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Table of Contents

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The 'Constitutional Revolution' and The Role of The Judiciary in Israel

Abstract

The article analyzes the recent developments in Israeli constitutional law. It describes a process described as the 'constitutional revolution' - the assertion of the power of judicial review by the Israeli judges in the Bank HaMizrahi judgment. The 'revolution' cannot be understood whit out the knowledge of Israeli constitutional arrangements. The first part of the paper describes the Israeli constitutional system, its evolution and the position of the judiciary. After that, I describe the Bank HaMizrahi judgment itself. The second part of the change in the role of the judiciary is the more wide use of international law in cases involving the Occupied Territories. One of the main drives of the 'constitutional revolution' was the 'militant judiciary' - personal judicial philosophy of Justice Aharon Barak. In the last part the identifies and describes political and legal factor that ushered in the 'judicial revolution': separation of powers, politics of rights, interest groups and opposition use of the courts, partisan, paralyzed majoritarian institutions, positive perception of the courts and willful delegation of problematic issue to the courts by political institutions.

Key Words: Judicial revolution, Israel, Aharon Barak, judicial activism, *Bank HaMizrahi v. Migdal Cooperative Village.*

When the Court does not become involved, the principle of rule of law becomes flawed. A government that knows in advance that it is not subjected to judicial rewiev, is a government likely not to give dominion to the law, and likely to bring about its breach.

Israeli Supreme Court
decision in *Segal v. Ministery of Interior*, 1980[1]

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

Robert H. Jackson, US Supreme Court Justice

The State of Israel is a very interesting case to study for scholars in the field of law and political science. From the point of view of a legal scholar, Israel is considered to be one of three countries without a written constitution. Israeli legal system is a immensely complicated mixture of secular and sectarian, common and civil law traditions and British, Ottoman and Jewish elements. For a political scientist Israelis[2] constitute a very divided and extremely differentiated society, literally a melting pot of people from all over the world. Yet, they manage to sustained a level of democracy and economic welfare far surpassing that of their neighbors and all this in a state of almost permanent conflict and threats to the mere existence of their state. The circumstances in which the State of Israel came into being are an interesting case study of the nexus of political ideology, national identity and its influence for state building and international relationships in one of the world's most crucial regions. One particular question in Israeli state life can offer interesting insights, that is Israeli constitutionalism

[1] Edelman 1995, 411.

[2] In the English language the term „Israelis" was coined in order to denote citizens of post 1948 State of Israel to distinguish them from ancient Israelites. The term "Israelis" is also religiously and nationally neutral, it can refer to Israeli citizens of not only Jewish but also Islamic, Christian and Palestinian background.

and the change in the position of the third branch of government – the judiciary. Israeli constitutionalism is in a constant state of flux, but a careful observation of the developments and changes in it, especially into what had been named 'the constitutional revolution', can yield interesting observations of the most significant changes in the legal systems of many states. Those changes are: the proliferation of judicial review[3] and a change of the role of the judiciary, from merely reactive "mouth of the statutes" to active agents of public policies, mainly the defenders of human rights and sentinels of democracy and the rule of law. Those changes can be considered parts of a worldwide phenomena of the global growth of judicial power[4].

In this paper I shall argue that recent developments in Israeli constitutional history show in the most clear way how and why judges and legal issues tend to have more and more influence on the political process.

In Israel this process is twofold. First and foremost it is what had been labeled as the "constitutional revolution", the seizure by the Supreme Court of Israel the power of constitutional review in the 1995 *Bank HaMizrahi v. Migdal Cooperative Village* ruling. For a lawyer from another jurisdiction the audacity of this move is truly amazing. There were no statuary empowerment for an introduction of such an important institution that in effect can reshape the whole legal system. In fact Israel does not have a written constitution, and the basic laws that have been declared as having a super-statuary (constitutional) normative value are just normal acts opened for amendment by the Knesset in a normal legislative procedure. The *Bank Mizrahi* judgment has often been compared to the famous 1803 decision of the US Supreme Court in *Marbury v. Madision* case that was one of the most influential court decisions in worlds legal history. As I shall argue, American inspirations where very important in reaching this landmark decision. The second jurisprudential instrument is wide and consistent

[3] For the purpose of this paper judicial review shall be understood as a competence of a court to assess the compatibility of a statute (an act of a legislative body) whit the constitution or a higher norm of constitutional rank. The effect of such assessment can be declaring a statute void or 'striking down' legislation – either by a refusal of a court to apply the contested regulation ('the American, decentralized model' now adopted in Israel) , or by erasing the provision form the statute book ('the Kelsenian, concentrated model'). Koopmans 2003.

[4] Vallinder 1995.

application of international law in the process of reviewing administrative action by the courts. This tool is by far less important in the day-today legal life of the State of Israel then the "constitutional revolution", but it has a great international impact. It is mostly used in assessing the actions of military administration on the West Bank and other Occupied Territories and its political significance is paramount, it touches the most controversial political issues facing Israeli political community – security and the relationship whit the Palestinians.

The reasons for this 'change of paradigm' of the position of the judiciary in Israel are complex. As I will try to show, this shift has two main causes. First, a dysfunctional, partisan party politics, resolving in a permanent deadlock in representative institutions and the inability to resolve the most crucial political questions in contemporary Israeli politics, mainly the status of Occupied Territories, the settlement policy and the relations whit the Palestinians. Second *spiritus movens* of the 'judicial revolution' is the personal influence of Aharon Barack, notable Jewish lawyer and the Israeli Supreme Court president from 1995 to 2006 (in this time arguably the most influential figure in Israeli politics[5]). Other influential factors that contributed to the 'judicial revolution' are the self-definition of Israeli legal system as a common law system (and a set of assumptions about the role of a judge resulting from this) and influence of comparative law.

The assessment of this processes is a tricky issue. Almost 20 years had come to past after the *Bank HaMizrahi* decision, yet, in my opinion, it is still too early to observe and understand all of the consequences of that verdict. However, it seems clear that the Israeli Supreme Court and the judiciary has show restrain in exercising its newly acquired power. It also seems clear that the 'judicial revolution' had not brought the resolution of the most profound political controversies, the Palestinian question and the problems arising from the Occupied Territories. However, activist judges can reshape a little bit the settlement policy and give redress and relief to the Palestinians that were victims of most evident human rights violations and abuses of military power. The most immediate consequence of 'the judicial revolution' is the acceleration of constitutional developments in Israel. Almost all constitutionally relevant actors perceive the present situation as temporally and calling for a more permanent regulation. That regulation almost certainly cannot be selective, it can resolute in

[5] Neuer 1998.

ushering a permanent written constitution to the State of Israel. Already exotic coalitions in a highly divided society had been formed to curtail 'the excessive power' of the judges. The most difficult to grasp is the more general influence of the endorsement of 'militant democracy', judiciary whit a self-imposed mandate to defend human rights, on Israeli public life. Many observers point out that Israel is a country permanently threatened whit a menace of fasization of politics. Almost permanent existential thread, demoralizing occupation, extensive role of the army, political, social and religious differentiation and highly partisan political parties do not create an environment in which democracy and human rights thrive. The permanent state of constitutional flux does not help either.

Although, Israel is very peculiar, it is still a postcolonial, young state emerged in the common law legal tradition. Ancient Jewish state traditions had been severed long ago and the bulk of the population comes from countries whit no democratic traditions[6]. Considering the extend of former British colonial empire and the fact that more and more states try to follow the path of democracy and the rule of law, the analyze of Israeli developments can offer surprisingly universal conclusions.

Before elaborating on those issues I will briefly outline Israeli constitutional system, whit emphasis on the position of the judiciary.

The Israeli constitutional arrangements

As I mentioned before, Israel is considered to be one of the tree states whit out a codified constitution[7], Israeli constitutionalism is in a pre-codification state of permanent flux. Declaration of the Establishment of the State of Israel (Declaration of Independence) announced on 14 May 1948 declared that the constitution shall be drafted by a Constituent Assembly elected before 1 October 1948[8]. The war of 1948 delayed the

[6] Barak 2006.

[7] The other two are Great Britain and New Zeland.

[8] 'WE DECLARE that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "The State of Israel"'.

elections. Later disagreements, most notably among religious and sectarian political groups concerning the role of religion and secular character of the state had paralyze the work of the Constituent Assembly[9]. The disagreements paralyzed the constitutional work of the First Knesset. To resolve the deadlock the so called *Harrari Decision* was adopted in 1950. Rather than passing the full text of the constitution at once, a piecemeal 'constitutionalisation' will take place. The Knesset will draft and adopt basic laws, one basic law will be one chapter of the future constitution and when all chapters will be adopted, they will be compiled into one document.[10] It is important to note, that the basic laws were adopted in a normal legislative procedure, they are not rigid laws (they can be amended or even abolished in a normal legislative procedure). Also, by the time of their adoption they had not been considered binding in a way characteristic for constitutional acts in modern constitutional, ex. other acts where not to be interpreted in a consistent manner whit them, their where not considered 'higher law'[11]. The temporary arrangements of the *Harrari Decision* has proven to be surpassingly resilient. 11 basic laws were adopted[12], they regulate the most importand aspects of the life of the state: position of parliament, president, economy, some human rights, the army etc. They had not been compiled into a single document, and probably they won't be any time soon. Peculiar for Israel are two basic laws – Basic Law: Lands of Israel and Basic Law: Jerusalem. The first declares that lands belonging to the State and to the Jewish National Found are *rei extra commertium,* they cannot be sold and will remain the property of the State. The later proclaims Jerusalem as the indivisible capital of Israel and ensures the safety and access to Holy Sites of all religions. In effect it was and annexation of mostly Palestinian East Jerusalem and is not is internationally recognized. It's worth to notice that Basic Law: Human Dignity and Liberty, central for the 'constitutional revolution' was adopted in 1992 by a vote of 32 against 21 of 120 member Knesset and had not attracted much attention of the public opinion[13].

Whit the lack of a written, formal constitution *The Declaration of Independence* plays a special legal role. It constitutes the State of

[9] Bożek 2002.
[10] Bożek 2002.
[11] Koopmans 2003.
[12] List of basic laws Bożek 2002 p.26.
[13] Aronson 2011, n. 53.

Israel and proclaims the equity of Israeli citizens, regardless of their religion or race.[14]

The special position of religious courts is a specifically Israeli feature, a residue of Ottoman times. The multiple religious tribunals (most notable are Jewish, Muslim, Christian and Druze) have jurisdiction mainly in the field of family law and marital maters, although in same matters they share jurisdiction whit secular civil courts. It's important to note that religious courts area part of the state judicial system and thanks to 'the constitutional revolution' they too obtained the power of judicial review[15].

For this paper it is important to briefly characterize tree basic laws: Basic Law: The Judiciary (adopted in 1984), Basic Law: Human Dignity and Liberty (1992) and Basic Law: Freedom of Occupation (1994).

Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation are considered to be a codification of human rights. They guaranty the right to life, liberty, property, privacy, freedom of speech and "freedom to engage in any occupation, profession or trade". The rights guaranteed by those Basic Laws are to be observed by all officials by all functionaries of the State of Israel and 'cannot be varied, suspended or made subject to conditions by emergency regulations'[16]. Those Basic Laws are not rigid legal acts, they can be amended in a regular procedure but there are some special requirements for an act that will infringe the laws guaranteed by the human rights Basic Laws (those acts must be proportional, purposeful and in accorders whit Israeli values[17]). Besides those provisions, the Basic Laws do not state that they are a piece of legislation of a 'supra statuary', higher legal rank

[14] Bożek 2002.

[15] Aronson 2011.

[16] Basic Law: Human Dignity and Liberty § 12 'This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required'.

[17] Basic Law: Human Dignity and Liberty § 8 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required'.

then ordinary acts of parliament[18]. The right to property guaranteed by § 3 of Law: Human Dignity and Liberty[19] has become to legal basis for the 'constitutional revolution'.

The 1984 Basic Law: The Judiciary is the main legal act regulating the matters connected whit the exercise of judicial power. The act regulates the structure of courts, the procedure of appointing judges, states that judges are independent in exercising their power and gives procedural and institutional guarantees of their independence. According to this act civil courts (magistrate and district) have the jurisdiction in civil, criminal and administrative cases. For this paper most relevant are the provisions establishing and regulating the functioning of the Supreme Court of Israel. There are fifteen justices sitting on the bench of the Supreme Court, adjudicating cases in random panel of tree. Those panels can be enlarge by the President of the Court to nine or even eleven justices if the case is complicated or important. Lately enlarged panels had become more and more common.[20] The procedure for nominating the justices is a purely judicial one, nominated by the President after the election by the Judges Election Committee[21]. The process of nominating justices of the Supreme Court does not interlope whit the political process[22].

The Supreme Court has two jurisdictional capacities, it can sit as The High Court of Appeals or as The High Court of Justice (HCJ). In the appellate jurisdiction the Court is the court of last resort and hears appeals from judgments of lower civil courts. The Court decision has the value of the precedent and binds lower courts.

The HCJ jurisdiction is a particularly Israeli equitable, original and non-discretionary kind of jurisdiction[23]. § 15 (C) of The Basic Law: The

[18] Wojtyczke 2001.

[19] 'There shall be no violation of the property of a person.'

[20] Aronson 2011.

[21] Basic Law: The Judiciary §4(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, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates elected by the National Council of the Chamber. The Minister of Justice shall be the chairman of the Committee'.

[22] For example in USA the justices of the Supreme Court are nominated by the president after a vote in the Senate.

[23] Aronson 2011.

Judiciary states 'The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.' § 15 (D) enumerates the specific remedies that can be granted by the HCJ[24]. The HCJ jurisdiction is a powerful judicial tool. When The Supreme Court sits as The High Court of Justice it is the court of first and last resort, its judgments are final. Basic Law: The Judiciary gives the HCJ powerful tools to monitor the actions of the government and other public bodies, it also equips the Court whit a wide range of specific remedies. Since the 1980's the Court in its jurisprudence has removed most of the standing and justiciability barriers that had limited the inflow of cases. The HCJ currently considers around 2 000 petitions a year field by various legal actors challenging the full variety of governmental action[25]. In essence The High Court of Justice is and administrative court that assesses, annuls and grants specific relief against actions of the authorities. The HCJ jurisdiction is also important for 'the constitutional revolution'. Whit the exception of the *Bank HaMizrahi* case, six of seven instances in which the court had 'struck down' a statute on rights based grounds were cases heard under the HCJ jurisdiction[26].

The anatomy of 'the constitutional revolution'

The crux of the 'constitutional revolution' is the Supreme Court taking by his own judicial *fiat*, whit out any statuary empowerment, the power of judicial review. The crucial moment was the 1995 judgment in the *Bank Mizrahi* case[27]. The facts of case are trivial and obscure. Whit the intention of reviving the agricultural sector Knesset passed and

[24] 'This includes, inter alia, the power to review actions and decisions of Israel's several systems of specialized adjudication, most notably labor courts (that govern labor, employment, and welfare disputes), religious courts (in charge primarily of marriage and divorce), and military courts (which try service members and residents of the Palestinian Territories). In the absence of a possibility of appeal to the Supreme Court from these tribunals (each of which includes an appellate instance of its own), the Court uses its HCJ jurisdiction to conform their actions to a common constitutional framework. See Basic Law: The Judiciary, § 15(D)(3),(4).' Aronson 2011, p. 7 n. 18.

[25] Aronson 2011.

[26] *Op. cit.*

[27] C.A. 6821/93 Bank HaMizrahi v. Migdal Cooperative Village, P.D. 49(4) 221, 418 (1995).

amended a law 'that established a body called the —rehabilitator, which was granted broad authority to settle, restructure and cancel debts that had been created up to the end of 1987'[28]. Between the passing and amending this law, Basic Law: Human Dignity and Freedom was adopted. Tree petitions were filed in civil courts, tree creditors were seeking relief against the actions of the rehabilitator that acted on the basis of the amended law. The petitioners attacked the amendment claiming that it breaches their right to property and infringes § 8 of Basic Law: Human Dignity and Freedom. The case was heard by a panel of nine justices in the appellate jurisdiction. Every justice wrote his own opinion (the verdict is immensity long, 437 pages, and cites cases from eight jurisdictions and the Bible).

The main legal controversy was the constitutional powers of the Knesset. Minority of justices wanted to give relief to the petitioners under § 8 of Basic Law: Human Dignity and Liberty claiming that the actions of the rehabilitator breached the right of property. But justice Aharon Barak that wrote the opinion of the Court used another doctrine. According to it, Knesset passing the basic law acts in his constituent authority given to the First Knesset in the Declaration of Independence. The minority disagreed whit such a claim, they held that the constituent authority of the First Knesset was not transferable to subsistent Knesset's. The result of the judgment written by justice Barak was that the amendment to agricultural law had been considered 'unconstitutional' and the Court refuse to apply it under the doctrine of judicial review[29]. As a result of that decision, all courts in Israel, under the doctrine of precedent, had obtained the power to assess the constitutionality of acts of parliament. The provisions of certain basic laws were given a constitutional status. Justice Barak also rests the supra-statuary binding force of the guaranties of the right of property on the fact it will be for certain a part of the bill of rights of the future Israeli constitution.

The boldness of the Courts decision is breathtaking. In effect, the Supreme Court gave Israel a constitution. Before the verdict of justice Barak the basic laws had been considered an ordinary pieces of legislation. Now certain parts, the judges will decide which parts, will be

[28] Bank HaMizrahi, p. 2.

[29] The minority wanted to give relief to the petioners under § 8 of Basic Law: Human Dignity and Freedom, this scenario would have left the agricultural law standing as a valid and applicable piece of legislation.

considered to have a constitutional value and other acts must be in compliance whit them. This introduction of a new, powerful institution seems to be rooted more in the constitutional and jurisprudential legacy of other countries then Israeli legal tradition. Justice Barak, in a manner of a comparative constitutional law professor, elaborates on the nature of judicial review using examples from many jurisdictions and quotations from philosophers of law for almost 20 pages[30]. As a result, every judge, even a rabbi in a religious tribunal, obtained the ability to struck down an act of parliament. As I mentioned, the judiciary shows restrain in using this newly acquired competence. Only seven times has the Supreme Court 'struck down' a law under the judicial review doctrine. Most notably, it recognized the provisions of Basic Law: Freedom of Occupation to have a constitutional character and 'struck down' military regulations preventing woman from being military pilots. Once, a district court had found a statute to be unconstitutional but the Supreme Court reversed the judgment and criticized the district court judge for not working hard enough to find an interpretation of the statute consistent whit the basic laws.

The consequence of the Courts decision was a rapid 'juridicisation' of politics. Nearly every political question ends up in the Supreme Court. Sometimes the Court gives surprising decisions, ex. when the Court assessed the internal regulations of the Knesset[31]. Yet, again the Court has set a limit for its jurisdiction in 'supervising' the Knesset. When an MP dissatisfied whit the Oslo II accords tried to attack the parliamentary resolution accepting it and force the Speaker to hold a debate in the plenum, justice Barak concluded 'that unless the democratic fabric was being injured, the court would not intervene in internal Knesset affairs'.[32] Even the most activist judges are not willing to rule on such importuned political matters as the peace process whit the Palestinians.

There seems to be a consensus among Israeli right and left political activists that the position of the judiciary is to strong and something must be done about it. Justice Barak claims that the actions of his Supreme Court are not anti-democratic because the elected parliament

[30] Bank HaMizrahi, p. 208-232.

[31] In case Sarid v. Knesset Speaker . Such intrusion upon the legislative branch by the judiciary is unthinkable in any other country. Neuer 1998, n. 32.

[32] Neuer 1998, n. 28.

can overwrite them whit a single statute[33]. The *Bank HaMizrahi* decision recognized the constitutional powers of the Knesset to do so. Yet, almost 20 years after the 'constitutional revolution' there seems to be no political will to take the power of judicial review from the judges. One reason for that maybe that in the end, the judges had showed restrain in the most important political issues connected whit national security.

The consequence of the 'constitutional revolution' for the political process and Israeli political culture are not yet fully visible. Neuer is critical about the influence of judges in the democratic process:

'Similarly, the court's tendency to intervene in matters of policy discourages ideological rivals from making an effort to persuade one another, or to rally the support of uncommitted segments of the population. Such advocacy work has the effect over time of building consensus, encouraging compromise among diverse elements of society, and raising the level of debate. The high probability of judicial intervention, however, has left many activists feeling that their resources are better invested in a decisive legal victory than in a persuasive public campaign, or in negotiating a mutually acceptable outcome. Those groups who find their efforts constantly thwarted by the High Court come to despair of the benefits of cultivating public support, and those who frequently merit High Court approval need not trouble themselves with public opinion or accommodation. In this atmosphere, disputes are neither settled nor resolved; they are merely decided, usually keeping one party's rancor, and the other's callous disregard, well preserved.'[34]

Neuer tends to agree whit Barack that Israel has a low political culture, but for him a 'militant judiciary' is not the answer. There are some benefits of judicial activism in Israeli public life (ex. corruption bashing) but the actions of judiciary cannot usher in a new constitution. The proponents of judicial activism counter that the judiciary is best equipped to protect human rights and that its actions force the government to 'take rights seriously'[35]. In my opinion, in the case of Israel, we don't know enough to settle this debate. Israeli political life remains as divided as ever. Also, without a mayor crisis threatening human rights the judiciary's power to defend them remains unchecked.

[33] Barak 2006.
[34] Neuer 1998.
[35] Barak 2006.

The role of international law

The way for the 'constitutional revolution' has been paved prior to the passing of human rights basic laws. The Supreme Court in a series of decisions had relaxed the two main doctrinal barriers to judicial activist, the restrictions on standing[36] and justiciability[37]. The Supreme Court had reached many precedential judgments, staring from the 1980's, that in effect permitted almost anybody to petition the Court in almost every matter. The exemptions from conscription for ultraorthodox students, procedures of debate in the Knesset and proceedings against corrupted officials were considered to be in the jurisdiction of the High Court of Justice.

This had a profound effect on the situation of the Palestinians living under Israeli military occupation. In the Israeli legal system, like in most common law systems, international law ratified by the state is binding and directly applicable[38]. The actions of the State of Israel on the Occupied Palestinian Territories is very controversial. Especially the settlement policy is widely considered illegal and contrary to international law. The detailed analyses of the legal aspects of Israeli settlements lies beyond the scope of this paper.The settlements are considered contrary to the Fourth Geneva Convention[39].

[36] 'The doctrine of locus standi, or "standing," has traditionally dictated that only a party who has some substantive relation to the case-that is, somone who has suffered injury to a right or personal interest-can be heard. This restriction has long been regarded as an important means for courts to protect themselves from being overwhelmed by what the legal literature calls "unnecessary" litigation-cases that really do not require a judicial remedy, whose adjudication only distracts the court from its proper business.' Neuer 1998.

[37] 'Whereas standing determines which party the court will hear, justiciability determines which issue the court will hear. The justiciability standard is classically used to exclude from judicial consideration a range of policy questions, such as the conduct of foreign affairs, best left in the hands of the executive or legislature. By keeping such issues out of the judiciary's reach, the justiciability doctrine immunizes entire areas of governmental action from the law's watchful eye-a state of affairs deemed intolerable by Barak and his like-minded colleagues.' *Op. cit.*

[38] Barak 2006.

[39] Art. 49 (6) "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Bisharat 1989.

For the purpose of this paper it is important to show, that Israeli courts tend to be more and more bold in judging the conduct of the military authorities on the Occupied Territories. Israeli civil courts do not have jurisdiction over the Occupied Territories. The Israeli Supreme Court sitting in the HCJ ruled that it posses jurisdiction over military personnel acting in their official capacity and reviews appeals filed by the residents of the Occupied Territories. This tenuous legal construction was never challenged by the Israeli attorney general, because of an political agreement[40].

Aside from that, for years the Supreme Court jurisprudence has been opaque. For example, the Court held that only certain parts of international humanitarian law is directly applicable. The Hague Convention of 1907 was directly applicable and the Court gave relief to Palestinians on its basis. But other mayor act of international law, especially the Fourth Geneva Convention, that regulated the conduct of the occupying power on an occupied territory was not used to restrict the conduct of the Israeli military. Thus the for long the Court accepted a contradictory claim by the government that it observes the provisions of the Fourth Geneva Convention 'as a matter of principle'[41].

Recently this approached has changed. In 2004 in *Beit Sourik Village Council v. The Government of Israel* the Supreme Court sitting as the High Court of Justice nullified six military orders pertaining to the seizure of land in the West Bank on the grounds that they breached the Fourth Geneva Convention. Thus reversing the longstanding line of precedent and giving the Palestinians a potential avenue to combat some military abuses, like the selective enforcement of the Ottoman land laws in order to expropriate them. In 2005 the Court ruled that using local residents by IDF soldiers in arresting a wanted terrorist is unlawful under international law. In 2005 the Supreme Court, contrary to the general tendency in its jurisprudence, denied standing to settlers that were forcefully evacuated from Gaza in the processes of implementation of the Gaza Disengagement Plan. The Court stated that they cannot rely on the Fourth Geneva Convention[42].

The tendency seems to be clear: the Supreme Court is more activist in controlling the actions of soldiers on the Occupied Territories. Although it seems doubtful that the judiciary will one day render the

[40] Bisharat 1989.
[41] *Op. cit.*
[42] Nollkaemper 2011.

settlement policy illegal or bring about peace, it definitely gave some relief to the Palestinians and gave them at least some procedural guaranties.

Again the boldness of the actions of the Supreme Court astonishes. The basis for the Courts jurisdiction are doubtful and the scope of its action seems immense, especially if we consider the political inertia in the Middle Eastern peace process. Moreover, the Court acts in the most controversial field of national politics, in other countries judges would probably leave those issues to the political process. For example, for someone who knows how American courts adjudicate national security cases, the actions of the Israeli Supreme Court seem almost heroically insolent.

The causes of the 'paradigm shift'

In my opinion the most immediate cause of the 'constitutional revolution' is the personal legal philosophy of justice Aharon Barak. Justice Barak champions the idea of 'militant democracy', and a judiciary that is strongly engage in defending human rights. It is possible that childhood experience of living in a ghetto under Nazi occupation are source of this[43]. Justice Barak writes:

'I do realize that my judicial philosophy has its critics. It clearly has its disadvantages. It may not fit some democracies. It may not fit us in years to come. I do, however, believe that it is the proper judicial philosophy for Israeli democracy in our times. One should not forget that a large part of Israel's population immigrated to Israel from the Near East and from Eastern Europe – places where there are no democratic traditions. Democracy is thus young in Israel. We don't have two hundred years of democracy. Furthermore, because of English influences, many viewed for many years democracy in formal terms. Parliament, for them, was omnipotence. It could do everything. It can affect every right. Furthermore, for a variety of reasons, the concept of "it is not done" is not a central part of governing in Israel. Israel lacks a rigid constitutional framework. Basic structures and concepts can be changed by bare majorities. The protection of those structures and concepts requires judges who see their role as protectors of our constitution and democracy.'[44]

[43] Aharon Barak was born in 1936 in Kovno and spend three years in the Kovno ghetto. Neuer 1998.

[44] Barak 2006.

Another reason is the disappointment whit the constitutional capacities of the political process. The wording of the *Bank Mizrahi* judgment, both in majority and minority opinions, shows disappointment about the fact that Israel lacks modern constitutional arrangements.

Similar causes lie behind the expansion of application of the use of international law in the Occupied Territories jurisprudence. The protection of human rights is considered to be an importuned part of the profession of the modern judiciary and it adds a new dimension to judicial work[45]. Israeli judges are aware of that, they also realize that act in a political environment that shows disdain for those values.

But even the strongest personal motivations cannot bring about a systemic change whit out the help of deeper, systemic factors. One such factor is surely the political polarization. It prevented the Knesset from passing a law that would take away the power of judicial rewiev from courts. Rampant partisanship has also undermined the trust for other governmental institutions. In the ranks of public trust the courts come second only to Israeli Defense Force (the army), way before the Knesset and local and central government[46]. This 'paradigm shift' could not be possible whit out the common law legacy of Israel and the high esteem that judges have, as well as the binding force of precedent that are its essential parts. The institutional form of the Israeli judiciary was also an important factor, especially the strong position of the Supreme Court and its capacity to sit as the High Court of Justice[47].

Is the 'constitutional revolution' and the 'paradigm shift' a good thing or not? It is hard to give a clear-cut answer to that question. As a political scientist I look at the 'paradigm shift' in Israel whit anxiety. I fear that it may further weaken the majoritarian democratic institutions, and doesn't have the ability to usher in a positive change in the most controversial maters, mainly the Palestinian question. But as a lawyer I am more optimistic. I feel amazed by the audacity of the judges. I admire the artistry of their legal conceptions and I see that they gave justice, at least to a few individuals.

Lessons from Israel

Legal scholars and political scientist had identified factors that tend to facilitate the growth of the role of the judges: separation of

[45] Koopmans 2003.
[46] Edelman 1995.
[47] Edelman 1995.

powers, politics of rights, interest groups and opposition use of the courts, partisan, paralyzed majoritarian institutions, positive perception of the courts and willful delegation of problematic issue to the courts by political institutions.[48] Israel fits this description. The example of Israel also show that the growth of the judicial power can be radicalized by a charismatic, committed judge.

Although Israel has been more successful in institution building then other postcolonial states, it is still in essence a young nation. If in such dramatic circumstances judges could procure such considerable power, it can happen elsewhere. The judiciary, especially the judges from the highest courts of the lands are a globalized, well educated folk. They interchange ideas and emulate the solution of other, particularly if they enlarge their powers. When other postcolonial nations will achieve certain level of democratization and institutional stability they can also see the 'judges marching in'. Especially the former British colonies, that share the common law traditions and its assumptions about the role of a judge. If policy makers fail to bring sufficient solutions, especially in the field of human rights protection, it is probable that they face not only dissatisfied voters but will also have to share their powers whit a militant judiciary.

[48] Tate, Vallinder 1995.

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