LAW OR POLITICS: ISRAELI CONSTITUTIONAL ADJUDICATION AS A CASE STUDY

Gidon Sapir[*]

A frequently asserted claim among American constitutional scholars is that constitutional adjudication is not law, but politics; more precisely, that the judicial process of interpreting the constitution and then of bringing the interpreted constitution to bear in resolving the conflict at hand, is not a legal process but a political one. Taking, as a case study, Israeli constitutional adjudication on religion and state, especially regarding freedom of religion, this article aims to illustrate that Israeli constitutional adjudication is indeed, to a large degree, politics and not law. A close examination of several Supreme Court decisions involving religion-and-state disputes will reveal that the justices' different backgrounds and worldviews have consistently led them to differing opinions regarding the exact meaning and scope of freedom of religion.

If the proposed description of the Israeli perspective is indeed true, it demonstrates the importance of recognizing the inevitable political nature of judicial decisions, and therefore of making them more responsive to the democratic will. I shall make several initial suggestions regarding changes and adaptations that can and should be executed with a view to achieving this goal.

---

* Lecturer, Bar-Ilan University, Faculty of Law; Senior Lecturer, Northwestern University School of Law. Rabbinic Degree, Har Etzion Yeshiva, 1989; LL.B., Bar-Ilan University, 1993; LL.M., Northwestern University, 1996; S.J.D., Northwestern, 1998. The author is indebted to Gad Barzilai, David Kretzmer, Uri Regev, Suzanne Stone and Eugene Volokh for their valuable comments on an earlier draft.

I. INTRODUCTION

A frequently asserted claim among American constitutional scholars is that constitutional adjudication is not law, but politics, or more precisely, that the judicial process of interpreting the constitution and then of bringing the interpreted constitution to bear in resolving the conflict at hand, is not a legal process but a political one. On the American political right, the argument is that constitutional adjudication should be mainly a legal process but has been, especially in the modern period of American constitutional law, mainly a political process.[1] On the political left, "critical legal scholars" argue that adjudication, including constitutional adjudication, can only be a political process.[2]

Taking, as a case study, Israeli constitutional adjudication on religion and state, especially regarding freedom of religion, this paper aims to illustrate that Israeli constitutional adjudication is, indeed, to a large degree, politics and not law. A close examination of several Supreme Court decisions involving religion-and-state disputes will reveal that the justices' different backgrounds and worldviews have consistently led them to differing opinions regarding the exact meaning and scope of freedom of religion.

---

[1] *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

[2] *See* J. Stick, *Can Nihilism Be Pragmatic?* 100 HARV. L. REV. 332 (1986).

Such an example is hard to find in the U.S., where judges' religious beliefs generally have little consistent impact on their decisions, in part because religious beliefs, such as Catholicism and Judaism, are felt to very different degrees by different judges from ostensibly the same religious tradition. And yet, the Israeli perspective discussed in this article is useful, in fact especially useful, for people thinking about American law. Both Israel and the U.S. have faced crises of confidence in the impartiality of the judiciary, especially on matters of religion-laden cultural significance.[3] If the proposed description is indeed true, it demonstrates the importance of recognizing the inevitable political nature of judicial decisions, and therefore of making them more responsive to the democratic will.

A comprehensive discussion of the practical measures that may be taken -- in view of the recognition that the judicial branch functions, at least to some extent, as a political arm -- falls beyond the scope of this article, but I shall make several initial suggestions regarding changes and adaptations that can and should be executed with a view to achieving this goal.

II. THE "RELIGIOUS SEAT" IN THE SUPREME COURT

Throughout most of the years of the Israeli Supreme Court's existence, the justices serving on it have included some who are religious, observant Jews. Justice Yitzhak Olshan, the second Chief Justice of the Supreme Court[4] and a member of the Court since its

---

[3] For an example of Israel, see Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 602 (1996). ("The civil judicial system is now viewed by a considerable portion of the Israeli population as an active participant in a political debate, an actor identified with the secular-liberal segment of Israeli society.") Regarding the US, *see, e.g.*, JEFFREY A. SEGAL AND HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 65 (1993). ("[T]he Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices. Simply put, Rehnquist voted the way he did because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.")

[4] Olshan was the Supreme Court's Chief Justice from 1953-1965. By tradition, the

establishment, recounts in his memoirs -- in a sharply critical tone -- that with the establishment of the Supreme Court, the religious parties demanded that its five justices include at least one who was religious. According to his account, the transitional government accepted this demand without any opposition.[5] Justice Haim Cohen[6] gives an entirely different description of the circumstances of, and reason for, the selection of the religious justice. He claims that it was he who insisted that the Supreme Court include one expert in Mishpat Ivri (Jewish Law). He therefore took pains to convince Ben Gurion and the first Minister of Justice, Pinhas Rosen, to agree to the appointment to this respected position of Rabbi Simhah Asaf, who was Justice Cohen's university professor.

Either way, Rabbi Simhah Asaf was the first to occupy the religious seat in the Supreme Court. Rabbi Asaf was, according to the testimony of Justice Haim Cohen, a respected expert in the field of Jewish knowledge, and was also a shining example of "personal uprightness, integrity, intellectual power and enlightened perspective."[7] At the same time, Justice Asaf was, according to Olshan, an ignoramus in the sphere of secular law, a fact that burdened his colleagues who were constantly required to guide him in the intricacies of the law.[8] With Asaf's death in 1953, no observant justice was appointed to take his place in the Supreme Court. For a number of years, the justices of the Supreme Court included no orthodox person in the accepted sense of the term, despite the demand by the religious parties that someone with such background be appointed. In 1965, a

presidency of the Court is given to the justice who has served longest in the Supreme Court. The Israeli Chief Justice is substantially more powerful than the Chief Justice of the United States Supreme Court. In the United States, cases that come before the Supreme Court are heard by all nine justices. In Israel, however, most cases are heard by a smaller panel of three or five judges. Under normal circumstances, the judges are selected at random; in sensitive cases, however, the Court Chief Justice has the power to determine which judges will participate, and can thereby effectively determine the outcome of ideologically laden decisions. For an important example of how this can play itself out, see PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 199-200 (1997).

[5] YITZHAK OLSHAN, LAW AND WORDS 247 (1978) [in Hebrew].

[6] HAIM H. COHEN, SUPREME COURT JUDGE -- TALKS WITH MICHAEL SHASHAR 115 (1989) [in Hebrew].

[7] *Id.* at 116.

[8] OLSHAN, *supra* note 5, at 328.

religious justice was finally appointed -- Justice Kister -- and since then, the Supreme Court has never lacked yarmulke-wearing justice in its ranks. Since Justice Kister's appointment, whenever the seat of the religious justice is vacated, another observant candidate is immediately appointed to fill it. In addition to Asaf and Kister, those who have served or continue to serve in this respected position, by permanent appointment, include Justices Sharshevsky, Elon, Tal and Englard. Until recently, there was never any overlap in the terms of the yarmulke-wearing justices, despite the fact that the number of justices of the Supreme Court has grown over the years.[9] The other justices of the Supreme Court, in the past and in the present, have not been yarmulke-wearing.

The process of electing justices in Israel is set out in the Basic Law: Judicature,[10] the Courts Law (consolidated version),[11] and the Rules of the Judiciary (Procedures for the Judicial Selections Committee).[12] These enactments stipulate that the justices of all courts of law, including the Supreme Court, are to be appointed by a committee numbering nine members.[13] From debates in the Knesset

---

[9] There are twelve permanent appointments to the Supreme Court, and the Knesset has made provision for two more appointments when necessary. Within this total number there is a certain amount of room for maneuvering between the permanent appointments and the temporary appointments. A temporary appointment, as opposed to a permanent appointment, is made at the discretion of the Minister of Justice and the Chief Justice of the Supreme Court, rather than by the Judicial Selections Committee. The appointment is for a period of up to one year and there is no possibility of extending it beyond this period. The institution of the temporary appointment serves several purposes, including providing a means of evading sectarian pressure for permanent appointments. Thus, for instance, the Chief Justice of the Supreme Court has in recent years appointed two orthodox justices in a temporary capacity as a means of evading the demand of religious politicians that a second religious justice be permanently appointed to the Supreme Court.

[10] Basic Law: Judicature, 1984, 38 L.S.I. 101, (1983-84).

[11] Courts Law (consolidated version), 1984, 38 L.S.I. 271, (1983-84).

[12] Rules of the Judiciary (Procedures for the Judicial Selections Committee), 1984, K.T. 4689, 2370.

[13] Basic Law: Judicature, *supra* note 10, at 102. The full text of the relevant provisions in Basic Law: Judicature reads:

> Appointment of Judges: 4. (a) A judge shall be appointed by the President of the State upon election by a Judicial Selections Committee. (b) The Committee shall consist of nine members, namely, the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government,

leading up to the creation of the Basic Law: The Judiciary, we may deduce that this system of appointment was chosen with a view to anchoring the independence of the judicial branch and its members from the political, governmental arm or other influence groups, and to preserve the professional and ideologically nonaligned nature of the Court. The Committee is comprised of representatives of the legislature, the executive, and the judiciary, as well as representatives of the Israeli Bar Association, in such a way that the balance between these various bodies, it is claimed, ensures the independence of those elected and the neutralization of the personal ideological element in the election process itself.

This article proposes the claim that at least with regard to those issues involving a religion and state conflict, this expectation has not been fully realized. This article demonstrates that in instances where a question has arisen concerning the status and scope of the principle of freedom of religion, the positions of the justices of the Supreme Court have tended to diverge in accordance with their worldviews, with the religious justices on one side and the secular justices on the other.

As a result, the Israeli Supreme Court's interpretation of the principle of freedom of religion is characterized by a noticeable degree of incoherence. As we may deduce from the accumulated analysis of the rulings mentioned in this article, this incoherence in its interpretation of the principle is expressed not only in the rulings handed down by the Court as a body, but also within the positions of sub-groups among its justices. We shall see that while in instances where the appeal to freedom of religion serves the interests of those attacking the orthodox position, the secular justice tends to adopt a broad interpretation, in instances where the appeal is raised by the orthodox camp, the secular justice tends to choose a narrower interpretation of freedom of religion -- an interpretation which entails rejection of the appeal. The religious justice, in contrast, acts in precisely the opposite manner. In contrast with his narrower interpretation of the principle when a claim is made against orthodox interests, he prefers a broader interpretation when this serves his

two members of the Knesset elected by the Knesset and two representatives of the Israeli Bar Association elected by the National Council of the Bar. The Minister of Justice shall be the chairman of the Committee.

orthodox worldview. According to the thesis proposed in this article, this is not surprising. Every justice adopts, ad hoc, the interpretation of the principle of freedom of religion that accords, under the circumstances at hand, with his background. The religious justice arrives at his interpretation based on the orthodox position he holds, while the secular justice acts in a similar way in representing the position of the alternative streams and of the secular sector.

The limitations imposed by the definition of the subject under discussion prevent me from anchoring my claim in absolute empiric facts. At the same time, even if, owing to these given limitations, I do not prove my contention beyond all doubt, I hope that I shall succeed in providing sufficient proof to substantiate it to a reasonable degree.

III. THE BATTLE AMONG THE DIFFERENT STREAMS OF JUDAISM

The first ruling examined here is the *Movement for Progressive Judaism in Israel vs. Minister of Religious Affairs*.[14] In this ruling, the panel of five justices addressed the appeal of the Movement for Progressive Judaism and two rabbis associated with this movement, against the decision by the Minister of Religious Affairs not to recognize the appealing rabbis as "registration authorities" for the purposes of the Marriage and Divorce Act (Registration). Since the petitioners did not fulfill the necessary halakhic qualifications for a rabbi who is a marriage officer, the appeal was unanimously rejected. Our interest, however, lies not in the final outcome, but rather in the justices' grappling with one of the claims raised by the petitioners in their appeal, according to which the refusal to recognize them as marriage officers contradicted the principle of the freedom of religion and worship.

Justice Elon agreed with the petitioners that the principle of freedom of religion and conscience is a fundamental principle of our

[14] H.C. 47/82 Movement for Progressive Judaism in Israel Fund v. Minister of Religious Affairs [1989] 43(2) P.D. 661, *abridged in* 25 ISR. L. REV. 110 (1991).

legal system, but nevertheless rejected the claim that the refusal to recognize rabbis who do not belong to the orthodox stream as marriage officers represents a violation of this important principle. Elon did not explain in detail the reason for his position, concluding simply "the performance and registration of a marriage is a public act of the state, as is accepted in any country of culture."[15] In an attempt to fill in what Elon omits, we may assume that his position is based upon the distinction between the right to participate in religious worship, which in his opinion should be considered part of the principle of freedom of religion, and the demand that legal governmental approval be conferred upon a religious act, entailing a change in the legal status of its participants -- which apparently does not, in his opinion, fall within the boundaries of that right. This distinction is discussed at length later on.

Justice Shlomo Levin disagrees with Elon's position. In his view, if the decision that a certain person should not be authorized as a marriage officer is based solely on the fact of his identification with the Conservative or Reform movement, the court should be entitled to intervene. In Justice Levin's opinion, such a decision would -- "for purely moral reasons" -- prevent a large number of Jews from being married by rabbis acceptable to them.[16] Like Elon, Levin is also somewhat opaque. He does not state explicitly in his ruling what exactly is inadmissible in withholding from Conservative and Reform couples the right to be married in a ceremony that reflects their views, but it would appear that his position is bound up with his interpretation of the principle of religious freedom.

Let us take a closer look at Levin's view, which at first glance appears factually questionable. After all, the debate is not about the right of members of the liberal movements to participate in marriage ceremonies held in accordance with their views -- a right to which no one was negating -- but rather, about what the legal outcome of such a ceremony would be. To what, then, does Levin refer when he says that the existing legal situation prevents members of the Reform community from being married by rabbis acceptable to them? In order

[15] *Id.* at 692.
[16] *Id.* at 715.

to invest Levin's position with some significance, we have to conclude that his disagreement with Elon turns on the question of whether the state's denial of recognition of a marriage ceremony held in accordance with the custom of any religious stream -- with all the legal and monetary significance attending such recognition -- should be considered a violation of the principle of freedom of religion, properly understood. In Elon's view, so long as the actual right to participate in the religious marriage ceremony has not been withheld, no violation of freedom of religion is involved. Levin, on the other hand, maintains that freedom of religion, under these circumstances, should be interpreted as including not only the right to be married in a religious ceremony of one's choice, but also the right to receive governmental recognition of this ceremony, with all its accruing benefits.[17]

A similar dispute to the one just described arose among the justices in *Pessaro (Goldstein) vs. Minister of the Interior*,[18] which was heard

[17] In fact, even this understanding of Levin's position fails to ameliorate its problematic nature for a different reason. As already noted, in practice, Levin did not oppose Elon's practical conclusion. Levin did not disagree with the notion that the Rabbinical Courts are entitled not to recognize the validity of marriages performed by conservative and reform marriage officers. For this reason he ruled that the Minister was entitled to refuse the granting of approval for reasons of public order. Since the petitioners stated that their view of the halakha was not the same as the halakha practiced in the Rabbinical Courts, licensing them as marriage officers would harm those making use of their services, in view of the likelihood that marriages performed by them would be disqualified by the Rabbinical Courts, which have exclusive jurisdiction over matters of marriage and divorce in Israel. Thus Levin does not disagree that, in light of the current legal situation, recognition of rabbis belonging to the liberal streams would not lead to legal recognition of the marriages that they would perform. This being the case, it is not clear what benefit, from the point of view of the principle of the freedom of religion of those seeking to marry, he believes would be gained by the licensing of marriage and divorce officers belonging to alternative streams.

[18] H.C. 1031/93, Pessaro (Goldstein) v. Minister of the Interior [1995] 49(4) P.D. 661. Pessaro, a Spiritualist from Brazil who arrived in Israel as a tourist, was converted to Judaism by the *Bet Din* (religious court) of the Council of Progressive Rabbis in Israel -- the Israeli counterpart of the American Jewish Reform stream -- and married a Jew by the name of Goldstein. Shortly thereafter she applied to the Ministry of the Interior for citizenship under the Law of Return. When her application was denied, she appealed to the Supreme Court. The Court declared the Ministry of Interior's criteria for recognizing conversions to Judaism in Israel (and consequently granting citizenship status by the Law of Return) as null and void. This finding should have resulted in the petition being upheld and an order to grant Mrs. Pessaro an *Oleh* visa. The Court stopped short of doing so. Realizing that the political

by an enlarged panel of seven justices. The legal question under scrutiny here involved the validity of a non-orthodox conversion to Judaism held in Israel for the purposes of registration in the population register. The concrete question posed to the Court concerned the authority of the registration clerk to request proof of the authenticity and validity of the conversion certificate produced by the petitioner in accordance with section 2(a) of the Population Registration Law, which stipulates that certain details pertaining to the subject be noted, including his religion.

Chief Justice of the Court at the time, Justice Shamgar, ruled with the majority that the Population Registration Law is a civil law whose aim is the gathering of factual information, including statistics. The Act does not instruct the registration clerk to appeal to the courts or to a religious-halakhic body for a ruling as to the validity of the conversion of the resident standing before him. The clerk must complete the required details according to the information supplied by the resident, in the same way that he deals with conversions performed overseas.

Justice Tal, in contrast, held the minority view that while the clerk cannot -- nor is he authorized to -- conduct an investigation concerning the source and nature of conversion certificates from overseas, when it comes to a ceremony performed in Israel, the clerk may, and is even obligated, to ascertain whether the certificate was issued with proper legal authority. A valid certificate, in Tal's view, for the purposes of registration as a Jew by someone who converts in Israel, can only be one issued by the Chief Rabbinate in accordance with the Religious Community (Change) Ordinance.[19]

This would appear to be a neutral legal dispute pertaining to the scope of the application of the Religious Community (Change)

---

implications of the case touch upon one of the most sensitive internal conflicts in Israeli politics, the Court did not order the ministry to register the petitioner as a Jew. The Court reasoned cautiously, stating, *inter alia*, that the Knesset should be allowed to set the standards for recognizing conversions in this area. It should be noted, however, that on December 28, 1998, the Chief Justice of the Jerusalem District Court took the decision a step further and ordered the Ministry of the Interior to register as Jews some 23 immigrants who converted either in Israel or abroad under non-Orthodox instruction. Gigi v. Minister of the Interior [1998] 5757(3) P.M. 454.

[19] Religious Community (Change) Ordinance, The Laws of Palestine, Vol. 2, 1294.

Ordinance and nothing more, but in fact it goes further than that. The controversy regarding the proper interpretation of the Religious Community Ordinance arises, *inter alia*, from another dispute on the question of the proper scope of the principle of religious freedom -- the same dispute that arose between Justices Levin and Elon in the Progressive Movement case.

In addressing the proper scope of the Religious Community (Change) Ordinance, Chief Justice Shamgar notes that the freedom of religion and conscience is one of the fundamental principles underlying our legal system. He rules that the freedom to convert is protected within the framework of freedom of religion and conscience. Therefore, he explains, a reasonable interpretation of the existing legal situation demands that the various authorities not interfere in this sphere of autonomy of the individual, such that a decision on the part of a resident or citizen to convert on one hand, and the decision to accept a person as a member of the religion which he has chosen to join on the other, will be free from state interference and regulation.[20] Shamgar does not disagree that freedom of religion may be violated in instances where state interests require this, but in his view such an interest may arise, as pertaining to matters of conversion, only in connection with authority in matters of personal status, but these have nothing to do with the appeal at hand.[21]

Tal disagrees with Shamgar. He maintains that making registration as a Jew in accordance with the Registration Act, and the awarding of immigrant status in accordance with the Law of Return, conditional upon a certain type of conversion, does not violate the religious freedom of the convert. He declares, "[m]aking the entry of a foreigner into Israel conditional upon religious conditions does not violate religious freedom, nor does it violate the principle of equality. If any violation is involved then it is a violation of "freedom of entry into Israel," and not a violation of freedom of religion. "Freedom of entry into Israel" does not exist, and in all matters of immigration laws -- in contrast with other laws -- an interpretation based on the principles of

[20] *Id.* at 685.
[21] *Id.* at 686.

freedom and equality is irrelevant."[22]

A study of Tal's words reveals a narrower version of the argument proposed by Elon in the Progressive Movement case. According to the approach of Elon and Tal -- both orthodox Jews -- the right to participate in religious ritual should be upheld for anyone seeking it, on the strength of the principle of freedom of religion, but the demand that legal recognition -- and rights arising from such recognition -- be awarded to the participants in such a ceremony, are not necessarily included within the framework of this right.

Let us take a closer look at the Shamgar-Levin approach. As stated, according to the understanding proposed above, the Shamgar-Levin approach perceives religious freedom as including not only the right to fulfill religious commandments, including participating in religious ritual, but also the right to receive active support from the state, in the form of recognition of the legal validity of religious rituals and the awarding of monetary rights accruing from such recognition. This interpretation of the principle of freedom of religion might seem, at first glance, to exceed the bounds of the accepted formulation of this principle. In general, freedom of religion is described as including freedom from state-imposed limitations, prohibitions, and sanctions on religious activities. Freedom of religion includes, according to the accepted approach, the right to hold certain views, to belong to a religious community, and to participate in religious rites of worship, to teach the fundamentals of the faith and its beliefs to others, and the right of religious communities to organize themselves and form institutions with authority over private matters pertaining to communal religious life. The claim that religious freedom includes not only "negative rights" but also the right to a share of the benefits awarded by the state, represents a qualitative expansion of the framework of that right beyond what is normally accepted. What normative basis could there be for this broadened position?

The following paragraphs propose two possible justifications for the position of the secular justices. The first returns their position squarely to the limited interpretation discussed thus far for the principle of freedom of religion, while the second justifies it within a

[22] *Id.* at 741.

broader and more ambitious framework.

One possible basis could lie in the intuitive association in the minds of both of these justices, and those who support their interpretation, of the principle of freedom of religion with the principle of equality. A good example of such an association can be found in a recent statement by Justice Zamir. In a suit filed by the Traditional Movement against the Minister of Religious Affairs,[23] Justice Zamir

---

[23] H.C. 1438/98 Traditional Movement v. Minister of Religious Affairs (unpublished opinion). The facts and holding of this case are as follows: Section 3a of the Foundations of the Budget Law of 1985 outlines the framework for the distribution of support from state funds for public institutions, defined by law as bodies which are not state institutions and the aim of whose operations is education, culture, religion, science, art, welfare, health, sport or some similar goal. This section stipulates that the Annual Budget Act determines the level of government expenditure on support; that government expenditure on support for public institutions is to be determined in each section of the budget as a total for each type of institution; and that the sum determined in the section of the budget for each type of institution is to be distributed among those institutions belonging to that type according to impartial criteria.

On the basis of section 3a of the Foundations of the Budget Law, the Ministry of Religious Affairs set out criteria for the distribution of support for public institutions "involved with carrying out religious cultural activities ... through Torah lectures, publications, groups, colleges, study workshops, study halls, etc." These criteria distinguished between three types of organizations entitled to receive support: national, regional and local organizations.

The Ministry of Religious Affairs submitted a proposal for the Annual Budget Act for 1997 including a proposal for the distribution of support by the ministry for public institutions promoting religious and ultra-orthodox culture. According to this proposal, such support would be given, as in previous years, to national, regional and local organizations. However, during the debate surrounding the proposed bill in the Knesset's financial committee, a certain member of the Knesset raised a qualification to the proposal. According to this qualification, any amount of support given for the furthering of religious or ultra-orthodox culture would be awarded only to national organizations, but not to regional or local ones. This qualification was substantiated on the basis of the administrative difficulty involved in overseeing smaller organizations and the consequent need to concentrate the beneficiaries of the support in a number of large organizations in order to facilitate effective supervision.

Ultimately, the Knesset passed the proposed bill subject to the qualification. The budget bill of 1997 accordingly stipulated that the entire sum of support for public institutions promoting religious and ultra-orthodox culture would be distributed exclusively among nationally-based organizations.

In accordance with the 1997 budget bill, the Ministry of Religious Affairs placed a notice in the press inviting funding applications by "national Torah organizations" for that budget year. The Traditional Movement submitted a request for funding. The request was reviewed by the Ministry of Religious Affairs in light of the criteria and was rejected since the Traditional Movement did not fulfill -- from the point of view of the required number of lectures and number of participants -- the conditions set down as criteria for recognition as a

stated as follows:

> Freedom of religion, like other rights, has two aspects. On one hand, freedom of religion awards freedom to every person or body to choose for himself the religious beliefs that he desires. On the other hand, freedom of religion imposes a prohibition on any administrative authority to harm any person or body, and this includes a prohibition of discrimination against any person or body, on the basis of the religious beliefs he has chosen for himself. Accordingly, first and foremost, the Ministry of Religious Affairs, which is charged by the state to assist members of different religions and with different philosophies to satisfy their religious needs, is obligated to treat them equally. This is so both in general and as concerns the giving of support.[24]

According to this approach, the position of the secular justices is not as far reaching in its scope as we first imagined. A careful analysis of Zamir's wording reveals that he is not claiming that religion is entitled to receive active state support. In fact, he does not even insist that religion has a right to an equal share of the benefits given by the state to institutions and bodies whose activities correspond one way or another with religious activities.[25] For example, he does not insist that

---

national organization. The Traditional Movement appealed to the Supreme Court.

The Court, with a panel of three justices, ruled that the Ministry had acted contrary to the law and that the institutions of the Traditional Movement should be included in the list of those receiving support. The Court based its ruling, *inter alia*, on the violation of the freedom of religion of the Traditional Movement that was, in its opinion, being perpetrated.

[24] *Id.*

[25] I believe that this position is inconsistent with the perception of equality in the sense that I understand it. It is difficult to evade Michael McConnell's stark presentation on that point. McConnell asserts:

> [w]ithout aid to private schools ... the only way that parents can escape state "standardization" is by forfeiting their entitlement to a free education for their children—that is, by paying twice: once for everyone else's schools (through property taxes) and once for their own. By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 132 (1992). It seems, therefore, that in most cases, for a welfare state not to encourage or discourage religious belief or disbelief, for a state to provide equal treatment for religion is to include religion among other, parallel, sponsored activities.

a state that decides to award benefits to museums, theaters, or sports organizations must also include synagogues in its list of beneficiaries, otherwise the freedom of religion of the believers is violated. His position with regard to the obligation of equality pertains exclusively to circumstances where the state elects to favor a certain religious stream. It is only in this situation, in Zamir's view, that there arises an obligation to act fairly, requiring the state to award equal benefits to the members of other religious groups as well.

This interpretation is accepted even in the United States, which is commonly perceived as representing an extreme example of church-state separation. It is true that the Establishment Clause "no aid" camp would endorse inequality between religious beliefs and institutions and secular beliefs and institutions -- thereby endorsing discrimination against religious institutions and in favor of secular ones.[26] But even they agree that discrimination 'among religious denominations' is unconstitutional. For instance, if school vouchers are allowed, they must be given equally to parents who send their children to Catholic schools and to parents who send their children to Jewish schools.[27]

The Shamgar-Levin approach can be justified based on another perception of freedom of religion -- narrower than the first view on one hand and broader on the other. According to this interpretation, a state may single out religion in general or any religious denomination as more valuable than other options. A state should not, however, take action, or enact policy or law, that has the intention or effect of coercing people to accept any specific religion or religion in general.[28] But what exactly is considered coercion? There are two possible

---

[26] Those holding this view claim that impartial support for religious activities not only is not required by the constitutional principle of freedom of religion, but that it even infringes upon the constitutional prohibition of establishment. They would ban the government from awarding financial support to religious institutions and religious activities, even in instances where the government makes use of neutral criteria and is not motivated by the desire to promote religion.

[27] Even Scalia in Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting), stresses that such equality among denominations is a minimum requirement of the Establishment Clause. *See also* Larson v. Valente, 456 U.S. 228 (1982).

[28] The non-coercion standard was introduced in academic circles in the U.S. already in the early 1960s. *See* Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 330 (1963).

interpretations of coercion, one narrow and the other broader. The concept of coercion, as explained by Locke, is traditionally based on the distinction between persuasion and force.[29] The narrow interpretation of non-coercion would recognize coercion only when a person is compelled by force or threat to do something that he would not otherwise do.[30] The broad interpretation of non-coercion does not distinguish between persuasion and force, or between direct and indirect coercion.[31] Both are considered coercion. According to this broad interpretation, any state intervention that results in favoring religion in general, or any specific religion, and that makes it harder for people to remain non-religious or to avoid practicing a religion other than theirs, should be prohibited.[32] I shall explain and illustrate this perception by means of a brief discussion of the exclusive status of orthodox marriage in Israel.[33]

Section 1 of the Rabbinical Court Jurisdiction (Marriage and Divorce) Law of 1953 states that "matters of marriages and divorce of Jews in Israel, being nationals or residents of the state, shall fall under the exclusive jurisdiction of the Rabbinical Courts."[34]

---

[29] *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 17, 18-19 (John Horton & Susan Mendus eds., 1991); *see also* McConnell, *supra* note 25, at 159 (1992).

[30] This was the position of Justice Scalia in Lee v. Weisman, *supra*, note 27, at 631 (Scalia, J., dissenting). Scalia interpreted coercion narrowly, willing to recognize coercion only if imposed "*by force of law and threat of penalty.*" *Id.* at 640 (emphasis in original).

[31] *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment and dissenting in part).

[32] For a complete presentation of this argument, see Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 614-22 (1999).

[33] The United States Supreme Court case of Lee v. Weisman, *supra* note 27, at 577, which examined the constitutionality of indirect coercion, may also illuminate the point. In this case, the American Supreme Court examined the validity of including clergy who offer prayers as part of an official public school graduation ceremony. The Court found that "the school district's supervision and control of a high school graduation ceremony places public pressure ... on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593.

The Court found the involvement of indirect coercion sufficient to invalidate the ceremony. As Justice Kennedy put it, "To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.* at 594.

[34] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 7 L.S.I. 139, 139-40

Thus, official ministers of the Jewish religion are authorized to perform marriages for members of the Jewish community. There is no provision for the contracting of civil marriages in Israel.[35] Hence Jews cannot enter into mixed marriages or into marriages prohibited by Jewish law, such as the marriage of a widow subject to the requirement of leviration, or the marriage of a Cohen (member of the priestly caste) with a divorcee. In addition, within the Jewish community, the only legally recognized stream is the Orthodox one. Conservative and Reform rabbis are not recognized as rabbis in Israel for the purposes of performing marriages. Hence, state law does not validate Conservative or Reform marriage ceremonies.

Several Israeli commentators have argued that by denying recognition to conservative and reform marriage ceremonies, Israeli law violates freedom of religion and that by denying the option of civil marriage, it violates freedom from religion.[36] As stated previously, this is also the generally held position among secular Supreme Court justices.

The claim that the current legal situation involves a violation of the freedom of religion and the freedom from religion can be based on the second interpretation for these principles proposed above. Such a broadened interpretation would suggest that not only prevention of participating but also the presentation of difficulty in participating or of the refraining from participating, in religious ritual should be

---

(1953). On the origins of the law and its applications see S. ZALMAN ABRAMOV, PERPETUAL DILEMMA 179-98 (1976).

[35] Similar exclusivity has been granted, since the times of the Ottoman Empire, to Muslim and Christian Courts over the Muslim and Christian communities in Palestine (Israel). Also, in 1962, the Druze Religious Courts were granted a status similar to that held by the Rabbinical Courts in matters of marriage and divorce. The jurisdiction of the Moslem and Christian religious courts, in matters of personal status, as defined in Art. 51 of the Palestine Order-in-Council, 3 Laws of Palestine 2581, is set by Arts. 52 (Moslem) and 54 (Christian) of the Order. The Druze Religious Courts are established under the Druze Religious Courts Law., 17 L.S.I. 27, 27-32 (1962). For more details about the jurisdiction of the various religious courts in Israel, see Andrew Treitel, *Conflicting Traditions: Muslim* Shari'a *Courts and Marriage Age Regulation in Israel*, 26 COLUM. HUM. RTS. L. REV. 403, 411-21 (1995); SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 106 (1994).

[36] *See, e.g.*, Shimon Shetreet, *Freedom of Religion and Freedom from Religion: A Dialogue -- Some Reflections on Freedom of Conscience and Religion in Israel*, 4 ISR. Y.B. ON HUM. RTS. 194, 211 (1974); Asher Maoz, *Constitutional Law, in* THE LAW OF ISRAEL: GENERAL SURVEYS 5, 37 (Itzhak Zamir & Sylviane Colombo eds., 1995).

considered a violation of freedom of religion or freedom from religion.

The rationale underlying this interpretation would be that by making fundamental entitlements conditional upon participating in certain religious ceremonies, the state indirectly coerces non-adherents or those who belong to other religious streams to participate in religious ceremonies.[37]

The main topic of this paper is not a clarification of the proper interpretation of the principle of freedom of religion, but rather a discussion of the claim that the worldviews of the justice and his background have a clear influence on his rulings. Let us return, then, to a discussion of this claim. At first glance, the rulings that we have reviewed thus far would appear, at least to someone unfamiliar with the reality of Israeli life, to oppose this claim, or at least not to provide any basis for it. It is specifically the secular justices of the Court who

---

[37] Even if we adopt the broad interpretation, the validity of this argument is still contingent upon the validity of the reality it assumes, and the reality, one might argue, is somewhat different from what has been described so far.

While the exclusivity of religious marriage is symbolically preserved in Israel, in fact, Israeli courts have developed various means of circumventing it. Although an Orthodox ceremony is obligatory within the borders of Israel, couples -- including Israeli citizens and residents -- may marry in civil marriage performed abroad. At times, the recognition of the courts has amounted to validation of marriage validly contracted abroad even when the couple -- or one of them -- did not have the legal capacity to marry under religious law. In addition, many individuals disqualified from religious marriage ceremonies have circumvented the problem by means of private marriage ceremonies performed elsewhere than in the offices of the Rabbinate, and these ceremonies, too, have been recognized by the secular courts.

Israeli law also recognizes marriage-like relationships. Various enactments occasionally confer the benefits accruing from marital status upon couples who live together as husband and wife without being formally wed, even in cases that constitute a direct contravention of religious law, such as a married woman living with a man who is not her husband. For example, section 55 of the Succession Law of 1965 provides that a *de facto* spouse -- which means someone who "lives a family life in a common household" -- will inherit a share equal to that of a legal spouse.

One could argue, therefore, that while "[o]utwardly, the law of the state continues to accord legal force to the religious law, ... at the same time, it has created outlets for easing the pressure resulting from religious prohibitions." Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 542 (1990). In a reality where every Israeli may circumvent religious law and acquire marital status in simple ways, such as by flying to nearby Cyprus for a civil marriage, the foregoing arguments against the Israeli law of marriage and divorce lose some of their weight, even if we adopt the broad version of freedom of and from religion.

adopt a broader interpretation of the principle of freedom of religion, while the justices occupying the religious seat propose a narrower view. Does this fact not stand in opposition to what we would expect if the claim were correct? The answer is obviously no. The positions of the religious and the secular justices are in fact completely compatible with their opposing worldviews.

The justices occupying the religious seat are not only religious people, but religious people belonging to the orthodox stream. This stream has achieved and continues to achieve, in most instances, protection for its interests within the framework of regular political processes. Marriages in orthodox style between Jews are officially recognized by the State of Israel, monetary governmental support for orthodox religious institutions and educational systems is anchored in law and is given routinely,[38] and there is never any question that a person who has undergone orthodox conversion is considered Jewish for all intents and purposes. In fact, in these three areas the orthodox stream enjoys not only governmental recognition and support, but also a large measure of exclusivity. The appeal to religious freedom introduced in the three rulings previously reviewed was not raised by representatives of the orthodox stream, but rather by representatives of alternative streams of Judaism as part of their attempt to use the court to break the orthodox hegemony. In the Israeli reality, in which the orthodox interests receive appropriate representation within the regular political framework, a broadened interpretation of the principle of freedom of religion would serve not the orthodox stream but rather the liberal stream that competes with it. The narrower interpretation of the

[38] The State of Israel has established religious councils, which are administrative bodies in each locality that provide religious services and distribute public funding for their maintenance (Jewish Religious Services Law, 25 L.S.I. 125, 125-27 (1971)). Another area in which the government provides monetary support for orthodox religious institutions is the educational system. State education law divides the state educational system between state schools and state religious schools. The law allows a parent to choose between state (secular) education and state religious education when he registers his child in the state education system. State funding of religious education in Israel is not confined to state schools, but also includes private schools, both elementary and secondary. These "recognized private schools" receive state financial support that is substantially equivalent to that received by official state schools (*see* State Education Law, 7 L.S.I. 113, 113-119 (1953)). For further discussion, see Stephen Goldstein, *The Teaching of Religion in Government Funded Schools in Israel*, 26 ISR. L. REV. 36 (1992).

orthodox justices is therefore completely compatible with the position of the orthodox establishment.

The secular justices, on the other hand, are in no way bound to orthodox interests. On the contrary, one of the proclaimed functions of the Constitutional Court is protection of minority groups. This function is also usually mentioned as one of the justifications[39] for the adoption of constitutional strategy and as compensation for the apparently unavoidable price of this strategy -- the collision with the principle of majority rule.[40] In the Israeli reality, a broadened interpretation of freedom of religion assists secular justices in fulfilling their function as protectors of the minority -- in our case, the Reform and Conservative streams -- or at least to be perceived as protecting these interests. Therefore, it is no wonder that they choose to adopt this interpretation.

---

[39] Several other justifications are commonly raised. One such argument is that a constitution enables the community to set the rules by which political discussion will occur, thereby freeing the participants to conduct their discussion more easily. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS, LAW OR POLITICS? 19 (1994) (A constitution can help a political community "establish ... its basic institutions, institutional arrangements, and practices, so that an ordinary politics might then begin ... to operate.") A second argument is that numerous constitutionally entrenched provisions are instrumental in protecting the democratic process. It is common, for example, to consider provisions such as freedom of speech and the right to vote as guardians of democracy. *See, e.g.*, STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 171 (1995). Third, it is argued, a constitution can protect the majority against those in power who might attempt to maintain and perpetuate their power. A fourth powerful argument in favor of adopting a constitutional strategy is the potential of a constitution to function as a gag rule. *See* Stephen Holmes, *Gag Rules or the Politics of Omission, in* CONSTITUTIONALISM AND DEMOCRACY 19 (Jon Elster & Rune Slagstad eds., 1988).

[40] For the classical formulation of the "counter-majoritarian difficulty," see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS, 16-17 (1962). *See generally* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992). For a recent argument against constitutionalism, based on the conflict between constitutionalism and democratic decision-making, see Jeremy Waldron, *Precommitment and Disagreement, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271 (Lawrence A. Alexander ed., 1998).

IV. THE BATTLE OVER THE CONSTITUTIONAL STATUS OF FREEDOM OF RELIGION

The narrower interpretative approach adopted by the religious justices in the question of the scope of the principle of freedom of religion in fact represents a direct continuation -- some would even say a kind of rearguard battle -- of the approach of the orthodox establishment with regard to the question of the very constitutional status of this principle. It was the orthodox establishment that opposed the inclusion of the principle of freedom of religion and equality within the framework of the two Basic Laws of human rights[41] adopted in 1992.[42]

The source of Orthodox reluctance to support a constitutional entrenchment of freedom of religion and equality was, and still is, quite obviously based on practical concerns. Their concern is not so much that the initial constitutional product would not adequately reflect Jewish values and needs. The real concern is that even if the constitution is initially shaped in a balanced manner, it is likely that the Supreme Court will interpret the constitutional directives freely, implement its own values, and use its power to review key provisions of the status quo.[43] Should such a scenario materialize, [44] the

---

[41] Hok Yesod: Hofesh HaIsuk (Basic Law: Freedom of Occupation), 1992, Sefer HaHukim [S.H.] 114; Hok Yesod: Kevod HaAdam VeHeiruto (Basic Law: Human Dignity and Liberty), 1992, S.H. 150, *translated in* Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 21, 21-23 (1997).

[42] For a detailed description of the process that preceded the adoption of the Basic Laws by the deputy attorney general at the time, an active participant in the entire process, see Judith Karp, *Basic Law: Human Dignity and Liberty-A Biography of Power Struggles*, 1 LAW & GOV'T IN ISR. 323 (1992-93) [in Hebrew].

[43] The status quo is the basic formula for conflict resolution in matters of religion and state that has prevailed in Israel since its establishment and throughout the past fifty years. For a general description of the status quo and its political history, see CHARLES S. LIEBMAN AND ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, 31 (1984); Eliezer Don-Yehiya, *The Resolution of Religious Conflicts in Israel, in* COMPARATIVE JEWISH POLITICS VOL. II: CONFLICT AND CONSENSUS IN JEWISH POLITICAL LIFE 203 (Stuart A.Cohen & Eliezer Don-Yehiya eds., 1986); Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment* 22 (forthcoming 22/4 HASTINGS INT'L & COMP. L. REV. 617 (1999)).

entrenched status of the constitution will make it difficult -- if not impossible -- to reverse Supreme Court rulings via the political branches.

It is quite probable that despite the intentional omission of the freedom of religion and equality from Basic Law: Human Dignity and Liberty, the Supreme Court will still read them into the present Basic Laws.[45] In an extrajudicial article, Supreme Court Chief Justice Aharon Barak claims that the concept of "human dignity," mentioned in Basic Law: Human Dignity and Liberty, should be interpreted broadly to include "all those human rights that have a close substantive connection to human dignity and liberty according to prevailing concepts among the enlightened public in Israel."[46] In a more deliberate extrajudicial article, Chief Justice Barak lists equality and freedom of religion among the missing rights that should be read into the Basic Law.[47]

In his judicial capacity, Chief Justice Barak was initially more cautious. Until very recently he expressed this position merely with regard to equality[48] -- arguing that the concept of human dignity, which is already articulated in Basic Law: Human Dignity and Liberty, should be understood as including the right to equality -- but

---

[44] In a pamphlet distributed at a rally in Jerusalem against the Supreme Court on February 14, 1999, Manof, the Center for *Haredi* (ultra-orthodox) Information, listed the rulings of the Court in the past year which it characterized as anti-*haredi.* They include the following: A ruling against withdrawing a *kashrut* certificate from a hall which has a Christmas tree; against the deferment of *yeshiva* students from military service; for secular burial; in favor of including Reform and Conservative representatives on religious councils; to force Religious Affairs Minister to sign appointments of Reform and Conservative members to the religious councils; to return a girl to a secular school after her father withdrew her; a neutral stand on whether one must wear a *kippa* (*Yarmulke*) in a Rabbinical Court; for registering a Reform conversion. The center also listed a series of court decisions negating the rulings of Rabbinical Courts in matters of marriage and divorce, division of property, and custody. Haim Shapiro, *A List of Haredi Grievances*, JERUSALEM POST, February 12, 1999 at 2.

[45] A 1997 article examined the likelihood of the adoption of the broad interpretation based on views expressed by Supreme Court Justices in their opinions, and concluded that the forces seem even. *See* Hillel Sommer, *The Non-Enumerated Rights: on the Scope of the Constitutional Revolution,* 28 MISHPATIM 257, 337-39 (1997) [in Hebrew].

[46] AHARON BARAK, III INTERPRETATION IN LAW, CONSTITUTIONAL INTERPRETATION 416 (1994). [in Hebrew].

[47] Aharon Barak, *The Constitutional Revolution: Protected Human Rights,* 1 LAW & GOV'T IN ISR. 253, 256-61 (1992- 93) [in Hebrew].

[48] *See, e.g.,* El-Al Airlines v. Danilowitz 48(5) P.D. 749, 760.

avoided suggesting the inclusion of freedom of religion, although the case at hand would have permitted such an argument.[49] Yet, in recent dicta, included in *Shavit vs. Hevra Kadisha Rishon LeTzion,* Chief Justice Barak has finally asserted that, in his opinion, freedom of religion is one facet of the human right to dignity.[50]

Chief Justice Barak's position, according to which we may, and should, include within the framework of Basic Law: Human Dignity and Liberty, even those human rights which are not explicitly mentioned therein, including the right to equality and to freedom of religion, received support from a number of justices of the Supreme Court.[51] The scope of this paper does not permit their enumeration,[52] but the important fact for our discussion is that to the best of my knowledge, this list did not include a single observant justice among all of those who have served in the Supreme Court from the legislation of the Basic Laws dealing with human rights until today. This fact arises, as mentioned, to the best of my understanding, from the fact that the anchoring of freedom of religion within the framework of the constitution-in-formation would, in the Israeli reality in most cases, serve not the interests of the central stream among the orthodox community but rather its opponents.

---

[49] *See, e.g.,* Mening v. Minister of the Interior [1993], 47(3) P.D. 282, 286; Jabarin v. Minister of Education [1994] 48(5) 199, 203.

[50] H.C. 6024/97 Shavit v. Hevra Kadisha Rishon leZion (unreported decision).

[51] Justice Barak's position received support also in the Israeli Academia. A few scholars supported his view and predicted that he will eventually succeed in forwarding his broad interpretation of the Basic Law. *See* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?* 26 ISR. L. REV. 238, 246 (1992); David Kretzmer, *The New basic Laws on Human Rights: a Mini-Revolution in Israeli Constitutional Law?* 14/2 NETHERLANDS Q. OF HUMAN RIGHTS, 173, 177-78 (1996); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* 26 COLUM. HUM. RTS. L. REV. 309, 334-35 (1995).

[52] This pattern is especially noticeable with respect to the right to equality. *See, e.g.,* Justice Theodore Or in Hopert v. Yad vaShem [1994] 48(3) P.D. 353, 362, and H.C. 5091 91, Nusseiba v. Finance Minister (unreported decision); Justice Matsa in Women Network v. Minister of Transport [1994] 48(5) P.D. 501, 522 & 526, and Miller v. Minister of Defense [1995] 49(4) P.D. 94, 110. But *cf.* Justice Itzhak Zamir in Women Network, at 535 and Justice Dahlia Dorner in Miller, at 131-32.

V. THE BATTLE BETWEEN ORTHODOX INTERESTS AND SECULAR INTERESTS

So far, I have illustrated the paradoxical contrast in the positions of the justices of the Supreme Court with regard to the question of the status and scope of the principle of freedom of religion: the orthodox justices keep to a narrower interpretation while the secular justices wish to fortify and broaden it. But such a description is not entirely accurate; it applies only to those instances in which the interests under discussion involve orthodoxy on one hand and the liberal streams on the other, with the orthodox interests receiving protection within the framework of the regular political system so that it is the alternative streams that claim that their freedom of religion is being violated. However, there is another category of instances where there is an attempt to claim a violation of freedom of religion. Here the interest that collides with orthodoxy is the secular view, and the appeal to freedom of religion is raised by representatives of the orthodox community in an attempt to garner support for a position whose legal legitimacy is under question. In this type of instance I believe we may discern a reversal in the positions of the justices in relation to their positions in the paradigmatic situations described thus far, with the secular justice refusing to recognize the orthodox interest as falling within the boundaries of the principle of freedom of religion, while the orthodox justice tends towards a broader interpretation of the principle.

The dispute surrounding the closure of Bar Ilan Street to traffic on the Sabbath may serve as a good point of departure for our discussion. This debate, addressed in the Horev ruling,[53] deals with the demand by the ultra-orthodox camp that vehicular traffic be limited, or even prohibited altogether, on the Sabbath and on Jewish festivals, on a road that transverses an ultra-orthodox neighborhood. The justices of the panel, headed by Chief Justice Barak, refused to identify the ultra-orthodox interest, supposedly worthy of protection in this instance, as falling within the bounds of the principle of freedom of religion, based

[53] Horev v. Minister of Transport, 51(4) P.D. 1.

on the reasoning that closing the road would not serve the freedom of religion of the religious residents, since, in the Court's understanding, the residents of the neighborhood were free to fulfill their religious duties even if cars were passing by on the streets on the Sabbath.[54] Instead, as in previous rulings, the Court identified the basis for the ultra-orthodox claim in terms of the right to protection of their religious feelings and their ultra-orthodox lifestyle.[55]

The presentation of the ultra-orthodox interest as a violation of religious feeling rather than as a violation of freedom of religion is not merely a semantic difference; it has practical significance. Firstly, while all agree that a claim based on the principle of freedom of religion carries considerable force, a claim that feelings have been violated is, as Danny Statman explained, rather weak, and provides "usually, at most, a basis for consideration, but no such obligation."[56] Moreover, the claim of violation of feelings is also "bound up with a kind of self-degradation."[57] Someone who bases his case on this type of claim "comes across as a cry-baby who, instead of complaining about the unjustness of his treatment ... complains that it hurts. Someone who establishes his moral claim on the fact that he is hurt is much weaker than someone who establishes his claim on the basis of justice or his rights."[58]

This position adopted by the Court, significantly weakening the moral basis for the ultra-orthodox claim, would seem to stand in some degree of opposition to the interpretation which the secular justices give to the principle of freedom of religion when the case involves a conflict of interests between different streams of Judaism. In contrast with the broad interpretation of freedom of religion adopted by the Court in such instances, the Court here proposes a very narrow interpretation of the degree of violation required in order to establish a claim based on freedom of religion. It would seem that if the Court

---

[54] *Id.* at 58.

[55] *Id.*

[56] Danny Statman, *Violation of Religious Sentiments, in* MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE 133, 160 (Menachem Mautner, Avi Sagi & Ronen Shamir eds., 1998) [in Hebrew].

[57] *Id.*

[58] *Id.*

wished to adopt a broader interpretation of freedom of religion in the Bar Ilan case, it could have suggested that not only absolute prevention of the possibility of observing religious duties would be considered a violation of religious freedom, but it would even make the observance of these duties more difficult. According to this broader view, the disturbance caused by traffic to prayer services and Torah lectures held in synagogues could also be seen as sufficient violation of the freedom of religion. Such a broader interpretation would be more compatible, I believe, with the position adopted by the secular justices on the question of the status of converts and marriage ceremonies conducted by members of the liberal streams of Judaism, or on the question of monetary government support that they are entitled to receive.

This trend of preferring the narrower interpretation of the principle of freedom of religion on the part of the secular justices of the Supreme Court in instances where the claim to this right is raised by the orthodox camp, as part of its attempt to protect its interests in the battle against secular interests, is also clearly discernible in the Shavit case which I mentioned briefly before.[59] The dispute in this case concerned the demand by the family of the deceased that they be permitted to engrave on her tombstone the year of her birth and death in digits according to the Christian calendar. This demand was rejected by the local Hevra Kadisha (burial society) with the explanation that the requested engraving on the tombstone was prohibited by a halakhic ruling of the rabbi of the community. As in the case of Bar Ilan Street, Chief Justice Barak again refused to recognize the interests of the Hevra Kadisha as falling within the framework of the principle of freedom of religion, and he adopted a narrower view. I quote:

> I, for myself, am doubtful as to whether the violation concerns freedom of religion. No one is forcing the members of the Hevra Kadisha to engrave writing that is not Hebrew upon the gravestone, and so they will not act contrary to the directives of the community rabbi in this regard. The engraving is to be performed by professionals and not by members of the Hevra Kadisha. It would

[59] H.C. 6024/97 Shavit (unpublished opinion). *See also supra* text accompanying notes 49-50.

> seem that no one would suggest that non-Hebrew writing should be engraved upon the gravestone of a deceased who was observant against his agreement or the agreement of his family. The non-Hebrew writing is done only upon the gravestone of the deceased, where he (during his lifetime) or his family (after his death) request it. Thus, it would seem to me that freedom of religion is not being violated.[60]

The religious justice on the panel, Englard, presented a different view. To his mind "the big question" facing the Court in this matter was "the relationship between the principle of freedom of religion of the Hevra Kadisha and of those family members of the deceased who are observant -- on one hand and the principle of the freedom of the family of the deceased to act in accordance with their worldview -- on the other,"[61] quite simply.

VI. BALANCING THE POWERS OF THE JUDICIAL BRANCH *VIS-A-VIS* THE OTHER BRANCHES

The Shavit case, with the contrast of positions which it demonstrates, thus serves as further substantiation of the claim that I made at the start: the interpretation given by different justices to the principle of freedom of religion tends to be derived from their worldview as regards religion. As a result, the Court's interpretation of the principle of freedom of religion is noticeably fluid. As we may deduce from the accumulated analysis of the rulings I have mentioned, this fluidity in the interpretation of the principle finds expression not only in the rulings of the Court, but also within the positions of smaller groups on the bench. According to what we have said, while in instances where the appeal to freedom of religion is raised by those attacking the orthodox position, the secular justice tends to adopt a broad interpretation of the principle of freedom of religion; in

[60] *Id.*
[61] *Id.*

instances where this claim is made by the orthodox camp, the secular justice tends to favor a narrower interpretation. The religious justice does the opposite: in contrast to his narrower interpretation of the principle when a claim is made against orthodox interests, he adopts a broader interpretation when this serves his orthodox worldview. For example, every justice adopts ad hoc the interpretation of the principle of freedom of religion that accords, under the circumstances at hand, with his background.

If the proposed description is indeed true, then the interesting question that we shall need to address is what to do about it. To my mind, the crux of our efforts must be focused not only on the question of how and whether it is proper to prevent the justices from giving expression to their worldviews in their precedent rulings, but also -- and more importantly -- on which changes and adaptations can and should be executed, in balancing the powers of the judicial branch in relation to the other two branches, in view of the recognition that the judicial branch functions, at least to some extent, as a political arm. A comprehensive discussion of the practical measures that may be taken, in view of this situation, falls beyond the scope of this article, but in the following section I shall make several initial suggestions regarding changes and adaptations that can and should be executed to serve this goal, through balancing the powers of the judicial branch in relation to the other two branches.

To begin with, I believe that although no completely successful method for making the judiciary fully responsive to the wishes of the people exists, there are several ways to minimize the influence of the justice's own worldview, thereby helping the public to attain a certain degree of influence on the outcome of the judicial rulemaking process. I will describe five methods that might serve this goal, all of which involve a degree of control over the judiciary: the first three methods limit the monopoly of the judiciary by extending the supervisory power of the political branches, while the last two limit it by restricting its creative interpretative power.

Throughout the world, different democracies have developed a range of methods for judicial election, but all have in common the basic principle that a candidate for a judicial post must, prior to his or her appointment, stand a democratic test. In certain states, it is the

legislature that elects the justices of the Supreme Court. In Germany, for instance, half of the justices of the Federal Constitutional Court are elected by the upper house of the parliament (Bundesraht) while the other half is appointed by a committee of the lower house (Bundestag).[62] In other countries, it is the executive branch, which is democratically elected, that fulfills the central function of judicial election. In Australia, for example, all justices of the Supreme Court are elected by the government.[63] Several other countries have adopted

---

[62] F.R.G. CONST. (German Constitution) art. 94(1). In the opinion of Professor Clark, the German legislator fulfills a central function in the selection of judges since "it bestows democratic legitimacy on the selection process and on the judges themselves." David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaact*, 61 S. CAL. L. REV. 1795, 1826-28 (1988).

The Federal Constitutional Court is comprised of 16 justices who sit in two houses (senates), 8 in each. *See* Constitutional Court Act, §§ 2 & 5 (1971). Three judges in each senate are elected by the houses of parliament from the supreme federal courts in order to ensure that the Federal Constitutional Courts will include members with judicial experience. The rest of the judges -- five in each senate -- can have a judicial background in the federal courts or in careers that are entirely different. The Bundestag elects its judges (4 in each senate) in indirect elections by means of a Judicial Selections Committee [hereinafter: JSC]. *Id.* § 6(1). The members of this committee are representatives of the parties, with each party represented in accordance with its proportionate strength in the Bundestag. The appointment of each judge requires a two-thirds majority of the members of the committee. *Id.* § 6(2). Thus the relative power of the representatives of the opposition parties sitting on the JSC for the Constitutional Court is maintained, and compromise becomes a necessity in the face of reality. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 21-22 (1989).

The Bundesraht elects its judges in direct elections. *Id.* § 7 Here, too, a two-thirds majority is required for the appointment of a candidate. An advisory committee made up of the Ministers of Justice of the various states prepares a shortlist of potential appointments. The members of the Bundesraht vote in a general election, but their vote is generally made on the recommendation of the advisory commitee. *See* DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY : A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 118 (1976).

[63] AUSTL. CONST. (Australian Constitution) Chapter III. (The Judicature) § 72 (Judges' appointment, tenure and remuneration), which addresses the ways of appointing and dismissing judges, stipulates that appointments to the federal courts -- including the Supreme Court -- are to be made by the government in power. The details of this process are articulated in the High Court of Australia Act, 1979.

By law, the Attorney General of the Commonwealth prepares a list of candidates, following consultation with the Attorneys-General of the States, and presents it for the decision of the cabinet. In reality, the cabinet almost always adopts the recommendations of the Attorney General of the Commonwealth. There are those who claim that the real order is the opposite -- that first the cabinet discusses the potential candidates and only after a consensus is achieved with regard to a certain candidate does the Attorney General of the Commonwealth present

a combined model whereby both the legislative and executive branches are involved. According to the American approach, for example, all candidates for the federal judiciary -- including the Supreme Court -- are appointed by the President, subject to approval by the Senate. [64] A candidate chosen by the President appears before the Senate in an open public hearing, providing the senators with an opportunity to question him concerning his legal philosophy and the ideological direction that guides him. Following the hearing, there is an open debate among the senators, and finally there is a vote to approve or reject his appointment. According to the data supplied by the American constitutional historian Herman Schwartz, in the course of the two hundred years that have passed since the adoption of this election process, one in five candidates for the Supreme Court has been rejected by the Senate, in many cases on ideological or political grounds. Out of twenty-nine rejections or withdrawals of candidature owing to opposition, almost a third were a result of the candidate's views on public issues.[65]

Israel is an outstanding exception in this regard. Judicial election in Israel does not match the democratic model. [66] As stated above, justices of all Israeli courts are appointed by a Judicial Selections Committee consisting of nine members. Five of them -- two

---

the Prime Minister with an official recommendation regarding that candidate. *See* Daryl Williams, *Judicial Independence and the High Court*, 27 U. W. AUSTL. L. REV. 140, 144-45 (1998).

[64] For a detailed description of the American selection process, see T.G. WALKER & L. EPSTEIN, THE SUPREME COURT OF THE UNITED STATES -- AN INTRODUCTION 34 (1993)

[65] HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 45 (1988). *See also* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 33, 65 (3d ed. 1992).

[66] With the establishment of the State in 1948, Israel in fact acted in accordance with an electoral system that matched the democratic system. Under the Court's Ordinance in effect following the establishment of the State of Israel in 1948, justices were nominated by the Minister of Justice, approved by the government and confirmed by the Knesset. Courts (Transitional Provisions) Ordinance, 1948, 1 L.S.I. 23 (1948). Attorney-General Elyakim Rubinstein has characterized the early system as "an appropriate arrangement which permitted the executive branch to appoint judges to the Supreme Court--but placed confirmation power in the hands of the legislative branch, similar to the American practice." ELYAKIM RUBINSTEIN, JUDGES OF THE LAND: THE ORIGIN AND CHARACTER OF THE ISRAEL SUPREME COURT 59 (1980) [in Hebrew]. Only in 1953 was the Magistrates Law passed, and the Knesset's authority to confirm judicial nominees was done away with. From then on, justices would be selected by a committee similar in composition to the one in place today.

representatives of the Bar, the Chief Justice of the Supreme Court and two other justices of the Supreme Court -- are not elected by the Israeli public and are not answerable to them. Moreover, the justices of the Supreme Court are naturally inclined to vote as a block, protecting the interests of the Supreme Court and its prevailing philosophies. Their vote also almost always determines the final outcome.[67] We may therefore say that in the State of Israel, the justices are elected, to a large extent, by themselves. This state of affairs is not ideal to begin with, but there can be no doubt that the transition of Israel from a parliamentary democracy to a constitutional democracy, with a dramatic strengthening of the status of the Supreme Court, makes a change in the system of judicial election and its adaptation to the democratic model absolutely vital.[68]

Such a change, as a first step, is insufficient. The adoption of a democratic election process is a tool of limited effectiveness. Even if the views of a justice are thoroughly ascertained prior to his election, he is thereafter at liberty to refine them or even to change them altogether. Here, too, the United States serves as a good example. Despite efforts by Bush and Reagan to appoint justices who would bring about a reform in the *Roe v. Wade* ruling,[69] which affirmed the

---

[67] Moshe Ben-Ze'ev, who served as Attorney-General from 1963-1968, has observed that "it is hard to imagine the appointment of a judge, and certainly not of a Supreme Court Justice, that contradicts the united opinion of the three Supreme Court Justices on the committee. I hope that this is an unwritten rule. If not, I think it should be enshrined in law." Moshe Ben-Ze'ev, *Politics in the Appointment of Judges*, ORECH HADIN, May 27, 1981, at 13 [in Hebrew]. *See also*, MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 34 (1994) ("By established practice, appointments to the Supreme Court require an affirmative vote of all three justices on the panel.").

[68] For a recent suggestion that Israel will amend its mechanism for selecting and nominating Supreme Court Justices, making the process more politicized and more closely resembling the American system, see Mordechai Haller, *The Court That Packed Itself*, 8 AZURE 64 (1999). Recently, Chief Justice Aharon Barak has waged a preemptive campaign to convince the public that nothing could be so disastrous as the introduction of democratic controls on the selection of justices. Speaking before members of the Knesset Constitution, Law, and Justice Committee in October 1996, Barak voiced his opinion thus: "May God save you from any attempt to bring about a politicization of the structure and composition of the highest judicial body. God in heaven, you can't have constitutional justice that way. It would be a tragedy for the country if appointments to the constitutional court were political." HA'ARETZ, October 23, 1996 [in Hebrew].

[69] Roe v. Wade, 410 U.S. 113 (1973).

'pro-choice' stance, they were unsuccessful. The seemingly conservative justices who had been appointed following questioning and cross-examination did not "supply the goods" as expected.[70] If we wish to maintain a balance between the judicial branch and the two democratic branches, a balancing mechanism is needed that will operate even after the process of judicial election is concluded.

A second way to limit the monopoly of the judiciary in interpreting the constitution is to limit the terms of judges empowered to interpret the constitution, as happens in Germany.[71] Such limits, which allow a relatively frequent replacement of retiring Supreme Court justices with new ones who must clear a series of democratic hurdles, "empower the present to exert more political influence over the Court than does life tenure for Supreme Court justices."[72]

A third way to restrain the judiciary, is to limit the privilege of the court by subjecting its interpretations to political control. The Canadian Charter, for example, adopted such a model in its notwithstanding clause.[73] Israel has amended Basic Law: Freedom of

---

[70] It is clear, though, that the Supreme Court nominations in the 1980s and early 1990s shifted the balance of the Court in favor of the conservative side.

[71] The judges of the German Constitutional Court are appointed for a term of twelve years and are ineligible for reappointment (Constitutional Court Act Section 4(1) (1971)). For such a proposal with respect to the US, see Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?* NEW REPUBLIC, Aug. 19, 1991, at 17.

[72] PERRY, *supra* note 39, at 197.

[73] Section 33 of the Canadian Charter of Rights and Freedoms states:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under Subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or a legislature of a province may re-enact a declaration made under Subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under Subsection (4).

CAN. CONST. (Constitution Act, 1982), Part I (Canadian Charter of Rights and Freedoms), §33. For an analysis of §33, see CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 188-211 (1993); Caroline S. Earle, *The American Judicial Review Quagmire: A Canadian Proposal*, 68 IND. L.J. 1357 (1993).

Occupation to include a parallel clause,[74] and several American constitutional scholars support the adoption of such a mechanism in the US.[75] Providing the legislature an overriding power will prevent the Supreme Court from acting as the universal arbiter of constitutional issues, while avoiding the costs we would have to pay if we left these subjects entirely to ordinary politics.

A fourth way is to adopt an interpretative method, such as 'originalism,' which will provide the court with a conclusive and objective response to constitutional questions and thus obviate the need for subjective interpretation.[76] Indeed, this claim to objectivity is limited and incomplete. Even the adherents of originalism admit that "there is often more than one plausible conclusion to the inquiry into the original meaning of a constitutional provision."[77] Therefore, some constitutional interpretative debates cannot be resolved in a totally objective manner. But even if proper theories of interpretation cannot avoid the problem of subjectivity, they can nonetheless minimize it.[78]

---

[74] Section 8 of Basic Law: Freedom of Occupation now states that "a statutory provision which infringes freedom of occupation will be valid ... if it is included in a statute enacted by a majority of the Knesset members and expressly declares that it is valid despite the Basic Law." Basic Law: Freedom of Occupation, 1994, S.H. 90, §8.

[75] *See* PERRY, *supra* note 39, at 197-201; Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 J. L. REFORM 51, 84 (1984). Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 124 (1991) ("Any measure that could be navigated through all the branches of the national legislative process ... might well be considered a more sensible approach to the problem than would a verdict from a bare majority of five on the Supreme Court.").

[76] There are some variations among originalist theories. However, they have in common a belief that the materials relevant to determining the Constitution's meaning are limited to the text, structure, and historical context of the document. As such, originalism has been characterized as a relatively passive method of interpretation, which conceives the Constitution as embodying meaning that the interpreter seeks to find. Defenses of originalism have been closely related to the concern for constrained judicial role. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (Originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."). Among leading originalists are Robert Bork and Raoul Berger. *See, e.g.*, BORK, *supra* note 1; Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993).

[77] PERRY, *supra* note 39, at 56. Perry dedicates Chapters 4 and 5 of this book to support the proposition that "Originalism Does Not Entail Minimalism."

[78] Thus, even supporters of nonoriginalism, such as Michael Perry (in his early works),

Finally, a fifth way to limit the power of the judiciary is to articulate constitutional documents in clear and detailed language that minimizes the need for interpretative work.[79] The U.S. Constitution's Bill of Rights, for example, is short and concise.[80] It is no wonder, then, that one of the fiercest debates in American modern Constitutionalism is over the role of the judiciary in interpreting and enforcing the constitution, and that the call for judicial restraint is so commonly expressed in the US.[81] Modern constitutions, such as that of the Federal Republic of Germany or Canada, are clearer and more detailed. These constitutions require much less interpretative work than the American constitution. Unfortunately, Israel is an outstanding exception here too. The two recently enacted Basic Laws are short and concise, allowing the Supreme Court's justices to interpret the constitutional directives freely, implementing their own values.

---

have conceded that originalism provides a "better way of keeping faith" with the aspiration to electorally accountable policymaking. *See* MICHAEL PERRY, MORALITY, POLITICS, AND LAW 168 (1988).

[79] For a similar view, see Michael J. Perry, *What Is "the Constitution?" (and Other Fundamental Questions), in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 40, at 99, 131. ("I am inclined to agree ... that constitution-makers should be cautious about including indeterminate norms in a constitution...."). This second method must, however, be balanced with the opposite need to articulate constitutions in loose terms in order to allow future developments for unforeseen situations or as a compromise between competing positions. *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW 126-30 (1961) (To achieve determinacy is sometimes "to secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant. We shall thus succeed in settling in advance, but also in the dark, issues that can only reasonably be settled when they arise and are identified."); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 60 (1995).

[80] With this reality in mind, Learned Hand correctly observed that "It is as important to a judge called upon to pass judgment on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume and Kant as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly everything he will." Learned Hand, N.Y. TIMES MAG., November 28, 1954, at 14, *quoted in* ABRAHAM, *supra* note 65, at 44, 48.

[81] *See, e.g.*, BORK, *supra* note 1; SCALIA, *supra* note 76. Justice Scalia has exercised judicial restraint in many important cases since his nomination to the U.S. Supreme Court.

VII. CONCLUSION

In this article I have attempted to provide empirical proof for the claim that the justices of the court rely in their decisions -- to a greater or lesser extent -- on their own views and values. In the United States, this claim is accepted by legalists and academics as almost obvious. In the words of Charles L. Black, an American legal scholar, "it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great question of his time.... It would be hard to find a well-regarded modern thinker who asserted the contrary."[82]

The recognized influence of a justice's worldview on his decisions exists in all the courts and with regard to every subject that finds its way into the court. Nevertheless this influence weighs most heavily, and is most acutely felt, when the question at hand is of a constitutional nature. This phenomenon, too, has not escaped the notice of American legal minds: "That the [US] Supreme Court plays a partly political role -- that it makes public policy under the doctrine of judicial review -- is all too obvious."[83]

According to what we have said here, the way to address this phenomenon is not necessarily -- and perhaps cannot be -- the negation of the justice's right to give expression to his worldview. What is required, in the face of this reality, is rather an appropriate mechanism that will balance the three branches of authority, recognizing that these ought not to be comprised of two political branches -- the legislative and the executive -- and a third that is objective and neutral, but rather of three branches that aspire, each in accordance with its own means and character, to shape society's value system and order of priorities. In the last part of the article I briefly

---

[82] Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970).

[83] ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 99 (1976).

outlined five mechanisms that together could assist in achieving the required balance.

In Israel, too, there is a growing awareness of the subjective-cultural dimension of judicial activity in general and with respect to constitutional issues in particular. Thus, for example, the trend of division -- examples of which have been reviewed here -- among the different groups of justices, with religious justices on one side and secular justices on the other when it comes to questions of religion and state, has not escaped the notice of the Israeli public. It is also clearly apparent that the views of the religious justices are almost always rejected as a minority opinion. However, it would seem that what is obvious to the man on the street -- and what may even cause him some degree of concern -- does not arouse the same degree of interest among Israeli academics. It is only recently that legalists and political scientists in Israel have turned their attention to this subject.[84] Among those who recognize the phenomenon, there are some who consider it a blessing and express the hope that what they describe as the secular-liberal composition of the court will succeed in its battle against the fundamentalist and nationalist religious elements within Israeli society.[85] Those who, like myself, believe that the rules of the democratic game cannot exclude the judicial branch, can only hope that this perception will occur to the decision makers in the other two

---

[84] *See, e.g.*, Michael D. Birenhak & David Gussarsky, *Designated Seats, Designated Opinions and Judicial Pluralism*, 22 TEL-AVIV U. L. REV. 499 (1999) [in Hebrew].

[85] *See, e.g.*, Menachem Mautner, *The Descent of Formalism and Ascent of Values in Israeli Law*, 17 TEL-AVIV U. L. REV. 503, 596 (1993) [in Hebrew] Mautner states:

> In the years following the Six Day War, there was a strengthening of ... all three elements that play a part in the battle over Israel's cultural image: nationalism (the birth of Zionism), Judaism and western liberalism. Moreover, during those years it appeared on more than one occasion that the forces of nationalism and Judaism had collided with a view to removing western liberalism from Israeli life. The Supreme Court has always had an important -- perhaps critical -- contribution to make in fortifying Israel's moral connection with the liberal west. During the 1980s, the Court came out against those who attacked Israel's connection with the values of the west, and acted decisively and purposefully for the continued existence of this connection. Anyone who believes that in the coming years Israel's connection with the liberal west should continue and even be strengthened must hope that the battle waged by the Supreme Court will be crowned with success.

branches, bringing about the adoption of mechanisms that will return the Israeli Supreme Court squarely to its proper role within the democratic process.