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THE SUPREME COURT OF ISRAEL: A SAFEGUARD OF THE RULE OF LAW†

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I. INTRODUCTION

The Supreme Court of Israel has three functions: it is the Supreme Court of Civil Appeals, the Supreme Court of Criminal Appeals, and the Court of Administrative and Legislative Review. The Review Division of the Court, known as the High Court of Justice, attracts the most attention and enjoys the greatest respect of the Israeli public.

The explanation for the esteem in which the common Israeli citizen holds the High Court of Justice can perhaps be found in an often quoted, non-controversial statement made in a 1969 case: "This Court is the safest and most objective stronghold of the citizen in his discord with the Government."[1]

What was true some twenty years ago has by now become even more so. But since then, and especially during the last decade, the balance of weight has changed. It has moved from the concept of the Court resolving disputes between the citizen and the authorities, to the concept of the Court safeguarding the rule of law: "The function of the H[igh] C[ourt] of Justice is to assure the realization of the principle of the Rule of Law."[2] This reflects a different judicial philosophy of the function of the Judiciary as a review court: resolving disputes is related to private law; the function of review is in the field of public law.

This new concept of the role of the High Court is responsible for a dramatic change in the Court's openness to deal with matters from which previously it had carefully veered away. Its reluctance to enter the arena of public controversy has been replaced by liberal rules of standing and justiciability that now bring it to involvement with matters even of political controversy, which less than two decades ago was inconceivable.

Several causes may have combined to bring about this change: the disillusionment and loss of confidence of the public in the political institutions, as a result of the deterioration of our political culture which "on occasion reached a political eclipse;"[3] the growing respect and trust in the Supreme Court; the gradual

1. H.C.J. 287/69, Meron v. Minister of Labour, 24 P.D. (1) 337, 362, (Justice Berinson).

2. H.C.J. 910/86, Ressler v. Minister of Defense, 42 P.D. (2) 441.

3. H.C.J. 1635/90, Zerjevsky v. The Prime Minister, 45 P.D. (1) 748, (Deputy President Elon).

departure from the English legal tradition which was prevalent in the Mandate days and in the earlier years of the State of Israel; the growing influence of American constitutional concepts; and, the coincidence of a younger, more activist generation of Justices.

II. STANDING

The statutory source of the High Court's review jurisdiction is in the Basic Law: Judiciary. It is couched in broad terms, to grant relief against public bodies performing functions under law. It does not define these bodies or the status of the petitioner. Israeli law does not, however, recognize the *actio popularis*, or action on behalf of the public.

Through the years, the High Court has established rules for exercising its discretion to grant relief. These rules are not based on legal theory; they are intended as a practical guide for self restraint — as a self-defense.

In the development of these rules one can follow a movement, at first slow and gradual, towards liberalization: from the stringent requirements for standing — of a *lis* by a petitioner with a claim for the infringement of a legal right — to a gradual mitigation satisfied with an interest, not necessarily a legal right and not necessarily special to the petitioner, but common to him and many others — not necessarily proven properly, but proven to reasonable likelihood. Later came more rapid and substantial developments, recognizing two exceptions to the *actio popularis* by allowing standing to a petitioner who could show no interest of his own, provided: 1) he raised an argument which indicates corruption on the part of a Governmental authority; or, 2) he raised a problem of salient constitutional character. This frame has included matters of elections and political parties' funding by the State, the duty of the Broadcasting Authority to observe principles of freedom of expression, and matters that are the core of the democratic regime or our society's constitutional structure.

By the late 1980's these exceptions were generally accepted. They became the "classic" approach. In one case, standing was allowed to six Members of Parliament and eleven academics who petitioned against the refusal of the Minister of Justice to extra-

dite an Israeli citizen to France.[4] Public petitions have also been heard against the Minister of the Interior for failing to introduce Summer Time[5]; against the pardon granted by the President of the State before conviction (a petition by law professors, Members of Parliament and practicing lawyers — more than twenty in all);[6] against the Attorney General;[7] against the Advocate General of the Army for non-prosecution;[8] a petition, in 1990, also by a number of Members of Parliament and academics, against the validity of political coalition agreements;[9] and other petitions all in matters of deep public controversy.

The example of petitioner Ressler[10] is illuminating. Ressler, a practicing attorney and an officer in the military reserve, petitioned against the Minister of Defence for granting deferment from military service to Yeshiva (Rabbinical Seminary) students. The issue is one of acute public controversy. It involves strong contradicting views on religious and political matters. The deferment has been, through the years since the State of Israel was established, a cornerstone of a status quo political coalition agreement with the religious minority parties, without which no coalition has ever been formed. Three petitions on this issue had been dismissed for lack of standing: one in 1970,[11] and two by Ressler in 1989[12] and 1982.[13] Ressler's application for additional hearing of one of them was also dismissed.[14] In 1986, probably aware of the changing position of the Court, Ressler tried again. This time he won on standing but lost on the merits. The Court held the Minister's decision lawful and the use of his discretion legitimate, being within the range of reasonableness.[15]

The main opinion in the last *Ressler* case,[16] on the whole

4. H.C.J. 852, 869/86, Aloni v. Minister of Justice, 41 P.D. (2) 1.

5. H.C.J. 217/80, Segal v. Minister of the Interior, 34 P.D. (4) 429. This is known as daylight savings time in the United States.

6. H.C.J. 428, 429, 431, 446, 448, 463, Barzilai v. The State of Israel, 40 P.D. (3) 505.

7. H.C.J. 935, 940, 943/89, Ganor v. Att'y Gen., 44 P.D. (2) 485.

8. H.C.J. 425/89, Tzopan v. Att'y Gen., 43 P.D. (4) 718.

9. H.C.J. 1635/90, *Zerjevsky*, 45 P.D. (1) 748.

10. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

11. H.C.J. 40/70, Baker v. Minister of Defense, 24 P.D. (1) 238.

12. H.C.J. 448/81, Ressler v. Minister of Defense, 36 P.D. (1) 81.

13. H.C.J. 179/82, Ressler v. Minister of Defense, 36 P.D. (4) 421.

14. A.H. 2/82, Ressler v. Minister of Defense, 36 P.D. (1) 708.

15. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

16. *Id.*

with the consent of the panel, marks a leap in liberalizing the standing of a petitioner without an interest. The "classic" approach would have sufficed. The petition could easily have come under the second exception, as a salient constitutional problem. But it expresses a far reaching obiter, calling for more liberalization in the exceptions to the *actio popularis*. Referring to the "classic" exceptions it states that the first exception should not be limited to cases of corruption solely, but should be extended to any case in which petitioner points to a grave defect. It also states that the second exception should not be limited to constitutional matters, but should extend to all cases in which the petition is of a public character that directly concerns the promotion of the rule of law and the delineation of guidelines necessary to ensure its observance in actual practice, as well as to issues of extraordinary legal substance that concern the principles of the rule of law. However, these are just milestones; rigid categories should be avoided. The list is not exhaustive. It should remain flexible to include additional situations, such as cases which by their nature do not affect any personal interest. The greater the defect complained of, the more prominent the character of the dispute, the more it affects the public at large, the fewer are the holders of rights and interests. All the more reason in such cases to recognize the public petition. Access to the Court is the cornerstone of the rule of law. Closing the Court's doors to the public petitioner in such situations would mean refraining from performing the Court's duty to maintain the rule of law by imposing it on the Governmental authority. This is a far cry from the position of the Court in 1970 in the first military deferment petition, according to which the more public and political the character of the subject matter of the petition, the more strict the Court would be on the standing of the petitioner, requiring infringement of a private right.

With such flexible standards as suggested in *Ressler*,[17] it will fall to the "expert feel" of the Justices to filter the petitions and discern those deserving from those non-deserving of standing, to distinguish between a publicity seeking petitioner and a petitioner motivated by a bona fide interest in the rule of law. Not all are in agreement with this new development. Justice S.

17. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

Levine criticizes it severely in an article entitled, *Does the Right of Standing Have a Standing?*[18] in which he states that he declines to be a "legal policeman" on the guard of the rule of law, and sees his function as a judge in the traditional duty to resolve disputes. Justice Levine is concerned with the detrimental effect of liberal standing on the status of the Court. An interesting suggestion he makes is to establish an Authority, with powers somewhat similar to those of the police, to receive and investigate complaints from the public for serious breaches of the law by the authorities in matters of general public importance and, in the appropriate cases, to take the matters to the Court.

Be it as it may, the seed has been sown. For better or for worse, depending on one's view of the doctrine of standing, the new "unclassic" exceptions to the *actio popularis* are generally becoming "classic." The uncertainty that was to be expected from their flexibility has lessened with time as standards were refined by the Court's decisions. By now, the State hardly ever questions the standing of public petitioners in matters of general or constitutional importance.

III. JUSTICIABILITY

Ressler is a landmark not only on the doctrine of standing, but on the doctrine of justiciability as well. It dealt with a matter that touched sensitive political and religious nerves in an acute public controversy. Nonetheless, the High Court held unanimously that it was a justiciable controversy.[19]

While standing determines whether the Court should listen to the petitioner, justiciability decides whether it should deal with the issue he raises on the merits. Justiciability does not concern jurisdiction. It concerns whether the Court should exercise its discretion to use jurisdiction; whether the petition is suitable to judicial hearing.

The concept of the main opinion in *Ressler*, in legal theory, is that justiciability has two meanings: 1) the normative, i.e., the existence or non-existence of applicable legal norms and legal standards to resolve the dispute; and, 2) the institutional, i.e.,

18. 39 HAPRAKLIT 453 (1990).
19. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

whether or not the court is the proper institution to do so. First, everything is normatively justiciable. There is no act to which the law does not apply; everything is a legal matter in the sense that the law takes a position as to whether it is permitted or forbidden. There is no legal void; where there is a legal norm there are also legal standards to implement the norm. Reasonableness is such a standard. In the *Zerjevsky* case,[20] where this theory was challenged by the Deputy President in a minority opinion, it was also explained in defense of the theory in *Ressler* that even acts of human relationship, in the realm of morals, are governed by law in the sense that they are within the liberties permitted by law. The law also applies to political matters because "political" matters may at the same time be "legal" matters, though the legal standards applicable to them may sometimes be different. In exceptional matters such as making peace or war, a petition will be dismissed not because of absence of normative justiciability — the powers of Government to make peace and war are regulated by law — but because they are legal.[21] This is how normative justiciability works.

Institutional justiciability, on the other hand, determines if the matter is appropriate to be resolved according to legal standards by the court. *Ressler*[22] deals with the various arguments for holding disputes of political character nonjusticiable. It refers to the matters considered nonjusticiable in the opinion of J. Brennan in *Baker v. Carr*[23] as examples representing a general approach according to which matters of political character should be nonjusticiable, and deals with them accordingly. First, as to the infringement of the principle of separation of powers, the conclusion the Court reaches is that there is nothing in this principle to justify the objection to justiciability. Rather, it is the principle of separation of powers that justifies judicial review of the Executive's actions, including those of a political nature. Review is the function of the Court, guaranteeing that each of the three branches of the State acts lawfully within its powers.

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20. H.C.J. 1635/90, *Zerjevsky*, 45 P.D. (1) 748.

21. *Compare* J. Brennan, Goldwater v. Carter, 444 U.S. 996 (1979): "the power to declare war is justiciable. It must be resolved as a matter of constitutional law, not political discretion."

22. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

23. 369 U.S. 186 (1962).

Second, the Court in *Ressler* also thinks the idea of detriment to a democratic regime is unfounded. The tension between majority rule and individual rights, which is the essence of a democratic regime, is well served by judicial review. Democratic regime does not mean hermetically closed barriers between the three branches. The modern idea of separation of powers means balance. Judicial review ensures that the majority opinion finds expression in its legal frame according to the constitution, namely, in the House of Representatives, in Parliament. Acts of the Executive will be confined within the legal bounds defined by the majority vote and the Judiciary will review their legality. Thus a balance is created between the separate powers. There is no reason why political acts of the Executive should not also be subject to review. The Court does not apply political review. It applies legal review instead. It is not the idea of a democratic regime that the majority may act unlawfully.

Third, the Court believes that the most serious argument for nonjusticiability is the impairment of the confidence of the public in the Court; that is, the need to protect the Court against the politicalization of adjudication. In truth, there is no objective ground for this argument, for even when the Court deals with political issues, it does not examine them by political standards or standards of political wisdom, but by legal standards. There could, however, be a subjective ground. The public may not distinguish between judicial review and political review. It might identify the legal decision with a political position.

The High Court has been aware of this danger. It expressed its awareness in several cases. For example, in *Shalit*[24] the question raised was "who is a Jew?", a question which will always remain elusive and controversial, cutting along the line between religious and secular Jews. The Court also voiced it in the *Elon Moreh* case[25] which dealt with the legality of a Jewish settlement in the occupied territories, a matter of sharp political dispute between the political right and left. The Court decided that the settlement on privately owned land was illegal because the military need for it was not the predominant consideration.

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24. H.C.J. 58/68, Shalit v. Minister of the Interior, 23 P.D. (2) 477.
25. H.C.J. 390/479, Dwaikat v. The Government of Israel, 34 P.D. (1) 1.

> [W]e have valid (legal) sources for deciding (the dispute) and no need — and are indeed proscribed, whilst sitting in judgment — to interpose our personal views as citizens of the State. It is, however, still greatly to be feared that the court will appear to be abandoning its proper place and descending into the arena of the public debate, and that its decision will be received by one part of the public with acclamation and by another part with utter emotional rejection. In this sense I regard myself here as bound by the obligation to decide in accordance with the law in every matter duly brought before the court, knowing well from the outset that the public at large will not pay attention to the legal reasoning but only to the final conclusion, and the proper status of the court as an institution is likely to be prejudiced in taking a stand proper to it, beyond the disputes which divide the public. But what else can be done? That is our task and our duty as judges.[26]

The Court repeated its awareness of the danger in *Barzilai*[27] in which the issue that aroused great public agitation was the pardon granted by the President of the State to members of the Security Service before conviction. In all these cases the Court decided with reluctance that, although the public will not understand that reviewing does not mean taking a stand in the controversy, it has to descend into the arena of public debate because, as judges, this is their task and they may not disclaim it — just as C.J. Marshall said as early as 1821 in *Cohens v. Virginia*:[28] "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[29]

Would self restraint make a difference? Will it operate to ensure the confidence of the public in the Court? This is doubtful. If the public has difficulty in understanding that the admission of a petition does not amount to ideological or political assent with the public or political issue, will it better understand that dismissing it does not amount to dissent? The fear that we will not be understood exists equally whether we decide to hear the petition or not.

In *Ressler*[30] J. Barak said:

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26. *Id.*
27. H.C.J. 428, 429, 431, 446, 448, 463, *Barzilai*, 40 P.D. (3) 505.
28. 6 Wheat 269 (1821).
29. *Id.*
30. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.

> I am less afraid of judicial occupation with "political matters" leading to politicalization of adjudication than I am of the court's reluctance to deal with political matters leading to the violation of the rule of law and shattering the public faith in law.[31]

And quoting from an earlier case he added: "There is a danger of disrupting the faith of the citizen in the rule of law if we disclaim the power vested in us."[32]

The operative decision in *Ressler*[33] on institutional judiciability, that the matter was appropriate to be dealt with by the Court according to legal standards, was clear and unanimous. Not so clear is its theoretical conclusion:

> What conclusion arises from our analysis of institutional justiciability (or rather non justiciability)? . . . the conclusion is that this doctrine is most problematic; that its legal foundations are shaky, and that it is based to a large extent on "irrational reasons"; that it should be approached with due caution; that there will be room to consider its employment only in special cases, where the fear of harming the public's faith in the law; and that the list of such cases is not closed, but will be decided ultimately, according to the experience of judicial life and the expert feel of the judge."[34]

There were also reservations by the President about the far reaching theory that all matters are judiciable, and about its applicability to all political matters. A disagreement on similar grounds was expressed also by the Deputy President.[35] He stated that the legal theory of *Ressler* is based on legal-mathematical assumptions and academic distinctions, where what is needed is the expert feel of the judge. He rejects the idea that all matters are subject to legal norms and standards. Human relations — family and social relations — are based on moral norms and are outside the area of legal ordering. He does not accept the open-frame standard of reasonableness as applicable to all matters, and questions whether there is a point in even posing the question of how a reasonable political party would have ac-

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31. *Id.*
32. H.C.J. 295/65, Oppenheimer v. Minister of the Interior, 20 P.D. (1) 309.
33. H.C.J. 910/86, *Ressler*, 42 P.D. (2) 441.
34. *Id.*
35. *Id.*

ted under the circumstances.

It is clear, however, that the range of matters considered as non-judiciable has been substantially restricted. The prevalent opinion is that they are limited to questions that are obviously of military character or predominantly of political nature.

Mr. Ressler made an important legal precedent on standing and on justiciability. He won on both, but he lost on the merits. The Court held that the Minister's decision on the military deferment of the Yeshiva students was not unreasonable, but left the door open for a new petition to show that the increasing number of deferred students presents a security consideration for the Minister to reweigh, if it was so.

IV. The Rule of Law and the Attorney General

The concept of the Court's function as a safeguard of the rule of law also finds expression in the scope of the Court's review of the head of the criminal justice authority — the Attorney General himself.

It had been the rule that the decision of the Attorney General to institute or to stay proceedings is subject to review on one ground only — the ground of bad faith. With time it was extended to also include the grounds of arbitrariness and ulterior considerations. This remained the rigid frame until the early 1980's when a few more particular grounds of review were recognized by the Court's decisions such as considerations contrary to public interest or extreme unreasonableness.

The first sign of change came with an obiter in a 1981 case[36] calling to place the review of the Attorney General's decisions on the same footing as that of all other public authorities, which are subject to the review of the High Court by the standards of Israeli judge-made administrative law.

It was not long before this obiter caught on. It has been adopted where the Attorney General had decided not to order a police investigation of a petitioner's complaint for contempt of court, despite his own opinion that it showed a good prima facie case. The Court ordered him to do so, holding the reasoning for

36. H.C.J. 329/81, Noff v. Att'y Gen., 37 P.D. (4) 326.

his decision baseless.[37] It was followed in a judgment against the Advocate General of the Army holding that his decision not to prosecute a Major General in a military court for grave assault on some Arab residents of the West Bank was unreasonable.[38] It was followed and expounded in the case of a bank's manipulation of bank shares which caused a heavy financial crisis, creating an expediency for government support of a few billion dollars which it has as yet not been able to recoup.[39] A commission of inquiry was appointed. Contrary to the commission's recommendations, which remained intact after police investigation, the Attorney General decided not to prosecute the heads of the major banks. The Court held that the Attorney General's decision was materially unreasonable and ordered him to prosecute.

There can be no question that the use by the Attorney General of his discretion in pressing or refraining to press charges is justiciable, both normatively — the matter clearly is governed by legal norms and regulated by legal standards — and institutionally — the review does not involve the Court in a political controversy. In the area of criminal prosecution the Attorney General holds a most powerful discretion. Such power is imbued with the danger of abuse, corruption and discrimination if uncontrolled and free from review. Though the Israeli experience has not proved this, apprehension of uncontrolled power is universal and ever present.

The Attorney General is not above the law. His decisions, like the decisions of all public authorities, have to comply with the standards of Israeli administrative law. His decisions, like the decisions of all other public authorities, are invalid if they do not do so. All public authorities are equally subject to judicial review. So also the Attorney General is not above the Court's jurisdiction. And just as there is no special law for the Attorney General with regard to the Court's jurisdiction, so there is no special law for him regarding the Court's scope of review. The scope of the Court's review of his discretion should extend to the full range of review of all public authorities subject to the same standards. These standards require all to use their discretion in

37. H.C.J. 223/88, Sheftel v. Att'y Gen., 43 P.D. (4) 356.
38. H.C.J. 425/89, *Tzopan*, 43 P.D. (4) 718.
39. H.C.J. 935, 940, 943/89, *Ganor*, 44 P.D. (2) 485.

good faith, with decency, honesty and reasonableness, and free of arbitrariness, discrimination and ulterior motive. This way equality before the law is achieved.

With regard to criminal justice, even a petition against a decision of the President of the State who, by statute, is immune from any legal proceedings, gained a hearing by the Court on a petition of some practicing lawyers, Members of Parliament and law professors whose only interest was in safeguarding the rule that political figures are not above the law.[40] The petition was brought against the Minister of Justice, the Attorney General, and some other functionaries. It concerned the use by the President of his statutory power of pardon. The question raised was whether the President had exceeded his power by granting pardon before conviction. The decision by the majority was that he had not.

V. The Rule of Law and Politics

The increased liberalization of the Court on standing and justiciability led to its involvement with politics and with the Knesset, our Parliament.

I should first mention that Israel has no written constitution. It has a series of Basic Laws. I will explain their nature. The Declaration of Independence of 1948 refers to a Constituent Assembly to be elected, which will draw up the Constitution of the newly born state. The Assembly was elected and then transformed into the Knesset (our Parliament) and disbanded. In 1950 the Assembly — turned Knesset — passed a resolution according to which the formal Constitution would be drawn by a series of Basic Laws. The Knesset has since enacted sporadic Basic Laws establishing state institutions and authorities such as the Basic Law: The Knesset; Basic Law: The Judiciary; Basic Law: The Government; Basic Law: The State Comptroller and several others. They do not make up a complete constitutional text. There is no Basic Law: Legislation. A draft was published only recently.

Until recently we had no Basic Law on human rights. The law of human liberties was all judge-made. Only in 1992 were

40. H.C.J. 428, 429, 431, 446, 448, 463, *Barzilai*, 40 P.D. (3) 505.

two Basic Laws dealing, very incompletely, with human rights enacted: Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.

Although Basic Laws were meant to be temporary substitutes for a formal Constitution, their status is not clear. They are enacted by the Knesset by the same procedure as ordinary laws. They require no special majority. It is not clear whether a Knesset that passes a Basic Law acts so as a Constituent Assembly. A Basic Law is not necessarily entrenched or immune to change or abolition. Some are, only by virtue of the fact that changes require a special majority. Others can only be changed by Emergency Regulations. Still others are not entrenched at all.[41] They have not been accorded constitutional value or status by the Judiciary. Subject to entrenchment, they have been regarded as ordinary laws.

The question of the power of the Knesset to bind itself, and future Knessets, by an entrenchment clause was raised in 1969 in *Bergman v. Minister of Finance*[42] but was left open. The Court proceeded with the case on the presumption that it could. It was thus given a positive answer, by implication.

Recently, in a 1989 case, one Justice's opinion stated that a Knesset passing a Basic Law does so as a Constituent Assembly.[43]

> We recognize the power of the Knesset to act as a Constituent Assembly and draw Basic Laws which will make up the various chapters of the Constitution.[44]

This statement was made in the narrow context of an entrenchment clause but it is more far reaching; it gives a Basic Law, entrenched or not, the normative superiority of a constitution over any ordinary law:

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41. One, the Basic Law: Human Dignity and Liberty (1992) has the following entrenchment clause:

> There shall be no violation of rights under the Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required.

42. 21 P.D. (1) 693.

43. The opinion was that of Justice Barak in Laor Movement v. Chairman of the Knesset, 44 P.D. (3) 529.

44. *Id.*

> Within this frame we recognize the power of the Knesset — acting as a Constituent Assembly — to entrench provisions of Basic Law against amendments — whether by ordinary law or by Basic Law — by ordinary majority . . . In the contest between the entrenchment clause and a provision reaching amendment without the special majority it requires, the principle which gives normative superiority to the entrenched Basic Law will prevail.[45]

So far this is only a single opinion, not the opinion of the Court.

A. *The Knesset*

Israel's political regime is a parliamentary democracy. Our Parliament, the Knesset, is the apex of the triangle of powers of the State. It is the Representative Assembly of the State.[46] Due to our countrywide relative system of election, though, the electors vote for parties, and it is the parties which make up their lists of representatives to the Knesset. The Knesset is the Supreme legislator. From it emanates all law. By its law the Judiciary is appointed and exercises jurisdiction.

The Judiciary is independent — "A judge is subject to no authority but the authority of the law."[47] The Government is the executive branch of the State.[48]

There is a separation between the three branches of the State, with checks and balances in their mutual relations. The Judiciary exercises review jurisdiction over all public bodies performing functions under law,[49] including Governmental authorities, and also over the Knesset, as we shall soon see. The Knesset has control over the Executive — "Government is responsible to the Knesset" and "Government serves by virtue of the confidence of the Knesset."[50] Unlike a presidential democracy, in a parliamentary democracy it is the Parliament (in Israel — the Knesset) which constitutes the Executive, by its vote of confidence:

> When a Government has been formed it will appear before the

45. *Id.*
46. Sec. 1, Basic Law: The Knesset.
47. Sec. 2, Basic Law: The Judiciary.
48. Sec. 1, Basic Law: The Government.
49. Sec. 15, Basic Law: The Judiciary.
50. Secs. 2 and 3, Basic Law: The Government.

> Knesset, present its platform . . . and request the Knesset's confidence. Government will be constituted upon the vote of confidence.[51]

And just as the Knesset constitutes the Executive by its vote of confidence, so it can depose the Executive by its vote of no-confidence. This feature is indeed so crucial and characteristic that some writers on constitutional law consider it as the exclusive criterion of a parliamentary regime.[52] The Knesset also has some quasi-political functions.

The authority of the Court to review acts of the Knesset is a constitutional problem of the greatest importance. It is the problem of the relations between the Legislature and the Judiciary. The source of the authority of review of the High Court is in the Basic Law: the Judiciary. The Judiciary has power to review the acts of public authorities performing functions under law. The Basic Law does not distinguish between the Knesset and other public bodies. It does not distinguish, for that matter, between the different functions subject to review. The problem is, therefore, not a problem of jurisdiction but of discretion — of the degree and extent to which the Court should exercise its authority or should practice judicial restraint. The answer varies with the different functions of the Knesset, and the political element they involve.

1. *Quasi-judicial decisions*

Quasi-judicial decisions are the least political of the Knesset functions. These decisions include removing members (by the plenum) of the Knesset convicted of criminal offenses and sentenced to at least one year's imprisonment, by a process similar to the United States' process of impeachment. They also include the suspension of membership (by the House Committee) pending final judgement and service of sentence, and the removal (by the plenum on motion by the House Committee) of a member's immunity in relation to a criminal charge (unconnected with his

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51. Sec. 15, Basic Law: The Government; A. RUBINSTEIN, 1 THE CONSTITUTIONAL LAW OF ISRAEL 479.

52. H. KLINGHOFFER, DAS PARLAMENTARISCHE REGIERUNGSSYST IN DEN EUROPÄISCHEN NACHKRIEGSVERFASSUNGEN, (Stuttgart, 1928); K. Klein, *The Legal Definition of the Parliamentary Regime and Israeli Parliamentarism*, 5 MISHPATIM 308, 313.

functions as a member of Knesset). The exercise of these powers is subject to certain conditions and certain procedures stipulated by statute.

As quasi-judicial, these decisions should be exercised according to legal standards. There is no reason then why they should not be reviewed in the same way as the decisions of quasi-judicial tribunals.[53] It is, therefore, only normal that such decisions should be subject to the Court's full scope of review. But this was not so until 1985.

In 1981, the Court petitioned to restrain the House Committee from dealing with an application for the removal of a member's immunity[54] stating: "As is well known this Court does not interfere in the proceedings of the Knesset and its committees."[55]

Later the same year, the Court decided (by majority of 4-1)[56] to review the decision of the House Committee to suspend membership, but limited it to the question of whether the committee had exceeded its power — whether the pre-conditions of the basic law which regulate such matters were fulfilled. It was a question of an interpretation of the statute. The then Deputy President stressed:

> We are not dealing here with a "political" question, nor with the legislative function of the Knesset or one of its committees, but with the judicial or quasi-judicial function. . . The Knesset Committee cannot possibly have immunity from judicial review in exceeding this function, and cannot finally determine the limits of its own powers.[57]

In the minority opinion, the then President expressed serious doubts about whether the Court should interfere with the Knesset.[58]

In 1985, the Court was finally ready for full scope review of a quasi-judicial decision of the Knesset. It was the first time the Court had interfered (by majority of 3-2) with a decision of the

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53. *Compare*, Powell v. McCormick, 89 S. Ct. 1944 (1969) (the unconstitutional exclusion of an elected Congressman from his seat by a House resolution).

54. H.C.J. 96/81, Abu Hazeira v. The House Committee, unreported.

55. *Id.*

56. H.C.J. 306/81, Flatto Sharon v. The House Committee, 35 P.D. (4) 118.

57. *Id.*

58. *Id.*

Knesset plenum.[59] The decision involved removal of a member's immunity on the ground of his public expression of identification with PLO terror. The Court made it clear that its review was not limited to the test of functional jurisdiction of the Knesset to take the decision. It examined the basis for the decision, including the evidential foundation and the motive. The removal of immunity, it said, is not meant as punishment for past behavior, but for prevention of future danger of unlawful behavior. There was not enough to substantiate such danger, nor had the causal connection been considered by the plenum between the removal of the immunity and the prevention of possible future danger from the petitioner. The petition was granted and the decision was declared void.[60]

2. *Intra-Parliamentarian decisions*

The most evident transformation during the 1980's was the Court's actual intervention in intra-Parliamentarian decisions. Such decisions concern the internal management of the Knesset and its organs. They can be a powerful instrument to achieve political ends. They are of obvious political character, and were never included in the sphere of review of the High Court, until 1981.

In a 1981 petition,[61] though dismissed, the Court took the opportunity to make clear its new position on the issue of review of such decisions. It evolved standards for intervention which have later been applied in actual interference to invalidate some decisions. The subject of the petition was a decision of the Chairman of the Knesset to postpone, by several hours, a proposal already scheduled for a vote of no confidence in the Government. It was argued, but not established, that the decision was motivated so as to enable Government supporters to arrive from abroad in time to vote. It was also agreed that the Chairman cannot legitimately serve as "an instrument in the hands of the Executive."[62]

The Court dismissed the argument that the subject of the

59. H.C.J. 620/85, Miari v. The Knesset Chairman, 41 P.D. (4) 169.
60. *Id.*
61. H.C.J. 652/81, Sarid v. The Knesset Chairman, 36 P.D. (2) 197.
62. *Id.*

petition is non-justiciable. The procedure of the Knesset is regulated by the Basic Law: The Knesset, and by the Knesset Rules made under it. The Knesset and its organs must abide by their procedure. The Court stated that in reviewing intra-parliamentarian decisions it should strike a balance between two considerations: on the one hand, the principle of the rule of law which is binding on all including the branches of Government and, first and foremost, on the Knesset — the rule of law in the law maker itself; and, on the other, the unique status of the Knesset and the principle that intra-parliamentarian activities are an internal matter of the House dealing with politics. This state of conflicting considerations calls for a balanced judicial review based on self restraint, but short of complete fettering, according to the standard that:

> [T]akes into account the degree of harm (in the decision subject to review) to the web of parliamentary life and the extent of its effect on the fundamental structure of our constitutional regime.[63]

The test prescribed focuses on the core and disregards the periphery. The decision under consideration — the postponement by several hours of a scheduled debate on a motion for non-confidence (even if wrongly motivated) — failed to meet this standard.

This standard was later applied to dismiss petitions in several cases which did not answer the above test: against the decision of the Knesset plenum to change the composition of a Knesset committee in order to replace its chairman[64]; the decision of the Knesset Chairman to fix a date for a vote of no confidence, in some deviation from Knesset rules[65]; and others. On the other hand, it intervened when the Chairman refused to schedule a motion for non-confidence by a one member faction on what the Court held to be a wrong interpretation of the Knesset Rules, and of a Resolution of the House Committee and precedents.[66] The matter was of fundamental significance. A vote of no confidence is a matter of vital importance to the constitutional regime and parliamentary life. It is the most useful

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63. *Id.*
64. H.J.C. 482/88, Reisser v. Chairman of the Knesset, 42 P.D. (3) 142.
65. H.J.C. 1179, 1180, 1181/90, Ratz v. Chairman of the Knesset, 44 P.D. (2) 31.
66. H.J.C. 73/85, "Kach" v. Chairman of the Knesset, 39 P.D. (3) 141.

measure at the disposal of the opposition, and the most effective means of control and supervision of the whole legislative branch over the executive. The matter was justiciable. It contained no element of political consideration, and no relation to the repugnant racist platform of the faction.

Another petition of the "*Kach*" faction (named for its representative Kahana[67]) concerned two bills that it submitted to the Presidency of the Knesset (the Chairman and his deputies). The Knesset rules require the Presidency to confirm the bills before they can be put before the plenum. The Presidency refused to do this because of their racist contents. The Court intervened. It decided that the Presidency's authority to confirm bills for submission to the House is confined to their legal frame and does not extend to their contents. The Presidency has no authority to ground a bill because of its social-political contents, repugnant as they may be. Once the faction has been allowed to participate in the elections and its representative has been elected, it cannot be prevented from trying to realize its political platform. The matter is a fundamental violation of parliamentary life — legislation being one of the central functions of Parliament. The petition was, therefore, granted. A third petition, also against the refusal to confirm "Kach" bills, was dismissed. By then the Knesset had amended its rules to prevent confirmation of bills that are racist in essence. The attempt, in 1985, to challenge the amendment in Court failed.[68] Later, after an amendment of the criminal law prohibiting racist activities, the faction was debarred from the elections. Its only impact on Israeli public life is its contribution to the development of our constitutional law.

It is worth mentioning that, in deference to the Knesset, the Court did not make an operative order in these petitions. It made only declaratory orders, which cannot be enforced. For this reason a further petition by Kahana for contempt of Court had to be dismissed.

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67. H.J.C. 742/84, Kahana v. Chairman of the Knesset, 39 P.D. (4) 85.

68. H.J.C. 669/85, 24/86, 131/36, Kahana v. Chairman of the Knesset, 40 P.D. (4) 393.

B. *Political Agreements*

In the 1990's the Court descended into the political arena in two cases concerning political agreements made between Knesset factions towards the formation of a new Government. Political agreements are made between parties or factions concerning the structure and policy of the Government and the way Governmental powers are to be exercised. As already explained, in our electoral system Parliament (the Knesset) is elected by the people, the electorate, by means of lists of parties. Political parties thus become a constitutional instrument by which the will of the people takes form. We have a multi-party regime which, by nature, is based on coalition. Political agreements have become a crucial legal political instrument in the political process, at least in the process of forming or breaking a Government.

In the first case, two petitions were brought at a time when each of the two major parties were secretly negotiating for shady political bargains with the small parties, without which none could have a majority to form the Government. The nature of some of the promises made aroused public concern. It was alleged that they were contrary to public policy. The agreements were secret. The first petition was to make them public.[69] The free flow of information to and from the public is key to the operation of a democratic regime. The public depends on it to obtain the facts necessary to form decisions on matters of government. Such information, which is at the core of democracy, also includes information on political agreements. Just as the electors should have knowledge of the party's platform in order to form a political position, so they should know the contents of political agreements that bring changes in the platform. Elected members of the Knesset also have to know of such changes before they take the vote of confidence in the new Government. The duty to reveal such agreements will have a deterrent effect, and will thus ensure the legality of their contents. It will enable public criticism and will strengthen the structure of the regime and the Government. The duty to reveal also derives from the position of the parties to the agreement as trustees of the public. In addition to these sources of public law for the duty to reveal

69. H.J.C. 1601, 1602, 1603, 1604, 1889/90, Shalit v. Peres, 44 P.D. (3) 353.

the nature of the regime and the character of the political agreement, there is the duty to give information, corresponding to the freedom of expression, which means not only the right to make one's opinion heard, but also the right to hear the opinion of others. On these grounds the petitions were granted and the Court ordered the agreements to be made public. In doing so, the Court established the general duty to reveal political agreements. For the prescription of specific arrangements, the Court called on the legislature.

This was a case of judicial activity in developing the law; but then, most of our administrative as well as constitutional law is judge-made. Just as we have no formal, written Constitution, we also have no code of administrative law. Indeed, the human liberties were all judge-made. The normative sources on which we rely are the fundamental principles and basic values of our system as a free democracy, which we recognize as the very soul of our system, though not written upon a book. These include such principles as equality, the duty of honesty and good faith, the rules of natural justice, and the human liberties themselves.

In the second case[70] the Court invalidated a certain clause of the agreement on the grounds of public policy, having reached unanimity that the matter was justiciable — "there are legal norms governing it and legal standards to apply to it and there is a judge to review" it[71] (in converse of the old Hebrew saying that there is no law and no judge, denoting lawlessness).

I ought to also mention the Deputy President's dissenting opinion concerning the intervention with the Knesset, especially with its intra-parliamentarian decisions. It is less concerned with the loss of prestige by the Court as the result of the politicalization of adjudication, as with the loss of status and fortitude of the political authorities. In his minority opinions in *Kahana*,[72] in *Miari*,[73] and in *Zerjevsky*[74] the Deputy President takes a strong stand against excessive intervention with and for more deference

70. H.C.J. 1635/90, Zerjevsky v. The Prime Minister, 45 P.D. (1) 748, (Deputy President Elon).

71. *Id.*

72. H.C.J. 742/84, *Kahana*, 39 P.D. (4) 85.

73. H.C.J. 620/85, Miari v. The Knesset Chairman, 41 P.D. (4) 169.

74. H.C.J. 1635/90, *Zerjevsky*, 45 P.D. (1) 748.

to the Knesset which, of the three branches of the State, is the only one elected by direct vote of the public and is the source of the law and the authority of the Judiciary. He stressed that by the concept of separation of powers the Knesset is responsible to the people. It is the people who will judge it on the judgment day of the elections — but not very likely in our political culture, many will say. The Court should exercise more self-restraint toward the Knesset and leave it free to its business without interfering with its regular and efficient functioning. In this the Deputy President is in the minority.

VI. Conclusion

The concept that the High Court's role is to resolve disputes has given way to the concept that its role is to safeguard the rule of law. In the name of the rule of law, the Court became actively involved in matters of political character from which it had recoiled before, more actively perhaps than courts in other countries. Explaining its intervention with an intra-parliamentarian decision, the Court said:

> Our fortitude lies in meticulous observation of the rule of law and the legality of Government. . . . [i]nsistence on the rule of law, including the rule of law in the legislature, and on the structural foundation of our constitutional regime is the soul of our national existence.[75]

The Israeli experience shows that liberalization on matters of standing and justiciability has not flooded the Court with public petitions nor, judging by the relevant opinion of the legal community, has the Court's status been impaired in the eyes of the public by descending into the political arena. On the contrary, the public's respect and confidence in the Court seems to have been enhanced. I would like to think that we have satisfied at least some of the public's high expectations. We are being sensitive to the public's feelings and views. There is an old Hebrew saying that the Judge sits in the midst of his people. We are aware of the public's disillusionment with the political systems, and of the reasons that are responsible for this. It was in response to this state of things that the Court overcame its re-

75. H.C.J. 742/84, *Kahana*, 39 P.D. (4) 85.

luctance and, in full responsibility to the public, rose to the need to restore faith in the country's constitutional institutions. The Court did so by introducing healthier norms into political life and by making it clear that nobody is above the law — that all are equally subject to the rule of law not excluding those who play a role in public and political life. In so doing the Court has acted with care, keeping a delicate balance and restraining itself by centering only on the core — on matters that have a serious effect on the fabric of our parliamentary life and the structure of our constitutional regime. Some of the new norms are now included in the Basic Law: Knesset, by an amendment enacted after the *Zerjevsky* case.[76]

Professor Zamir, a Professor of Administrative Law at the Hebrew University of Jerusalem, wrote recently that the Court has thus far proceeded in this field with caution and wisdom.[77] May it be able so to continue.

76. H.C.J. 1635/90, *Zerjevsky*, 45 P.D. (1) 748.
77. Itzhak Zamir, *Courts and Politics in Israel*, PUBLIC LAW 1991, 523.