation – a technical clause in a statute regulating the profession of financial advisers. The Court's action drew angry responses from the Speaker of the Knesset and from the Chair of its Constitution, Law and Justice Committee at the time.[24]

The practical import of the constitutional revolution has not been manifested evenly in all areas of the law. Two areas where change was rather limited were the human and civil rights of non-Jews and the relations between state and religion. In the former case, "security" arguments continued to override the Court's liberal values, while in the latter, the religious status quo has been largely protected from the requirements of the basic laws. The new liberal discourse has been manifested primarily in the social and economic spheres, where the constitutional revolution was yet another expression of the shift from a corporatist to a neo-liberal economy.[25]

Since the mid-1980s, the orientation of Israeli labor law had shifted from an emphasis on national goals, social improvement and a decent standard of living, to stressing contractual relations, individual rights and market forces. The decline of the *Histadrut* and of collective bargaining and collective labor agreements since 1985 has been reflected in a new conception of industrial relations as governed by individual contracts, hence as largely immune to state intervention.[26]

In the past, when rights such as workers' right to strike were curtailed, this was done in the name of collective *interests*, such as national security or the provision of essential services. Nowadays these rights are increasingly viewed as "balanceable" by other *rights*, such as the public's right to receive services (where "the public" is conceived of as made up of consumers, not workers), and the employers' right of private property, interpreted as their right to be protected from any economic loss. Clearly, rights are in a weaker moral position when balanced against other rights than when balanced against mere interests. And as Ran Hirschl has pointed out, "when an 'equation' between different rights is drawn, the decision about which right should prevail depends, at least to some extent, on the 'holders' of that right. . .[This] gives a preliminary advantage to the public (supposedly 'universal') interest over workers' ('particularistic') concerns."[27]

The two basic laws of 1992, as interpreted by the Court, have tilted the balance of rights even further towards the rights of employers and property owners. One of the rights guaranteed by Basic Law: Human Dignity and Freedom was the right to private property. The link between human dignity and private property, according to Barak, is personal autonomy: the possession of property is a condition for the exercise of autonomy.[28] This conception could conceivably have led to redistributive conclusions as well, since personal autonomy is the right of every person in a liberal society. However, the Court chose to interpret the right to property in a possessive way, that is, to give preference to the maintenance of the current property regime over the right of every person to own some property. The irony of this interpretation is particularly telling with respect to landed property. For the current land regime is the result of widespread expropriations of Palestinian-owned land since 1948. Thus the right to property is in

effect used to legitimize the widespread violation of Palestinian property rights in the past.[29]

Freedom of occupation could also be interpreted in ways that would balance the rights of employers and employees. For example, it could be seen as protecting employees from ethnic, national, or gender discrimination and from arbitrary dismissal from their jobs. However, the basic law guaranteeing this freedom has been interpreted by Barak in the following way:

> Freedom of occupation is not the right to be employed, nor the right to work. Freedom of occupation is also not the right not to be dismissed from a job; tenure in a job does not derive from freedom of occupation but from freedom of contract. Freedom of occupation is the freedom to employ or not to employ.[30]

This formulation diverges quite significantly from the way freedom of occupation had been conceived in Israeli jurisprudence. Since 1949, this freedom was understood to mean "the freedom of people to choose a profession, work in it and make a living out of it."[31] Only gradually did the understanding of this freedom expand to include free competition and the freedom from regulation in the conduct of one's business. Now, under Barak's interpretation of the basic law, "free competition is at the basis of freedom of occupation. If the state intervenes in free competition it infringes on freedom of occupation, and it must justify this intervention within the limitation clause." Examples of state intervention that need to be justified, according to Barak, include the regulation of wages, prices, working hours and conditions, production quantities and marketing methods, and the imposition of taxes, subsidies or limitations on entry into a particular field of business.[32]

IV.3. Opposition to the SC in the 1990s

The activist policy of the Court, reinforced by the constitutional revolution, had generated a great deal of opposition from all over the board. One powerful opponent was Rabin, PM for the second time in 1992–1995. As navigator of the Oslo process, following 1993, Rabin's friction with the SC was caused by his feeling that the Court was impeding his efforts to pursue peace with the Palestinians. At issue was Arye Deri, the political leader of Shas and one of the most accomplished political operators in Israel's history. Shas, a political party catering primarily to *mizrachim* of low socio-economic status, drew its support from the same electoral pool as Likud, and was thus a natural ally of Labor. Like most leaders of Shas, Deri supported the peace process, but the party's constituency was, and still is, the most aggressively hawkish group in the electorate. Deri's political skills enabled him to maneuver between the political preferences of the leadership and the rank and file, so that Shas in effect was instrumental in passing the Oslo Accords in the Knesset.[33] Deri, however, was charged with bribery and other financial misdeeds and the AG put pressure on Rabin to fire him from the cabinet, where he served (very successfully) as Interior Minister. Rabin refused, but was forced by the SC to abide by the AG's demand.[34] This caused Shas to exit his parliamentary coalition, leaving him with a minority government that depended for its survival on Palestinian Knesset factions. This further eroded the Rabin government's legitimacy (and may have brought about his assassination).

The Dery incident illustrated the structural tension that was endemic to the Labor Party's relations with the SC. While the two were strategic allies in the efforts to liberalize the society, the political wing of this alliance was willing to close its eyes to moral and legal transgressions committed by various tactical allies, such as business leaders and the

ultra-religious parties. The SC insisted that the rule of law be strictly enforced, no matter the political consequences.

The business elite had its own reasons to develop an ambivalent attitude towards the SC. For one, its decisions began to encroach on the freedom of contracts by imposing the obligation of good faith on the parties. In the groundbreaking *Apropim* case, Barak developed the doctrine allowing for substantive, not merely technical, correction of a contract by filling lacunae in its language through the requirement of good faith, rather than by identifying implicit conditions in the contract.[35] This decision enhanced the role of the state in regulating contracts, to the detriment of big repeat players. It also undermined the certainty, predictability and efficiency of contracts, from the perspective of those repeat players whose economic activities were liable to be found as lacking in good faith.

However, during the 1990s, the most vocal opponent of the SC was neither the Labor Party nor the business elite, but the nationalist and orthodox religious groups. Those groups directed their attacks on the Court at the areas where liberalization had the least effect: religious issues and the rights of non-Jews. The systematic dismantling of the socio-economic rights and institutions of the Labor Zionist era had received little attention from the Court's political (as opposed to academic) critics, because there were no longer any significant social groups committed to those institutions. This asymmetry led to the ironic consequence that the proposed Basic Law: Social Rights, that has been on the legislative agenda since 1994, has not been enacted because of the opposition of Shas, a political party that draws its support from the poorest of Israeli Jews. This opposition stems from the assessment that the enactment of any basic law would further empower the Court and enhance the momentum of liberalization.[36]

A landmark in the deterioration of the relations between the SC and the majority of Israeli Jews was Netanyahu's victory in the direct elections for PM in May 1996 following Rabin's assassination by a nationalist religious opponent of the Oslo process. Netanyahu presented himself as an "anti-elitist," anti-Left, anti-Arab candidate ("Bibi is good for the Jews"), and until he was defeated by Ehud Barak in the next elections, in 1999, the Court, identified in the public's mind with all of those groups, laid low.

V. A Neo-Conservative Counter-Revolution?

V.1. Ehud Barak's Victory and the Qaadan case

Ehud Barak's (no relation to the CJ) victory in the direct elections for PM in 1999 led, eventually, to the rise of the neo-conservative discourse and to a bitter, open clash between the political elite, the business community, and the SC. The new PM came into office with the idea that Israeli society had reached a point where it had to either conclude an historical agreement with the Palestinians and become a normal liberal society, or find out that it did not have a partner for peace, and reinvigorate its Spartan republican spirit that had been in decline for several decades.

While the PM was busy with this historical experiment, the SC, mistakenly believing that Barak's electoral victory ensured political support for its liberal agenda, issued two important decisions that put it on a course of confrontation with the political elite. In the first case, that dealt with the interrogation techniques of the General Security Service (GSS), Barak ruled that the GSS did not have the authority to subject suspects to "moderate physical pressure" (the common euphemism for torture). The Court also held that the "necessity defense," provided for in the penal code, could be used by GSS interrogators in cases of "ticking bombs" only *ex post*, and not *ex ante*. The importance of this decision lied not only in its

substance but also in the way it reflected the SC's attitude towards the concept of the state of exception. Contrary to the view of the political branches, which consider Israel to be in a permanent state of exception, allowing torturers to enjoy the "necessity defense" *prima facie*, Barak ruled that:

> The doctrine of "necessity" at most constitutes an exceptional *post factum* defense, exclusively confined to criminal proceedings against investigators. It cannot, however, provide GSS investigators with the authorization to conduct interrogations. GSS investigators are not authorized to employ any physical means, absent unequivocal authorization from the legislature which conforms to the constitutional requirements of Basic Law: Human Dignity and Liberty.[37]

The other decision, *Qaadan v. Israel Land Authority*, marked the high point of the Court's liberal attitude towards the citizenship status of Israel's Palestinian citizens. The Qaadans, a Palestinian couple who are citizens, petitioned the Court in 1995 to intercede on their behalf with the ILA that had refused to lease them land in Katzir, a "community settlement" being established by the Jewish Agency not far from Israel's 1967 border with the West Bank. In a path-breaking decision, Barak determined that it was illegal for the state to discriminate between its Jewish and Arab citizens in the allocation of state land, even when that discrimination was affected indirectly, through Jewish "national institutions." The Zionist interest in "Judaizing" the country, Barak ruled, could not overcome the liberal principle of equality. Furthermore, to counter the argument that the equality principle was compatible with a "separate but equal" allocation of land, Barak, citing *Brown v. Board of Education*, asserted that "a policy of 'separate but equal' is by its very nature unequal. . .[because] separation denigrates the excluded minority group, sharpens the difference between it and the others, and embeds feelings of social inferiority."[38]

Predictably, the Court wished to protect itself against the allegation that its decision undermined Israel's character as the state of the Jewish people. For, as many commentators were quick to point out, if the state cannot give preference to Jews in the allocation of land, what was the practical import of its being a Jewish state?[39] In anticipation of this argument, (Aharon) Barak repeated his long-held position that the Jewish values of the state were not in contradiction with its liberal-democratic values, and that the equality principle was rooted equally in both. He also stressed that the decision applied in the particular case before the Court only, and that its implications were future-oriented and should not be seen as raising any question about past practices. Moreover, in certain cases, he argued, discrimination on the basis of national affiliation could be warranted, so the Court did not decree that the state lease the Qaadans the property in question, only that it reconsider its decision not to lease it to them. But with all these disclaimers, Barak was cognizant of the fact that the Qaadan decision was "a first step in a difficult and sensitive road."[40]

Ehud Barak's strategic plan for Israeli-Jewish society enjoyed partial success. When the Oslo process collapsed, in the summer of 2000, the "enlightened public" accepted his explanation (corroborated by Bill Clinton and Dennis Ross) that it failed because Israel had no partner for peace. Barak probably wanted to restore the Israeli Jewish public's sense of reality (as he saw it) and self-legitimacy, but as often happens in history, reality had its own logic. When the second Intifada broke out, Barak's government was unable to contain it. In 2001 his government collapsed and he was defeated by Ariel Sharon in direct special elections for PM (the last time the PM was elected directly by the electorate). Thus, while the SC under Aharon Barak reached its most liberal moment in the Qaadan case, Ehud Barak

sowed the seeds of the neo-conservative reaction against it. The political spoils went to Sharon, however, although the differences between the two major parties, Labor and Likud, were almost negligible.

V.2. The Supreme Court in Dark Times

Through the 1990s most of the business community avidly supported the Oslo process, which it saw as a prerequisite for its own profitable integration into the process of economic globalization. This goal was achieved, however, with the signing of the Oslo Accords and the lifting of the Arab economic boycott of Israel.[41] The second Intifada had moved the Israeli business community to the right on the issue of peace with the Palestinians, like it did most Israelis. Since 2001, the business community by and large shares the general feeling in Israel that the Palestinians have to be isolated and contained, not negotiated with.[42] When Sharon, using the same brutal methods that had made him the scourge of Israeli liberals in the past, defeated the new Intifada, many Liberal Zionists rallied to his flag.

Sharon used brutal methods not only against the Palestinians, but against Israel's poor as well. He launched an unprecedented attack on the welfare state, cutting back welfare allowances to the bone. He was hailed for this by the entire economic establishment that credited this policy with Israel's emergence from the recession caused by the Intifada. Sharon clinched his hold on the Liberal Zionists- turned-Neo-Conservatives when he announced, and carried out successfully, Israel's unilateral withdrawal from Gaza, a move that they deluded themselves into interpreting as a step towards peace.[43]

Sharon announced his "Disengagement Plan" towards the end of 2003. In an attempt to appease the opposition within Likud, he declared that he would submit the proposal to a party referendum and respect its decision.[44] However, contrary to Sharon's expectations, Likud rejected his political initiative. This failure proved Sharon's inability to establish leadership of his party through political patronage and led to his decision to abandon Likud and create the new party, Kadima.[45]

Once the Neo-Conservatives adopted Sharon as their leader, they began their efforts to curb the campaign against political corruption and insulate Sharon from the criminal investigations then being conducted against him, some relating to Likud party matters, others relating to his personal finances. (In the end, one of Sharon's sons spent four months in prison for violating campaign finance laws). More fundamentally, the Neo-Conservatives' growing reluctance to inquire too closely into the relations between government and big business reflected the current phase in the evolution of Israeli capitalism. Neo-liberal economic policy, pursued since 1985 had created an immense concentration of wealth in very few hands.[46] Globalization, the immigration to Israel of a number of Russian oligarchs, and traditional ties between Israeli politicians and wealthy Jews abroad, have all worked to create a dense net of connections between money and political power.[47] Looking too closely at the propriety of these relations, the Neo-Conservatives felt, could harm not only the careers of useful politicians like Ehud Olmert, but could also drive off the kind of money that had made Israel a very prosperous country.

Neo-Conservatives do not necessarily have to be lenient on government corruption, of course, but in Israel this attitude served as the acid test for telling them apart from their former liberal allies. When Ehud Olmert succeeded Sharon as PM, due to the latter's incapacitation, he continued to enjoy the forgiving attitude the Neo-Conservatives had extended to Sharon. Thus, erstwhile liberals, such as legal scholar Ruth Gavison (a member of the Winograd Commission that Olmert appointed to investigate the second Lebanon war of 2006), called

for restraint in investigating wrongdoing in the high echelons of government.[48] In a similar vein, Shlomo Avinery, once a distinguished social-democrat, wrote that the SC must refuse to consider "political" appeals – such as appeals relating to the path of the Separation Wall in the West Bank, the future of the West Bank settlements, or the AG's decision not to indict Sharon for bribery. He claimed that the authority enjoyed by Israel's SC had no parallel in liberal democracies, and quipped that the Israeli regime should be dubbed "Supreme Courtocracy."[49] In December 2007, Avinery attacked the views of several seating and retired Justices who had said that the role of SC was to defend democracy, arguing that those Justices forgot that the people were sovereign and that they were the source of legitimacy and authority of all state institutions, including the SC. He added that the SC inadvertently promoted a neo-liberal, conservative worldview and helped to undermine the legitimacy of the state.[50]

This is the context in which former Minister of Justice Friedman, a highly regarded retired law professor specializing in contract law, launched his attack on the SC. Friedman was appointed by Olmert after his first choice for the position, Hayim Ramon, one of the chief political architects of Israel's economic liberalization, was accused of sexually harassing a female army officer. Friedman had been feuding with the SC, especially with its current CJ, Dorit Beinish, over appointments to the SC even before he was appointed Minister of Justice. Once appointed, he immediately proposed an amendment to Basic Law: Adjudication, the law that governs the authority of the various courts. According to this amendment, a majority of seventy members of Knesset could override a ruling by the SC declaring a law to be unconstitutional, and such a ruling could be given only by a bench of at least nine Justices, with at least two-thirds of them voting in favor. Other changes proposed by Friedman included changing the composition of the Judicial Selection Committee, so that SC Justices will no longer have the decisive voice on the committee and amending Basic Law: Human Dignity and Freedom so that issues pertaining to Israeli citizenship will be excluded from judicial review on the basis of that law.[51] The aim of the changes proposed by Friedman (most of which have failed to be enacted so far) is clear: shifting the balance of power back from the SC to the political branches of government. This move has gained support from Likud (currently the ruling party) and encounters opposition from Labor, now representing what is left of the Liberal Zionist camp.

It was not a coincidence that Friedman chose the issue of citizenship as his wedge issue for trying to limit the SC's power of judicial review and roll back the constitutional revolution. In July 2003, the Knesset enacted the Citizenship and Entry into Israel Law (Temporary Order) that *prohibited* the Minister of the Interior categorically from granting residency in, or citizenship of, Israel to residents of the occupied Palestinian territories, even those who are married to Israeli citizens or have Israeli children or parents. Excepted from the prohibition were only a few esoteric categories of people, most significantly, collaborators with the Israeli security services. The duration of the new law was to be for one year, but it has been extended repeatedly since then. In July 2005, in response to criticism by the SC, the law was amended, so that now the Minister *may* grant temporary residence (but not permanent residence or citizenship) to men aged 35 or older and to women aged 25 or older whose spouses are legal residents of Israel, and to children aged 14 or younger whose parents are legal residents of Israel. The state claimed that this amendment reduced the number of Palestinians barred from receiving temporary resident status in Israel by 30%.[52]

In 2006, the HCJ ruled in favor the constitutionality of the new law by a 6:5 majority, with Barak voting with the minority.[53] This was Barak's last major case as CJ, and his almost unprecedented failure to persuade his colleagues speaks volumes about the likely

fate of his legacy. Generally speaking, five Justices accepted Barak's view of the law as unconstitutional, while five others rejected this view. The eleventh Justice, Edmond Levy, accepted Barak's view in principle, but since the law was about to expire in a few months, he decided to vote to uphold it. (The law has been extended, of course, and it is still in force.) Currently, a new appeal against the constitutionality of the law is pending before the Court.

The two main opinions in the case were written by Barak and by retired Deputy Chief Justice Mishael Cheshin. They both agreed that the sole purpose of the law was to enhance the security of Israel and that some infringement of the rights of Israel's Palestinian citizens could be justified in order to achieve that goal. Their disagreements can be narrowed down to two key issues:

1. Did the renewal of armed conflict between Israel and the Palestinians in September 2000 affect the *scope* of the Palestinian *citizens*' equal right to family life in Israel, or did that right, grounded in Basic Law: Human Dignity and Freedom, remain intact, so that its infringement by the new law must pass the tests of the "limitation clause"?
2. Assuming that the right remained unaffected, can the margin of security achieved by denying all Palestinian residents of the occupied territories the ability to enter Israel for the purpose of family unification, as opposed to checking the security risks posed by each individual on a case-by-case basis, justify the infringement of that right?

According to Barak, the rights guaranteed by Basic Law: Human Dignity and Freedom, whether explicitly or implicitly, are not context-sensitive. Israel's constitutional law, he argued, did not distinguish between different sets of rights, one for times of peace and another one for wartimes. Thus the Palestinian citizens' rights to equality and to family life in Israel remained intact during the second Intifada, and were clearly infringed by the new citizenship law. That infringement could be justified, but only if the law passed the three tests of the "limitation clause:" serving a worthy purpose, compatibility with Israel's values as a Jewish and democratic state, and the test of proportionality. Barak determined that the law easily passed the first two tests but failed the test of proportionality: the enhanced security gained by the shift from the examination of applicants on a case-by-case basis to a blanket prohibition on the entry of all Palestinian residents of the occupied territories could not justify the infringement of the Palestinian citizens' rights to equality and to family life in Israel. Therefore, Barak concluded, the new citizenship law was unconstitutional.[54]

Justice Cheshin argued that a distinction must be made between the *core* rights guaranteed by Basic Law: Human Dignity and Freedom and peripheral rights that can be derived from them. Extending the same protections to the core and to the peripheral rights would infringe on the legislative powers of the Knesset.[55] According to Cheshin, whereas the right to family life is indeed a core right guaranteed by the basic law, the right to "import" a foreign spouse, parent, or child into the country is a peripheral right and is, therefore, context-sensitive.[56] If the spouse, parent, or child in question are "enemy aliens," especially when the country is at war, the citizen's right to bring them into the country is not guaranteed, and it can be infringed upon in order to protect the right to life of all Israeli citizens. Moreover, Cheshin argued, *even* if the right to bring in a foreign spouse, parent, or child were a core constitutional right, its infringement by the state at the present time would easily pass the proportionality test of the "limitation clause." For the enhanced security of the right to life of all citizens easily trumps the right of some to bring in their enemy alien family members. This conclusion is reinforced by the fact that the law is only a temporary measure, and that it exempts certain categories of applicants from its blanket prohibition.[57]

VI. Conclusion: Towards a Permanent State of Exception?

The move to shift power back from the SC and other gate-keeping institutions to majoritarian governmental bodies stems from the realization of powerful economic interests that once economic liberalization had reached the point of no return, the gatekeepers have outlived their usefulness and have become impediments to the smooth operation of the economy. However, like all political issues in Israel, this issue too is closely tied to the current phase of the Israeli-Palestinian conflict.

The second Intifada, and especially the suicide bombings employed by the Palestinians as a tactic, dealt a severe blow to Aharon Barak's "enlightened public" – that segment of Jewish public opinion that was concerned about the human rights of the Palestinians and the citizenship rights of *all* Israeli citizens. As long as Barak remained as CJ the Court stood its ground, more or less, as the sole defender of those rights. As late as 2005 it forbade the common military practice known as the "neighbor procedure" – using Palestinian civilians as human shields for IDF soldiers entering Palestinian homes in search and seizure operations.[58] Barak's departure in 2006 symbolized, and to a certain extent caused, the Court's realignment of its position with that of Jewish public opinion and the political branches of government, as clearly evidenced by the Citizenship Law decision.

The Court's image as an institution more concerned with the rights of Palestinians than with the safety of Jews, including Israeli soldiers, persists however, and is used very skillfully by the neo-conservatives, whose aim is to weaken the Court as the guardian of good government and of the rights of consumers and small economic players, as well as of the Palestinians. The offensive against it, led by the current Minister of Justice, Ne'eman, has already caused the Court to become much more cautious in its decisions. In the present state of affairs the rights regime built by the Court since the 1980s is in danger of being dismantled. If the constitutional counter-revolution succeeds, the very rule of law may succumb to the whims of public opinion and the manipulations of self-seeking businessmen and politicians. The curtailment of the Palestinian citizens' right to family unification, presented as a temporary measure undertaken under a state of exception, but affirmed by the Court as a permanent feature of Israel's citizenship regime, may be only the first step in a long and dangerous road.

NOTES

1. Aviad Glickman "Ne'eman: We're here to stop miscarriage of justice," http://www.ynet.co.il/english/articles/0,7340,L-3695765,00.html, accessed June 8, 2009.

2. H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 593–629; Lon L. Fuller, "Positivism and Fidelity to Law: A reply to Professor Hart," *Harvard Law Review* 71, No. 4 (1958): 630–672.

3. Michael Shalev, *Labour and the Political Economy of Israel* (Oxford University Press, 1992); Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge University Press, 2002).

4. As indeed happened with the National Health Insurance Law, a law designed to deprive the *Histadrut* of its last remaining asset, its HMO, that encountered stiff resistance within the Labor Party. See Shafir and Peled, *Being Israeli*, 296–302; Dani Filc, "The Healthcare System Under Neo-Liberal Hegemony: The Case of Israel" (PhD thesis, Tel Aviv University, 2001).

5. Shafir and Peled, *Being Israeli*; Uri Ram, *The Globalization of Israel: McWorld in Tel Aviv, Jihad in Jerusalem* (NY: Routledge, 2008); Dani Filc and Uri Ram, eds., *The Rule of Capital: Israel in the Global Age* (Hebrew) (Jerusalem: Van Leer, 2005).

6. Walter Laqueur, ed., *The Israel Arab Reader* (Harmondsworth: Penguin Books, 1970):161.

7. An interesting constitutional question raised by the Constituent Assembly turning itself into the First Knesset is, did the Assembly transfer its constituent powers to the Knesset, or did it void them? This

question would figure prominently in the future debate about the "constitutional revolution" of the 1990s. See Ruth Gavison, "The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy?" (Hebrew), *Mishpatim* 28: 1–2 (1997): 21–147; David Kretzmer, "The Path to Judicial Review in Human Rights Cases: From *Bergman* and *Kol Ha'am* to *Mizrahi Bank*" (Hebrew), *Mishpatim* 28: 1–2 (1997): 359–385.

8. Gregory S. Mahler, *Israel: Government and Politics in a Maturing State* (San Diego: Harcourt Brace Jovanovich 1990): 83.

9. *Divre ha-Knesset* (Hebrew), Vols. 4–5 (Jerusalem: 1950): 819.

10. HCJ 98/69 *Bergman v. Minister of Finance* (1969), http://elyon1.court.gov.il/files_eng/69/980/000/Z01/69000980.z01.pdf

11. Menachem Mautner, "The 1980s: Years of Anxiety" (Hebrew), *Tel Aviv University Law Review* 26 (2002): 645–736.

12. Avi Shilon, *Begin:1913–1992* (Hebrew) (Tel Aviv: Am Oved, 2007): 264–268.

13. Shafir and Peled, *Being Israeli*.

14. Aharon Barak, "Adjudication, Justice and Democracy," *The Public Sphere: Tel Aviv Journal of Political Science* 1 (2007) (Hebrew): 11–32, 25–26. The HCJ is one function of the SC.

15. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Hebrew) (Tel Aviv: Ma'agalay Da'at, 1993); "The Reasonableness of Politics" (Hebrew), *Teorya u-vikoret* 5 (1994): 25–53; Ronen Shamir, "The Politics of Reasonableness: Reasonableness and Judicial Power at Israel's Supreme Court" (Hebrew), *Teorya u-vikoret* 5 (1994): 7–23; Dan Avnon, "The 'Enlightened Public:' Jewish and Democratic or Liberal and Democratic?" (Hebrew), *Mishpat u-mimshal* 3, no. 2 (1996): 417–451.

16. Yossi Goldstein, *Rabin – A Biography* (Hebrew) (Tel Aviv: Schocken, 2006): 308–309.

17. HCJ 935/89 *Ganor v. Attorney General* (Hebrew) (1989) 44(ii) P.D. 485; Yoav Dotan, "Judicial Review and Political Accountability," *Israel Law Review* 32, no. 3 (1998): 448–474, 464.

18. Shafir and Peled, *Being Israeli*.

19. Guy Bechor, *Constitution for Israel* (Hebrew) (Jerusalem: Keter, 1996).

20. Already in April 1992 Justice Minister Dan Meridor declared that the new laws were "a real constitutional revolution." Aharon Barak, "The Constitutional Revolution: Protected Fundamental Rights" (Hebrew), *Mishpat u-mimshal* 1, No. 1 (1992): 9–35, 12–13.

21. Barak, "Adjudication, Justice and Democracy,"13.

22. David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" *Israel Law Review* 26, no. 2 (1992): 238–249, 240–242; Gavison "The Constitutional Revolution," 93–100.

23. CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995), 49(4) P.D. 195 (Hebrew).

24. Kretzmer, "The Path to Judicial review."

25. Avnon, "The 'Enlightened Public'"; Andrei Marmor, "Judicial Review in Israel" (Hebrew), *Mishpat u-mimshal* 4, no. 1 (1997): 133–160.

26. Guy Mundlak, *Fading Corporatism: Israel's Labor Law and Industrial Relations in Transition* (Ithaca: ILR Press, 2007).

27. Ran Hirschl, "The 'Constitutional revolution' and the Emergence of a New Economic Order in Israel," *Israel Studies* 2, no.1 (1997): 136–155, 141; Ruth Ben-Israel, "From Collective Justice to Individual Justice: Changing Employment Relationships in Israel," in J.R. Bellace and M.G. Rood, eds., *Labour Law at the Crossroads: Changing Employment Relationships: Studies in Honor of Benjamin Aaron* (The Hague: Kluwer Law International, 1997): 27–55; Aeyal Gross, "The Politics of Rights in Israeli Constitutional Law," *Israel Studies* 3 (1998): 80–118.

28. Aharon Barak, "Israel's Economic Constitution" (Hebrew), *Mishpat u-mimshal* 4: 357–379.

29. Gross, "The Politics of Rights in Israeli Constitutional Law"; Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture and Society* (Aldershot: Ashgate, 2007).

30. Barak "Israel's Economic Constitution," 369–370.

31. Gross "The Politics of Rights in Israeli Constitutional Law," 24; HCJ 1/49 *Bejerano v. Minister of Police* (Hebrew) (1949), 2 P.D. 80.

32. Cited in Gross, "The Politics of Rights in Israeli Constitutional Law," 94–97.

33. Peled, "Towards a Redefinition of Jewish Nationalism in Israel? The Enigma of Shas," *Ethnic and Racial Studies* 21, no. 4 (1998): 703–727; "No Arab Jews There: Shas and the Palestinians" (Arabic) *Palestinian Review of Society and History* 1 (2006): 112–136; Tamar Herman and Ephraim Yaar, "Shas's 'Dovishness:' Image and Reality" in Peled, ed., *Shas: The Challenge of Israeliness* (Hebrew) (Tel Aviv: Yediot Achronot, 2001): 343–389.

34. HCJ 3094/93 *The Movement for Good Government in Israel v. the Government of Israel* (1993) 47 (v) P.D. 404 (Hebrew).

35. CA 4628/93 *The State of Israel v. Apropim*, http://elyon1.court.gov.il/files_eng/93/280/046/Z01/93046280.z01.pdf

36. It was reported that Deri had vowed to oppose any basic law that came up in the Knesset, even a law enshrining the Ten Commandments as part of Israel's constitution. Mautner, op. cit.; Marmor, loc. cit.; Ben-Israel, loc. cit.: 36–37.

37. HCJ 5100/94 *Public Committee Against Torture v. Israel*, *Israel Law Reports,* http://www.btselem.org/english/legal_documents/hc5100_94_19990906_torture_ruling.pdf, 11–12.

38. HCJ 6698/95, *Qaadan vs. ILA* (2000) 54(i) P.D. 258, 279 (Hebrew).

39. Gerald M Steinberg, "The Poor in Your Own City Shall Have Precedence," *Israel Studies Bulletin* 16 (2000): 12–18.

40. HCJ 6698/95, *Qaadan vs. ILA*, 285.

41. Peled, "Who was Afraid of Decolonization?" in Guy Ben Porat, ed., *The Failure of the Middle East Peace Process* (Basingstoke: Palgrave Macmillan, 2008):219–235; Guy Ben Porat,*Global Liberalism, Local Populism: Peace and Conflict in Israel/Palestine and Northern Ireland* (Syracuse: Syracuse University Press, 2006).

42. Peled, loc. cit.

43. Peled, "Profits or Glory? The 28th Elul of Arik Sharon," *New Left Review* 29 (2004): 47–70.

44. See Sharon's Knesset speech on April 22, 2004: http://www.pmo.gov.il/PMO/Archive/Speeches/2004/04/Speeches9389.htm (Hebrew).

45. Navot, "Patronage and the 2006 Elections," in Asher Arian and Michal Shamir, eds. *The Elections in Israel, 2006* New Brunswick, N.J.: Transaction Publishers, pp. 241–265.

46. The latest figures indicate that in 2006 nineteen families controlled 54% of the business GDP. Noa Gerty, "Only 19 Families Rule the Economy" (Hebrew) *Wallah!*, July 19, 2007.

47. See, e.g., Gidi Weitz, "Our Own Government, Our Own People" (Hebrew), *Haaretz Magazine*, August 8, 2008, http://www.haaretz.co.il/hasite/spages/1009435.html.

48. Ruth Gavison, "On Corruption, the Public Good, and Fair Trial" (Hebrew) *Yediot Achronot*, May 26, 2008, 4, 20.

49. http://www.ynet.co.il/articles/0,7340,L-2943523,00.html, July 7, 2004 (Last accessed: July 6, 2008) (Hebrew).

50. https://www.haaretz.co.il/hasite/spages/930751.html, December 5, 2007 (Last accessed: July 6, 2008) (Hebrew).

51. Mautner has pointed out that these changes correspond to provisions that appear in a constitutional proposal authored by the right-wing Institute for Zionist Strategies (http://www.izs.org.il/?catid=117). Menachem Mautner, *Law and Culture in Israel on the Threshold of the 21st Century*, (Tel Aviv: Am Oved, 2008) (Hebrew): 223.

52. Peled "Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime," *Theoretical Inquiries in Law* Vol. 8, no. 2 (2007): 333–358.

53. HCJ 7052/03 *Adalah v. Minister of the Interior* (2006) 2 TakEl 1754 (Hebrew).

54. Ibid, par. 98 of Barak's opinion.

55. Ibid, par. 37–44 of Cheshin's opinion.

56. Curiously, while Israeli citizens do not have an explicitly stated right to bring in their "foreign" spouse, child or parent into the country, non-citizen Jews immigrating under the Law of Return, as amended in 1970, do have that right, down to the third generation.

57. To avoid misunderstanding, Cheshin vehemently opposes Friedman's proposed reforms.

58. HCJ 3799/02 *Adalah v. Commanding General, IDF Central Command* (2005) http://www.btselem.org/Hebrew/Legal_Documents/HC3799_02_20051006_Human_Shileds_Ruling.pdf.

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