

2010

Judicial Review, a Comparative Perspective: Israel, Canada, and the United States

Malvina Halberstam

Benjamin N. Cardozo School of Law, halbrstm@yu.edu

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Malvina Halberstam, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 *Cardozo Law Review* 2393 (2010).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/68>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, carissa.vogel@yu.edu.

JUDICIAL REVIEW, A COMPARATIVE PERSPECTIVE: ISRAEL, CANADA, AND THE UNITED STATES

INTRODUCTION

*Malvina Halberstam**

On April 26, 2009, the Benjamin N. Cardozo School of Law hosted a roundtable discussion, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, with prominent jurists, statesmen, academics, and practicing attorneys.** The panel was comprised of Justice Morris Fish of the Canadian Supreme Court; Justice Elyakim Rubinstein of the Israeli Supreme Court; Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit; Hon. Irwin Cotler, a member of the Canadian Parliament and formerly Minister of Justice and Attorney General of Canada; Hon. Michael Eitan, a Minister in the government of Israel, a member of the *Knesset* (Israeli Parliament), and former chair of the Committee on the Constitution, Law and Justice; Professor Daniel Friedmann, formerly Minister of Justice of Israel, who proposed legislation to remedy what some view as serious problems with judicial review in Israel; Nathan Lewin, one of the most eminent attorneys in the United States, who has argued many cases before the U.S. Supreme Court; Janice Sokolovsky, a member of the U.S. and Israeli bars, who has drafted legislation to regulate the role of non-governmental organizations (NGOs) as petitioners before the Israeli Supreme Court; and Professors Elizabeth Defeis, Marci Hamilton, Michael Herz, and Shlomo Slonim, all of whom are prominent constitutional law scholars; an extraordinary panel by any measure.

Professor Halberstam, who organized the Conference, addressed specific questions to individual members of the panel; all members of

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Professor Halberstam organized the Conference and served as the moderator.

** The Conference was funded by the Floersheimer Center for Constitutional Democracy. It was sponsored by the Benjamin N. Cardozo School of Law, and cosponsored by the American Association of Jewish Lawyers and Jurists (AAJLJ) and the American Branch of the International Law Association.

the panel were invited to intervene with comments. Following the roundtable discussion, Professor Friedmann, Justice Rubinstein, and Mr. Cotler made individual presentations. The Conference was transcribed and the panelists were invited to edit and add to their oral remarks, which several did. What follows is an edited transcript of the roundtable discussion and of the individual presentations.

TRANSCRIPT¹

PROFESSOR MALVINA HALBERSTAM: Judicial review is one of the great gifts of American jurisprudence to the world. It was established over 200 years ago by a decision of the U.S. Supreme Court.² It has recently been enshrined in the constitutions of a number of new states. But, judicial review does not mean the same thing in every country.

Judicial review in Israel, the United States, and Canada differ in a number of respects, including whether there are limitations on the kinds of questions the Court decides; whether the questions can be brought directly to the Supreme Court or are filtered through lower court decisions; whether Supreme Court review is as of right or in the Court's discretion; whether decisions are made by the Court as a whole or by panels; and on how judges are appointed to the Court, all of which affect the nature and scope of judicial review. More fundamentally, how broad should judicial review be in a democracy? Should the courts be the ultimate deciders of everything or should there be limitations?

I'll begin by asking members of the panel to briefly summarize how judges are selected in each country, whether review is discretionary or as of right, whether the cases are heard by panels or by the Court as a whole, and whether judicial review is based on the constitution, legislation, or a decision of the Court. We'll then proceed to discuss substantive issues such as limitations, if any, on judicial review in each of the countries, the pros and cons of such limitations, cases in which the Court's assertion of jurisdiction has been particularly controversial, legislation proposed to address some of those problems—particularly in Israel but, perhaps, in other countries as well—and a discussion of the proper scope of judicial review in a democratic society, a question on which there are very strong differences of opinion. We'll conclude with presentations by Professor Friedmann, Justice Rubinstein, and the Honorable Irwin Cotler.

¹ Transcript prepared by Ubiquis/Nation-Wide Reporting & Convention Coverage; 22 Cortlandt Street, Suite 802, New York, NY 10007.

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

I. THE COURT

A. *Structure*

So, let me start with the first question. How are Justices appointed to the Supreme Court, how many Justices sit on the Court? Perhaps we can begin with the United States. Professor Herz, would you briefly address that?

1. The United States

PROFESSOR MICHAEL HERZ³: There are nine Justices on the U.S. Supreme Court. The number is established by Congress, not by the Constitution. The first Congress in the Judiciary Act of 1789 set the number at six. Six is not an ideal number for a group that decides by simple majority voting because you can have three-to-three outcomes, but they stuck with six. Then, I believe, it went up to seven. During the Civil War it went up to ten briefly. This was partly because of the addition of another Circuit but it was mainly to give Abraham Lincoln another appointment so that the Court would rule obligingly on some pending constitutional issues. After Lincoln's assassination when the Congress was unhappy with President Johnson, it reduced the number of Justices to six or seven, though by attrition, so that Johnson would have no appointments. Once Ulysses S. Grant became President, Congress put it back to nine, where it has stayed ever since.

That history says something to those who would say that Supreme Court appointments have been uniquely and unprecedentedly politicized in recent years. We have not gotten to the point, in this or the last century, where the U.S. Congress changed the number of Justices in order to allow or not allow a President to make an appointment.

What's magic about nine? Nothing really. Presumably the idea is the more the better. You get better decisions from a larger group, but that's balanced by a kind of unwieldiness that comes with a larger group. The one other thing I would add is something that the Court does not do but that has something to do with this question of the number of Justices—whether one would imagine a system of supermajority voting on the Court, in particular for questions of judicial review. It is sometimes asserted that the Court should only strike down a statute when it is absolutely clear that the statute is unconstitutional.

³ Professor of Law and Director, Floersheimer Center for Constitutional Democracy, Benjamin N. Cardozo School of Law.

That's an impossible line to draw. It trades one line drawing problem for another. But one could institutionalize that idea by requiring some kind of super majority voting to strike down a statute. It ties into how many Justices are on the Court.

2. Israel

MINISTER MICHAEL EITAN⁴: The appointment of judges in Israel is by a committee of nine: three Supreme Court Justices, two government Ministers, two *Knesset* members, and two appointed by the Israeli Bar. This is the formal composition of the committee and it gives the three Justices of the Supreme Court nearly absolute power in the nomination process. How? There are only three Supreme Court Justices on the committee, but you have to take the political process into consideration. The *Knesset* traditionally selects one member of the opposition and one member of the coalition and when it comes to nominating judges, especially to the Supreme Court, very often the two representatives of the *Knesset* neutralize one another.⁵ The two Bar representatives—maybe at least one of them, but most of the time both of them—support the Supreme Court Justices on the committee. When we speak about the government, the Justice Minister sees himself, most of the time—Professor Friedmann was one of the exceptions—not as someone who represents the people who elected him but as a representative of the Supreme Court. In one case, the Minister stated publicly that the Justices on the committee knew better than he what the judicial branch needed so he would follow anything that they decided. In such an environment, it is accepted in Israel that you can't appoint a judge, especially a Supreme Court Justice, without the consent of the Justices on the committee.

Recently, we amended the law to provide that appointment of a Supreme Court Justice requires seven votes.⁶ I personally didn't know what to do. I strongly oppose the present system, but if I voted for the amendment it would give veto power to the three Justices. I was convinced to vote for it only for the possibility that in certain situations there would be another block on the committee that would have power to negotiate.

These are the dilemmas we have in Israel. I want to bring one example: the nomination of Elyakim Rubinstein—and I don't want to say a bad word about his nomination. I remember it clearly. I was a

⁴ Israeli Minister of Improvement of Government Services; Member, *Knesset*.

⁵ This applies to the appointment of all judges.

⁶ Courts Law (Consolidated Version) (Amendment No. 55), 5768-2008, No. 2176, S.H. 813 (Aug. 6, 2008).

member of the committee and it was announced that the Supreme Court Justices would vote for him. The subsequent procedures were like a rubber stamp. Everyone knew that he was going to be nominated. So, the Supreme Court controls judicial appointments in Israel.

JUSTICE ELYAKIM RUBINSTEIN⁷: Let me begin with a few words about our judicial system. The Israeli judicial system has three layers of courts: magistrate courts, district courts, and the Supreme Court. It is, in this respect, a unified system. There are six district courts in the various areas of the country, and there are numerous magistrate courts. The magistrate courts deal with criminal and civil matters up to a certain level stipulated by the law, and the family courts are part of them too. Matters beyond that fall under the jurisdiction of the district courts, which also serve as administrative courts (in certain types of cases against government authorities stipulated by the law), and as appellate courts on judgments of the magistrate courts. The Supreme Court serves as a Court of Appeal on judgments of the district courts, in criminal, civil, and administrative matters, and as a Court of original jurisdiction in general administrative matters (known as High Court of Justice cases), and also as a Constitutional Court, dealing with judicial review issues. Israel does not have a full-fledged constitution, but there are Basic Laws which have been recognized as constitutional texts, relying also on the Declaration of Independence of the State of Israel.

I should add that there are also labor courts, military courts, and religious courts of the various denominations (dealing mainly—but not exclusively—with marriage and divorce). All are, in different ways, subject to supervision of the Supreme Court, mainly as a High Court of Justice.

The committee for the appointment of judges, now called the “selection committee,” was established in 1953 and has been generally commended—and, I think, even with some shortcomings, that it was rightly praised, and that it is almost as good a system as one could hope for. It consists of nine members—five professionals and four politicians. There are two *Knesset* members (one traditionally comes from the opposition) and two ministers—the committee is chaired by the Minister of Justice, which is very important because he or she controls the convening of the meetings. The five professionals are three Justices of our Court (who include the President of the Supreme Court and two others who rotate on a three-year basis, and who are elected by seniority within the Court) and two Bar Association representatives. One should remember that when it was established it was perceived as a very important achievement compared to places where the Parliament or the political system is exclusively involved in the appointment of

⁷ Israeli Supreme Court.

judges, such as in the United States. Indeed, the three Justices of the Supreme Court constitute an important part of the committee, but that doesn't mean they control the committee. I should add that there is a process of screening by sub-committees—each consists of one Justice, one *Knesset* member, and one Bar Association representative—who also interview the candidates for judicial appointments.

In my view, the best proof of the system's quality and reasonableness is the fact that, historically, there has been a consensus that the judiciary has been a success story in terms of the quality of its members and decisions. Of course, some criticize it. But basically, it has been a good system. Now the question is, what are the alternatives? We have a good judiciary—professional and honest. It is not perfect. But it has been a success story. It would be a pity if it became politicized, by—for instance—changing the balance in the selection committee, as some suggest.

PROFESSOR DANIEL FRIEDMANN⁸: The system for selecting judges was introduced at a time when we did not have judicial review of statutes and before the Court expanded its jurisdiction in the way it did. It was a completely different legal system. The assumption was that we were concerned with a purely professional body that dealt only with civil appeals, criminal appeals, and review of administrative actions—nothing more. So the question that arises is whether this method of appointing judges should be retained after the Court decided that it also has power to review statutes and after the legal system has been changed so dramatically. My view is that it should not. I think that we should change the system in a way that reduces the influence of the Supreme Court Justices on the appointments so that we will be able to introduce into the Supreme Court judges with somewhat different views, backgrounds, and outlooks from those of the Justices that have recently dominated the Court or were very influential. In other words, the change in the function of the Court and its jurisdiction must affect the way Justices are appointed. Therefore, during my term as Minister of Justice, I supported the change in the law that Minister Eitan mentioned—namely, that a majority of seven out of nine members of the committee is required in order to elect a Justice to the Supreme Court. Although this change gives the Supreme Court veto power, it does not really increase their power since they have had a veto anyway. But the new law also gives the politicians a veto, because usually the Minister of Justice can get at least three votes; so there is a mutual veto.⁹ I regard this as a temporary situation and I assume that we will

⁸ Former Israeli Minister of Justice; Professor (Emeritus) and Former Dean, Tel-Aviv University Faculty of Law.

⁹ It seems that the new system had an effect at least in the recent appointment of Justices. In October 2009 (namely *after* the Conference), three new Justices were appointed to the Supreme

have to make additional changes in order to enable the system to reflect more divergent approaches in the Supreme Court, which becomes crucial when the Supreme Courts gets involved in political and other controversial matters.

MR. NATHAN LEWIN¹⁰: An informational question: How are the three Justices of the Supreme Court—those who are members of the committee—selected? I think, for example, in terms of the U.S. Supreme Court. If there were three Justices who participated in such a committee, it would make a big difference how those three Justices were selected. I'm wondering whether the three Justices are simply selected at random, which would make it one kind of system, or selected by the Chief Justice or the President of Court.

JUSTICE ELYAKIM RUBINSTEIN: The President of the Court is always there. So you have two additional Justices and they simply rotate. Their appointments are for three years by seniority.

MINISTER MICHAEL EITAN: Also historically, the Chief Justices have always been selected by seniority. That is, when somebody retired, the next one in line in terms of seniority would become the Chief Justice. But we don't know if this will be the situation in the future.

PROFESSOR MALVINA HALBERSTAM: Looking at it from the American perspective, I find it mind boggling that in Israel appointments to the Supreme Court are essentially determined by the President of the Supreme Court. For example, if Justice Warren decided who would be on the Court when he was Chief Justice or, conversely, if Justice Rehnquist decided who would be on the Court when he was Chief Justice, we would have very different Courts than we've had. And, while our system may have problems because it is a political appointment, it tends to swing back and forth; we get some liberal Justices; we get some conservative Justices. But if the Chief Justice can always pick the new Justices on the Court, it seems to me the Court will move in one direction only.

PROFESSOR DANIEL FRIEDMANN: Under the seniority system that has hitherto obtained, when the committee elects a new Justice to the Supreme Court you already know if he or she is going to be the President. Since we have a compulsory retirement age, namely at seventy, all that was required was that the new appointee was younger

Court. The President of the Supreme Court supported one of them (Uzi Fogelman). The two other Justices that were elected (Neal Handel and Itchak Amit) did not previously serve on a temporary appointment on the Supreme Court. The Justices of the Supreme Court have up to now strongly objected to the appointment of a district court judge who was not "tested" in the course of a temporary appointment to the Supreme Court. I strongly objected to this practice and I regard the recent appointments as a step in the right direction. Apparently the Supreme Court Justices had to compromise.

¹⁰ Lewin & Lewin LLP, Washington, D.C.

than all the present members of the Court. I think that this system of appointment by seniority is highly problematic. Whether it will continue is not clear. It is based on tradition and on the committee's complying with the wish of the Supreme Court Justices. But the appointment committee is not bound to follow this tradition. In addition, I initiated a statute that was passed by the *Knesset*, which may lead to a change although it does not directly deal with the issue of seniority. This statute provides in essence that the term of the President will not exceed seven years and also that he must have at least another three years in office in order to be elected President.¹¹ For example, if upon the retirement of the President of the Supreme Court the next person in line of seniority is sixty-eight years old, he will not, under the new statute, become President, since he will have less than three years to serve.

3. Canada

PROFESSOR MALVINA HALBERSTAM: Mr. Cotler, you told me that you changed the Canadian system based partly on the Israeli system and rejected other parts of the Israeli system. Please tell us about that.

MR. IRWIN COTLER¹²: If somebody had asked me when I was appointed Minister of Justice in December of 2003 what my priorities were, I would not have included the appointment of Justices amongst them. At the end of my tenure, I was prepared to say that the appointment of Justices was the most important thing that the Minister of Justice did because that really is the legacy issue. That determines the administration of justice, indeed, the integrity of the administration of justice, long after those of us who have the temporary stewardship of being Minister of Justice are there.

There are nine Justices on the Supreme Court of Canada. Under the Supreme Court Act, and to reflect the bi-jural character of the civil law and the common law and our geographical diversity, three of the Justices must come from the civil law system of Quebec. The other six are from the common law provinces, but they are chosen on a principle of diversity of geographical representation. To that end, three come from Ontario, two come from the Western Provinces, and one comes from the Atlantic Provinces.

With respect to the appointments process itself, prior to my

¹¹ Courts Law (Consolidated Version) (Amendment No. 45), 5767-2007, No. 2103, S.H. 382 (July 12, 2007).

¹² Member, Canadian Parliament, Mount Royal; Former Canadian Minister of Justice and Attorney General.

becoming Minister of Justice, there were two considerations involved. First was what might be called respect for the constitutional framework, which vested the appointment of Justices in the executive branch of government—that is, the Canadian Cabinet. In effect, it meant the Minister of Justice in consultation with the Prime Minister. The practice developed for the Minister of Justice to consult with certain other stakeholders, namely the Chief Justice of Canada—and perhaps other Justices of the Supreme Court—as well as the Chief Justices of the courts of the provinces from which the vacancy arose. For example, if it was from Ontario, then you would consult the Chief Justices of the Superior Court of Ontario and the Court of Appeal of Ontario. If it was the Western region, then it would be all the Chief Justices in the west. In addition, the Minister would seek the opinion of the President of the Canadian Bar Association or his or her designee, the President of the Provincial Bar Association, and any other people whom it would be deemed appropriate to consult.

The Cabinet of which I became a member was sworn in on December 12, 2003. On that same day, the new Prime Minister, Paul Martin, announced that the government would reform the Supreme Court appointments process. That announcement surprised even me, although I would be the one to carry it out, because I was not consulted beforehand. While he made clear that the details were up to me, he stressed the principle of prior parliamentary involvement in the Supreme Court appointment process. This was a radical change in that Canada had never before had parliamentary involvement in judicial appointments, whether by way of constitutional or statutory requirement or by conventions of practice. Appointments had been the prerogative of the Cabinet.

Before I could even embark on the reform process, there were two further unprecedented developments. Two sitting Judges of the Supreme Court of Canada announced their resignation prior to having to do so. Both resignations were to take effect on June 2004, which meant that the reform process had to be dramatically accelerated.

I promptly appeared before the parliamentary Justice Committee, under whose purview the reform process fell. There, I opened by describing the existing protocol for judicial appointments, which had not previously been discussed publicly. Since this protocol had worked so well and had remained so admirably unpoliticized, I retained some lingering doubts about the need for reform. Nonetheless, I proceeded to outline the criteria I felt should continue to guide the selection process. First was the merit principle. Excellence had to be the overriding criteria, alongside consideration of diversity to reflect Canada's multicultural nature. Second, the integrity of the Supreme Court must always be preserved. In other words, the new process must not damage

the reputation of any of the appointees. Third, promotion and protection of the independence of the judiciary. Fourth, transparency. Fifth, the value of provincial input because of the country's Federal Constitution. And sixth, the value of parliamentary input, which had previously been non-existent.

To make a long story short, the end result of the reforms was a four-stage process developed through consultations with Parliament, academics, and the judiciary—both domestically and abroad. In the first stage, the Minister of Justice would continue as before to consult comprehensively with the actors described above to develop a shortlist of five to eight candidates for appointment. At the second stage, the Minister of Justice would appoint a nine-person advisory committee; the Israeli model was influential here. This advisory committee would consist of four Members of Parliament, one from each federal party. It would also comprise one retired judge, appointed by the Canadian Judicial Council, to represent the views of the judiciary; one representative of the provincial Attorney General; and one representative from the provincial Bar Association. This allowance for Canada's federal nature was a departure from the American and Israeli models. In Canada, we are required by law to draw upon regional and provincial perspectives. Finally, the advisory committee allowed for public input, inviting suggestions of candidates through major newspapers. Interestingly, the recommendations received actually dovetailed with the ultimate appointees. The public was better informed than one might think on these matters. The third stage involved comprehensive consultation by the advisory committee with respect to the same criteria as had always informed the process, as a result of which the advisory committee would provide the Minister of Justice with a shortlist of three people drawn from the Minister's original list of five to eight. In the fourth stage, the Minister of Justice in consultation with the Prime Minister would make the executive appointment from that short list.

Almost as soon as we had articulated this process, a third Justice of the Supreme Court announced he was stepping down, having come to the mandatory retirement age. However, just as we came to the fourth and final step in choosing his replacement, an election intervened and it was left for the next government to make the ultimate decision.

Following the election, I spoke to the incoming Minister of Justice and advised him as to my choice from among the shortlisted names. Fortuitously, the new Minister agreed, and Justice Rothstein was appointed. Interestingly, we already at that point had two Jewish Justices on the Supreme Court of Canada, Justice Morris Fish and Justice Rosalie Abella. This would have been the third Jewish Justice of the nine. In a way, I felt, it was better that I not be the one to make

that appointment.

As for the reformed appointments process, before finalizing the appointment of Justice Rothstein, the new government made one addition, influenced by the American approach. I had opted not to include a public hearing before a parliamentary committee since I felt it might invite a politicized process. But I came around because the new government's approach to the hearing involved certain ground rules with respect to the kinds of questions that could be asked and was presided over by the most distinguished constitutional law professor in Canada, Peter Hogg. There were no questions really asked about the personal belief systems of the candidate. It was very professional. The hearing was intended to be less adversarial than the American procedure, and that was because our Constitution is also different from that of the United States; Canada's Constitution does not require the consent of Parliament. The four-stage process that I formulated gave Parliament an advisory role only. So that made for a more conciliatory hearing.

In sum, this major change to Canada's appointment process was not uninfluenced by the practices in Israel and the United States.

MR. NATHAN LEWIN: Minister Cotler, under the new process, did you consult with sitting members of the Canadian Supreme Court? I would love to hear what Judge Posner would say about all this, because to somebody in the American system, with the separation of powers, it would almost be scandalous for the President in appointing a Supreme Court Justice to be consulting with sitting Supreme Court Justices.

MR. IRWIN COTLER: Not only did I consult with the sitting Chief Justice of the Supreme Court with regard to appointments, but I also made it public that the Minister of Justice does consult with the Chief Justice and could consult with other members of the Supreme Court. I consulted with the Chief Justice of the Supreme Court and through the Chief Justice I sought, as best as possible, the views of the Court. It was left up to her to make that determination as to who she would consult and how she would convey it to me. In sum, in Canada there is a judicial contribution to the process. But the judicial contribution has to be seen as part of the larger advisory process.

JUSTICE MORRIS FISH¹³: Minister Cotler has taken such care in outlining the current procedure so that you'll realize how fortunate I am to have been appointed under the previous system. My question is, Minister Cotler, in the half century prior to my appointment, has there been criticism of even a single appointee?

MR. IRWIN COTLER: As discussed, March 2004 saw the first-

¹³ Canadian Supreme Court.

ever parliamentary hearings in connection with a judicial appointment. Then, as in previous appointment processes, I was not aware of any public criticism of an appointee on either political or ideological grounds. That may be a product of the political culture in Canada. People would have felt it might somehow diminish the integrity of the Court, its perceived excellence, if it were to be politicized. Interestingly, in the appointments in which I was involved, we used a confidentiality agreement. Everyone whom I consulted as Justice Minister would enter into a written confidentiality agreement as to the consultations. There was never any breach of the confidentiality agreement. I am not sure this would have been the case in other political cultures, including that of Israel. Confidentiality was always observed and I think that was an important part of why the process was able to work.

JUDGE RICHARD POSNER¹⁴: You know there's an analogy in the United States. President Carter appointed advisory commissions to advise on appointment of federal court of appeals judges, and they were a fake. Elaborate search processes usually are phony. That is to say, the person who comes out at the other end is the person who would have been picked anyway. President Carter wanted to give the impression of consultation, promote diversity, and bring some laymen into the process. So there were laymen on his commissions, who would ask goofy questions of the candidates. It was part of an obsession with process, an obsession that seems to be part of modern democratic government. I don't think it has any benefits. I think that Frankfurter in 1939 was the first Supreme Court nominee—or probably any federal judicial nominee—who had an oral hearing before the Senate Judiciary Committee. Initially the hearings were perfunctory, but gradually they became more searching, involved a deeper background search, and so on, and some people who lacked professional qualifications, like Harriet Miers, whom you recall President Bush tried to put on the Supreme Court, got excluded because of the enhanced procedures. But I don't think the Supreme Court has improved over what it was before.

JUSTICE ELYAKIM RUBINSTEIN: Since I will become kind of the defender of our system here, with my two colleagues having different views, let me just add as an informational point, that the candidates have been suggested either by the Minister of Justice or by the Chief Justice or by any three members of the committee.

This used to be a secret and also the names of the candidates. Now this has been amended. Now the names are made public thirty days before the committee convenes. So anybody who has anything to say can do so before the appointment. For instance, when I was appointed,

¹⁴ U.S. Court of Appeals for the Seventh Circuit.

there were people who wrote to the committee. The committee sent me the material and asked me to comment on it. The best proof, I think, that the system is not “controlled” by the Justices, although they do have a very important weight, is that Minister Friedmann has been able to appoint *two* practicing lawyers from the private sector to the Court, which was unprecedented, except for during the very beginning of the Court.

PROFESSOR MARCI HAMILTON¹⁵: I wouldn’t exaggerate the notion in the United States that the Justices aren’t involved because a retiring Justice always, unless they’re incompetent, pays a courtesy call on the President to inform him about the retirement before it happens and those conversations don’t infrequently involve the question “is there anyone you would particularly recommend.” Now, in the United States, though having had that conversation, the President is perfectly capable of ignoring every name and there are documented cases where the President has ignored suggestions by a Justice. So, some Justices are at least a voice in the process, but they can be ignored and have been ignored. I think that the big difference between the procedures you’re describing in Israel and the United States is that here interest groups are capable of capturing the appointment process. In the Bush Administration, it was common knowledge that the Federalist Society was the primary vetter of appointees and that one person in the Federalist Society was the primary individual. So I’m going to disagree with Judge Posner. I think that these procedures can be important if for no other reason than you can’t have one entity in Washington controlling the string of names that’s given to the President. The one break in the Bush Administration in which they did not follow the procedure that we all knew was going on otherwise was Harriet Miers, which the President did without consultation with the Federalist Society and she came down. So I think that the American system is not quite as removed from the Justices as it might seem but I also think that it’s perfectly capable of capture. We’ve just been through eight years where it was pretty clear.

JUDGE RICHARD POSNER: There have been times in the United States when a Chief Justice was consulted by or thrust his views on the White House. Chief Justice Taft was very aggressive in trying to make sure that no liberals got on the Supreme Court; and I think Chief Justice Burger must have been the person who suggested Blackmun as an appointment by Nixon. I can’t imagine where else Blackmun’s name would come from. But the idea of picking one’s successors is I think very questionable. So it’s a strength of the United States that we generally don’t have that practice.

¹⁵ Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law.

PROFESSOR DANIEL FRIEDMANN: I want to add my insight as a politician. The main lesson that comes out from our system is that in order to get a seat on the Supreme Court, or even on the lower courts, you should be loyal to the system. The question is not whether you are more qualified, because to everybody in Israel it is clear that anybody who seeks a seat on the Supreme Court must be loyal to a particular ideology. No jurist who was against judicial activism had, at least up to now, even a slight chance to get the seat. So the nomination method in Israel is part of judicial activism and it serves that policy—and we have to change it.

JUSTICE ELYAKIM RUBINSTEIN: What's your alternative?

PROFESSOR DANIEL FRIEDMANN: My alternative is to reduce the number of Supreme Court Justices on the Committee or to add a member of Parliament and also an academician elected by the Presidents of the Israeli universities.

JUSTICE ELYAKIM RUBINSTEIN: Let me then add, that in my book, *Judges of the Country*,¹⁶ which came out back in 1980, I praised our system for selecting judges (including Supreme Court Justices) through a selection committee, which had been introduced, as I mentioned before, via legislation in 1953 as an original Israeli contribution. It is a balanced system, giving the non-political people the majority within the nine-person committee, while the four political members are the minority.¹⁷ I do not think a change is necessary; I still believe that the system is fine.

MR. IRWIN COTLER: Just to comment on what Judge Posner said, namely that the Justices appointed at the end of the reformed process we introduced would have been the same ones appointed without the process. I think that is true.

Simply because there was agitation for the process to be reformed coming from the opposition—at the time, a conservative opposition ideologically somewhat like the Republican ideology in the United States—on the ground that the original process was secretive. Journalists, too, demanded that it be opened up. Academics demanded that it be opened up and the then-Prime Minister, my boss, wanted it opened up. So, reform was inevitable, and while I believe we would have the same two Justices as a result of the original process, the reformed process gave those Justices greater validation.

One footnote: After the appointment of Justice Abella, a journalist came to see me and asked about Justice Abella because, by some in the

¹⁶ ELYAKIM RUBINSTEIN, SHOFTEY ERETZ [JUDGES OF THE COUNTRY] (1980).

¹⁷ Let me also add, that after this Conference was held, three new Justices were appointed by consent from among the district court judges. Only one of them served before as an acting Justice on the Supreme Court, and not all of them may have initially been supported by all of the Justices on the committee. See *supra* note 9.

configuration of constituencies consulted, she was deemed to be somewhat of a controversial figure. The journalist said to me, “I understand that you’re a friend of Justice Abella.” I said, “No, not just a friend, a very good friend. But then again if you want to eliminate all of the people with whom I am friendly, including all my former students, you’d have to exclude a lot of people from the appointment process.” Then he said, “I understand that Justice Abella is Jewish, and you’re Jewish.” He asked whether that had been an issue. I replied that I had considered the matter, specifically in light of our Charter of Rights and Freedoms. Section 15 prohibits discrimination on grounds of religion. I was obliged by the Constitution not to take religion into consideration. At that point he said to me, “Well, I guess I don’t have a story.” I said, “Well, no, you do have a story. Not the story that you came in to write, but you have the whole appointments process.” I should note that, at the outset, he had asked if he could tape the interview. I said yes, and noted that I would be taping it as well. At the end of the exchange I said, “You see that tape? I’m just going to go ahead and have that tape reproduced so that people can understand the exchange that took place.” He said, “You wouldn’t do that, would you?” I said, “Why not? You’ve taped it. You could do it. I can do it. I’m going to put it out.” To sum it up, the person resigned as a journalist within ten days.

JUSTICE MORRIS FISH: My experience has been—in this and in related matters—that one must take care in attempting to implant into one’s own system a procedure that appears to have worked well in another jurisdiction. I found that out early at a conference at NYU where we talked about American judges and Canadian judges. Some of them were elected. And to the American judges, the notion that I was appointed by the Prime Minister and Minister of Justice was equally troublesome. So we have to take great care. I want to say that Minister Cotler is to be commended for both heeding advice and anticipating concerns in modifying the process for appointing Justices to the Supreme Court of Canada. He took a very balanced approach and sought to learn from both the Israeli and American processes without losing sight of the fact that Canada has a different appointment tradition.

B. *Scope of Review*

PROFESSOR MALVINA HALBERSTAM: The next series of questions: Does the Court sit in panels or as a whole? If it sits in panels, how many Justices are on a panel and how are they selected? Can cases be brought directly to the Supreme Court? Does the Court have discretion whether to take a case, and if yes, what are the criteria?

1. Canada

JUSTICE MORRIS FISH: In most cases the full Court sits. However, five Justices constitute a quorum¹⁸ and from time to time, seven or five will sit. A panel of five is rare, and occurs typically in a case of an as of right appeal, for example where there has been a dissent on a question of law in the Court of Appeal in a criminal matter. So in those cases there will sometimes be only five. Sometimes the dissent may flag an important question and although five Justices can hear the appeal, the Chief Justice may instead empanel all nine.

How is the panel selected? Since all nine Justices sit in most cases there is no difficulty. In other cases, the Chief Justice will select the panel. Sometimes, one of the Justices—for one reason or another—will be unable to sit. For example, if the Justice was part of the panel in the Court of Appeal that decided the matter now appealed to the Supreme Court, that Justice cannot sit. That is pursuant to the Supreme Court Act.¹⁹ Any Justice of the Court not already assigned to sit has the right to request that he or she form part of the panel and such a request—however rare—will generally be accommodated by the Chief Justice.

Cases apart from the criminal appeal exception that I mentioned and the Reference jurisdiction, which I will explain in a moment, can come to the Court only with leave of the Court. We receive about 700 applications for leave annually. The leave applications are distributed among three separate panels of three Justices each. The three Justices on that panel will study the file and make a recommendation to the other two members of the panel. However, all Justices have an opportunity to raise an issue concerning leave. I would therefore emphasize that although the final decision is that of the three Justices who are seized of the application, the decision of those three will be circulated to the others who may comment on the panel's provisional decision. On this point, I don't want to get into the technicalities of the process. I would simply say that at a monthly conference of the Court, any Justice who feels that a panel has overlooked an issue of importance, or alternatively, that there are other cases that have recently been decided on the same point, is free to draw that to the panel's attention. Now I'm told that in the United States, Judge Posner, there is a rule of four. Is that correct?

JUDGE RICHARD POSNER: That's correct.

JUSTICE MORRIS FISH: So in our system there is no firm rule of four, but if there is a strong sentiment to hear an appeal, the panel will

¹⁸ Supreme Court Act, R.S.C., ch. S-26, § 25 (1985).

¹⁹ *Id.* § 28(1).

normally accommodate that desire in its vote. The thought is that since the applications are divided on a random basis, it would be unfortunate if a litigant who would have had this one last opportunity to be heard if the application for leave had gone to another panel, is by the rule of chance, excluded.

I mentioned that the Supreme Court of Canada has another jurisdiction and this might seem a bit odd to American ears. Section 53 of the Supreme Court Act provides that the Governor-in-Council—essentially the Cabinet—can refer any question to the Court. Generally, this will take the form of a proposed statute, but this is not always the case. Whether the Court is obliged to pronounce on all aspects of the question is an issue that has been raised before the Court. In fact, the Court has said that it is not bound to do so.²⁰ Notably, this was articulated in the *Same-Sex Marriage Reference*²¹ and the *Quebec Secession Reference*.²² In fact, the very power of reference itself was held to be constitutionally permissible in the *Reference re References* in 1912.²³

What are the criteria applied in granting leave? The criteria are set out in Section 43 of the Supreme Court Act. The question is whether the application for leave raises an issue of public importance or involves an issue which is otherwise important. The distinction between the two is that a question may not be of truly national importance, but it may be quite important in a particular field of law. Moreover, the statute has a wonderful concluding catch-all phrase that states that if the Court for any purpose deems that the matter is one which warrants a decision by the Supreme Court of Canada, we are empowered by the statute to take it.

MINISTER MICHAEL EITAN: How many cases do you consider each year?

JUSTICE MORRIS FISH: We hear generally about the same number as the Supreme Court of the United States, perhaps a few more. Approximately eighty a year.

²⁰ See, e.g., *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 768 (Can.), available at <http://csc.lexum.umontreal.ca/en/1981/1981scr1-753/1981scr1-753.html>.

²¹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.), available at <http://csc.lexum.umontreal.ca/en/2004/2004scc79/2004scc79.pdf>.

²² *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.), available at <http://csc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html>.

²³ *Reference re References by Governor-General in Council*, [1910] 43 S.C.R. 536, *aff'd*, [1912] A.C. 571 (Can.).

2. The United States

PROFESSOR ELIZABETH DEFEIS²⁴: The answer to the question of whether the Supreme Court sits in panels in the United States is quite simply, “no.” The Court does not sit in panels, but it does require a minimum of six Justices in order to hear oral arguments and to decide a case. Often this quorum is not met because of illnesses of Justices or because of conflicts of interest of Justices.

One recent case that came up to the U.S. Supreme Court, and was greatly anticipated by international lawyers, was brought under the Alien Tort Claims Act. It involved a claim based upon aiding and abetting the apartheid regime in South Africa, and the question was whether or not that case could be decided by the federal district court.²⁵ Ultimately, the case went to the Supreme Court, but the Court was unable to decide the case. Because the litigation involved many corporations as parties, a number of Justices recused themselves, and the Court did not have a quorum. So we are still waiting for a proper case to come to the Court in order for the Court to decide the question.

Does the Court have discretion whether to take a case? Since 1988, the Court has almost unfettered authority with respect to the kinds of cases that it will take. Previously, under mandatory jurisdiction, the Court was required to take cases in certain categories, for example, when a state court held a federal law invalid, or a state law valid under a challenge to federal law. Congress revised the rules in 1988, so that now, with few exceptions, the only route to the Supreme Court is by petition for certiorari. There are about 10,000 cases per year that come to the Court through this method, and the Court must decide whether or not it will grant certiorari. Indeed, it takes only about 100 cases a year out of that great number. The criteria for the Court’s current method was stated quite well by Justice Rehnquist: The case must first raise a federal question to which different courts had given conflicting answers, or cases in which an appellate court decided a case in conflict with governing Supreme Court precedent.²⁶ Of course, one must satisfy the Court’s jurisdictional requirements, for example, that the parties have standing. Then the Court has wide discretion with respect to deciding which cases it will accept through the certiorari route, usually cases

²⁴ Professor of Law and Former Dean, Seton Hall University School of Law.

²⁵ *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (denying cert because the Court lacked a quorum, 28 U.S.C. § 1 (2006)); since a majority of the qualified Justices were of the opinion that the case could not be heard, affirming the judgment under 28 U.S.C. § 2109 (2006), which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as an affirmance by an equally divided Court).

²⁶ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 224-38 (2001).

which it deems most important and should be authoritatively decided by the highest Court.

MR. NATHAN LEWIN: Back in the days when Judge Posner and I clerked for Justices on the Supreme Court, in the 1960s, the Supreme Court decided approximately 150 cases a term. Now there are twice as many law clerks per Justice but they decide only half as many cases. They decide seventy-five cases per term.

JUSTICE MORRIS FISH: Are the opinions three times as long?

MR. NATHAN LEWIN: The writing may be substantially longer. But in those days, each Chamber—both the law clerk and the Justice—would read the petitions for certiorari and review them themselves. Now it is an open secret that there is a “cert pool” so that one memorandum is written for at least seven of the Justices and the Justices themselves do not read the petitions. Justice Alito, I’m told, has now withdrawn from the cert pool. Justice Stevens was never in the cert pool, but all the other Justices rely on the summary that’s written by one law clerk of the many law clerks that the Supreme Court has.

PROFESSOR MARCI HAMILTON: Actually it has been broken down to two. There are two cert pools in the Court right now out of those seven Justices. I clerked from 1989-1990, and at that time we were writing memos for four Justices and we had about 7000 cases coming in. There are 13,000 cases coming into the Court right now and the Court is taking about seventy-five. So a lot of the petitions are just scanned and thrown aside.

JUDGE RICHARD POSNER: It is an extraordinary paradox. Usually you think that if the inputs into some production process increase in quantity and quality, the output will increase in quantity or quality. So as Mr. Lewin said, in the olden days, the 1960s, Supreme Court Justices had only two law clerks, most of whom came directly from law school; and now they each have four or five law clerks who have clerked for at least a year for another judge and have been more carefully screened (in part because there is more competition to become a Supreme Court law clerk) and often have more extensive experience. And the cert pool has economized on the time of law clerks. Yet despite all that, the number of cases the Court decides has greatly diminished. The opinions are somewhat longer, they’re more learned, they’re more polished in a professional sort of way, but I don’t think anyone really thinks the Supreme Court is better than it was forty years ago. It’s different. If you’re a conservative, you like it more now; if you’re a liberal, you don’t. But it’s not improved. It seems that in government you can keep adding procedures, personnel, and so on, and yet you don’t actually get any additional social product.

3. Israel

JUSTICE ELYAKIM RUBINSTEIN: I envy the U.S. and the Canadian systems. Eighty cases a year is great. We in the Israeli Supreme Court are like latter day slaves. Except for not actually having a chain on my leg, my colleagues and I are basically in that situation. Last year we finished with over 11,000 cases. We are at this point twelve Justices. We could be up to fifteen, but there was haggling and controversy and then elections, so there were no appointments in the last year, year-and-a-half.²⁷ We sit basically in panels of three, which is the regular rule. That is in criminal, civil, or administrative law cases. In most of the cases we do not have the option of not taking them because they are appeals from the district courts on criminal or civil or administrative law cases which started there, and which we have to take. There are cases heard in a one-person panel, mainly detentions, injunctions, and leave requests. We have Justices on Call, two each month, and they take many cases which are detentions, injunctions, or stays, and a major part of their work is a one-person panel. Since legislation passed back in 1996, every detention case can be brought by right, not by leave, to the Supreme Court. Of course, not all of them are brought, but many are. So, for instance, I was Justice on Call in December 2008 and then in March 2009; for the two months together, I had to conduct over 150 hearings in detention cases. Many of them shouldn't be on the docket of the Supreme Court, but they are there by law. That is besides the regular workload done in the panels of three. We sit in bigger panels in matters of special importance, usually the three original Justices and whoever has been added. The composition of the larger panel is decided by the President of the Court or her deputy. So in such cases, the panel could be enlarged to five, seven, nine, or even eleven or thirteen if it's a constitutional case. Constitutional cases, in the last fourteen years, have always been decided by large panels. I will come to them later.

We do have partial discretion in deciding whether to take certain cases—it is very limited. That is in the request for leave if a case has already gone through the two levels of law courts—magistrate and district courts. But if it began in the district court, we don't have the option to deny a hearing. And, unlike the American tradition, for instance, where the Supreme Court writes “cert denied” without further explanation, in our system the tradition is that you explain why you do not grant leave. This decision is not a precedent, but many lawyers use it in later cases as if it were.

²⁷ Three more justices were appointed in October 2009.

The leave request is dealt with by one Justice. If the Justice thinks it is worth bringing to a hearing, he will refer it to a panel. I myself deal with many leave requests as a third layer in civil cases, and most of them are rejected but with an explanation.

The most prominent issues in the public eye are of the Supreme Court sitting as the High Court of Justice, known as *Bagatz* (*Beit Mishpat Gavo'ha Le'Tzedek*). These are administrative law issues of original jurisdiction coming to the Supreme Court. Over the years, the request for standing or *locus standi* was abolished by judicial decisions. When I was in law school, in the late 1960s—ancient history—we were taught that you are supposed to show standing when you want to bring a case to the High Court of Justice. Over the years, for various reasons, including the wish to give the public better access to the Court in administrative matters, and also to provide access to Palestinians from the territories administered by Israel, the Court has basically abolished the “standing” requirement.

The High Court of Justice cases come first to the Justice on Call. He or she will decide whether to request—and usually does request—a response from the relevant government agency, and they respond. Sometimes it's urgent, certainly in human rights issues. Urgent cases could be heard even on the same day or the next day. Sometimes I'm called by the Court registrar, asking if I can sit at six in the afternoon that very day on a panel. In some cases, though, we would decide that there is no justification for a hearing and we would dismiss the case by a three Justices panel written decision. The “regular” cases are brought to a hearing.

The Court has been criticized for judicial activism. Let me say that having served, inter alia, as attorney general, government secretary, and legal adviser to two ministries, that in having been for many years in government positions, I expressed my views on it in former incarnations and I can say it now also as a Justice of the Court. From the public point of view of better government, if you balance between the huge volume of cases which the Court took and decided on one hand, and the controversial issues for which it is criticized on the other hand, I have no doubt that the benefit to the public over the years by the Court is by far greater than the controversy on some issues which sometimes I myself would have thought could be approached otherwise. To sum up: The Court's work is indeed very heavy, and it could be reduced by legislation. But it is not the “judicial activism” which creates the problem. And indeed, many of the Court's critics are themselves submitting High Court petitions to it time and again. Finally, in response to Mr. Eitan: I have been a supporter—in fact, an enthusiast—for many years of the existing appointments system. In fact, as I mentioned before, I was one of the first to write on it in 1980 in *Judges*

of the Country,²⁸ the first book written—I believe—on the history of our Court.

4. Direct Review by the High Court: Israel's Unique Process

PROFESSOR MALVINA HALBERSTAM: Have the cases brought to the High Court ever been heard by another court?

JUSTICE ELYAKIM RUBINSTEIN: Basically, the answer is no, definitely as far as courts from the general system, whose decisions are subject to appeal. The High Court of Justice cases are original jurisdiction and they're brought right to the Supreme Court. There are some administrative law cases which go first to the district courts in their administrative capacity. But the basic High Court of Justice original jurisdiction is widely used. One of the Justices once wrote that a new custom has emerged—somebody reads a newspaper article and says “oh, come on, let's go up to Zion and I'll put in a petition.” But many cases are of importance, and render a great service to the public, to which I can attest—as I mentioned before—as a former government civil servant. I should add, though, that some of the High Court petitions concern decisions of religious courts or labor courts, where there is no appeal to the Supreme Court. The judicial policy of intervention in these cases is very restrained.

PROFESSOR MALVINA HALBERSTAM: If I'm correct, neither the U.S. Supreme Court nor the Canadian Supreme Court has that process where people can come directly and petition the Court.

MR. NATHAN LEWIN: There are original cases in the U.S. Supreme Court from ambassadors and most importantly states suing other states. When that happens, they get a special master who essentially functions as a district court judge to have a trial.

JUSTICE MORRIS FISH: But am I correct in assuming that the *Bagatz* process involves a lawsuit against the government or some government agency?

JUSTICE ELYAKIM RUBINSTEIN: It is a private party against the government. The petitioners are arguing that some right was violated by the government or one of its agencies.

PROFESSOR MALVINA HALBERSTAM: I just want to emphasize, if I understand it correctly, that Israel is unique in this respect, that anybody who thinks that anything was done wrong by the government can simply go to the Supreme Court, bring a case and have it heard at that time.

JUSTICE ELYAKIM RUBINSTEIN: Yes. I will just give you an

²⁸ RUBINSTEIN, *supra* note 16.

example. Recently, during the Gaza operation (in December 2008-January 2009), there were four petitions to the Court relating to the military operations. By chance I sat on all four of them (the panel is randomly decided). Like in other cases, there was a dialogue in the courtroom between the government and the Court about whether some of the government modes of behavior on a certain issue would be modified or improved. Those petitions related to humanitarian supplies, medical assistance, access to the media, and even the conduct of elections in one of the Israeli towns adjacent to the Gaza area. So it's common practice.

JUSTICE MORRIS FISH: Just let me ask again who determines the size and composition of the panels. When there's a petition for rehearing from three members, and as I understand it goes up to five or seven or nine or eleven, who makes the decision as to who are the members of the larger panel?

JUSTICE ELYAKIM RUBINSTEIN: In that rare case, it's either the President or the Deputy. It's not random. The three original Justices would be on and the additional Justices usually would be designated by seniority, but the President or her Deputy would still have discretion. In some rare cases it would be a larger panel from the beginning.

PROFESSOR DANIEL FRIEDMANN: The problems that the Supreme Court faces now result from the fact that originally the Israeli Supreme Court was thought to be simply a Court of Appeal, and this was its main function. There was the additional function inherited from the British mandate of receiving direct applications against the administration, but their number was relatively small. However, the Court's policy of expanding its jurisdiction and abolishing the standing requirement has greatly increased the number of cases that the Supreme Court is required to deal with. In other words, the Court developed rules that greatly increase its load and it now complains about the burden. By the way, the Minister of Justice is empowered to transfer these kinds of direct applications to the district court sitting as an administrative court and we do it usually only if the Supreme Court asks us to do so. Yet, the Supreme Court wants to keep those cases that are in the media, that attract attention and are important. It wants to keep this original jurisdiction and we allow it to keep it. The burden that ensues is the result of the Court's policy.

A related matter is that the Israeli Supreme Court—which originally was and still is a Court of Appeal—is trying to turn itself into a constitutional court, and they look at the U.S. Supreme Court and the Canadian Supreme Court with great envy and say well, we want to sit as a panel of nine judges, we want to be able to select our cases and no longer remain a Court of Appeal. That is what they want and they have

been lobbying for it for a long time. But I think that on the political level people see it differently and consider that one way to deal with the burden is to appoint more Justices to the Supreme Court; but the Justices on the Court object to it. They don't want it. I think that Minister Eitan when he chaired the committee in Parliament wanted to increase the number of Supreme Court Justices. President Barak resisted this very strongly. He said no, we don't want more Justices; we want less work. Eventually they reached a compromise of fifteen Justices, which was already an increase in the number of Justices that had been on the Court before. We started with five Justices when the State of Israel was established, then the number was increased to nine. Now we have fifteen Justices and I think Parliament would be willing to increase the number further. The Court resists this strongly. The current Justices do not want to have a Supreme Court based on the continental model where you have many more Justices. They have the American model in mind, and that's one of the conflicts that we have.

Justice Rubinstein spoke about a Justice on Call. I look at this as a "Justice without control." What happens if the Court accepts thousands of applications by applicants who have no standing and if everything is justiciable? What kind of litigation is it and what is the effect of this kind of litigation? This led to the situation that was described by Justice Cheshin in the following words:

In an exaggerated way we can say that nowadays [when] a person takes into his hands a newspaper . . . his eyes glance over the news until his eye catches a particular item. Having found what he found he calls upon his friends: Let us rise and go up to Zion—to the Supreme Court. He speaks and acts. An application [is submitted] as if written in the course of the trip [to Jerusalem] . . .²⁹

In the lines that follow, Justice Cheshin protests against such applications that lack sufficient facts to sustain them. But applications based mainly on facts publicized by the media are regularly submitted to the Supreme Court and the policy adopted by the Court actually encourages the practice. No costs are imposed on the applicant who files a groundless petition in the "public interest." From the applicant's point of view this is a win-win situation. Even if the petition is dismissed it usually gets publicity—which more than compensates him for his trouble.

Moreover, the Court gets the application and sometimes even if it lacks sufficient basis the Court calls the government, as Justice Rubinstein mentioned; the Court thus opens a dialogue with the government. But this kind of "dialogue" is backed by a potential order of the Court. In reality, the Court intervenes in the discretion of the

²⁹ HCJ 2148/94 *Gelbart v. Chairman of the Investigating Committee for the Examination of the Massacre in Hebron* [1994] IsrSC 48(3) 573, 600 (translation from Hebrew).

executive and in the way the government is governing the country. The Court is replacing the executive. So it is not only a technical issue. It is a process that upsets the checks and balances between the branches of government.

II. THE BASIS OF AND LIMITATIONS ON JUDICIAL REVIEW

PROFESSOR MALVINA HALBERSTAM: The next questions concern the basis of and limitations on judicial review. First, is judicial review based on the constitution, on legislation, or on a decision of the Court? Second, are there limitations, such as standing, the political question doctrine, or others?

A. *The United States*

PROFESSOR MARCI HAMILTON: There's a combination of bases in the United States. There's jurisdiction stated explicitly in Article III of the Constitution, but there's also, of course, *Marbury v. Madison*, which is the Supreme Court decision that states that the Supreme Court will have the last word on interpreting constitutional provisions.³⁰ Not that it will be the only body but it will have the last word in interpreting constitutional provisions, which is, of course, a rather large grab for power which has turned out to be pretty successful for the Court. It is the last word in the United States even, for example, when the question is who is the President of the United States.³¹ We have a number of limitations that are placed on cases. Some of them come out of what's called the case or controversy requirement. The Supreme Court and the federal courts are not permitted to issue advisory opinions. There must be both a dispute and there must be individuals who have standing. They can't file just generalized grievances. They must show they have some kind of interest at stake. They must show that the Court can solve the problem; and there are both constitutional and prudential reasons that keep cases out of federal court; and then there is a requirement of ripeness. The issue must be ready for the Court to hear. The Courts will not take cases, in the federal system at least, until the dispute is sufficiently ripe or well developed so that the Court can decide it based on facts as opposed to just bare theory.

Then there are limits that are related to keeping the dual sovereignty of the federal government and the state government. One is

³⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

³¹ *Bush v. Gore*, 531 U.S. 98 (2000).

that federal courts will not decide issues solely based on state law as a general matter and that means that the states must be the deciders of most state law issues. That means the states continue to have the primary role in the interpretation of state law. Federal courts will defer to state courts on the interpretation of state law. So, if the U.S. Supreme Court gets a case in which there is a pivotal state law question, the Court will send it back to the state supreme court to tell it what the state law means and then it will decide the federal aspects of the law. Additionally, there's the political question doctrine. For example, the U.S. Constitution guarantees to the states a republican form of government. This was just another element of the U.S. Constitution that rejected direct democracy. The theory is that there are not supposed to be direct democracies at either the state or federal level, but the Supreme Court has refused to hear those cases saying they're political questions about the order of government that a state chooses and the Court will not get involved. The result has been that we have had a rather widespread development of direct democracy in certain states.

JUDGE RICHARD POSNER: Let me register a minor disagreement with Professor Hamilton. I don't think it's correct that *Marbury v. Madison* represented a power grab, a mere *assertion* of the power of judicial review. That makes Chief Justice Marshall sound like Chief Justice Barak. The Constitution says that the Constitution and laws of the United States are the supreme law of the land, and that means that the Constitution is law and it was already well established in England and in the Colonies that if you have two conflicting laws and one is hierarchically superior to the other, the higher preempts the lower law. So if, for example, an act of Parliament was inconsistent with a local law in England, then the local law was invalid; or if a Colonial law was inconsistent with an act of Parliament, that local law was invalid. Thus the Colonial courts and the English courts already were invalidating laws. All this is explained in a great, recent book by Philip Hamburger, a professor at Columbia Law School.³² What obscures recognition of the point is that in the traditional British system, acts of Parliament were regarded as part of the British Constitution. The British Constitution isn't a single document. It's a collection. It includes laws enacted by Parliament, along with the Magna Carta, certain customs, and certain judicial decisions. Because acts of Parliament were of constitutional dignity, the British courts could not invalidate them. But the act of Parliament as a constitutional undertaking corresponds to the U.S. Constitution. The U.S. Constitution can be used to invalidate other laws, but what's interesting and emphasized by Professor Hamilton, is that the judiciary created by

³² PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); see also Richard A. Posner, *Modesty and Power*, *NEW REPUBLIC*, Dec. 31, 2008, at 38 (reviewing Hamburger's book).

Article III of the Constitution is modeled very closely on the English courts of the eighteenth century, and those courts conceived their function as procedurally rather narrow. They just entertained cases. They didn't have "abstract review." They thus weren't anything like the modern Israeli Supreme Court. While the U.S. Supreme Court has a secure power to invalidate federal statutes as well as all sorts of administrative and executive acts and state statutes and so on, there must be something quite like a conventional litigation in order to empower the Supreme Court to exercise its power of invalidation.

PROFESSOR MARCI HAMILTON: With respect to Judge Posner's point, I don't think it's inconsistent to say that the Supreme Court was engaging in a grab for power. Whether it was history or not, the U.S. Constitution did not explicitly give the power to the Court and the Court took it.

B. *Canada*

MR. IRWIN COTLER: In Canada, the power of judicial review wasn't solicited by the courts but imposed upon them—specifically, in its modern iteration, by two provisions in our Constitution Act. Section 52 of the Act provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."³³ In addition, there is a provision of the Charter of Rights—one element of our Constitution and the equivalent of the Bill of Rights—namely Section 24, which provides that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."³⁴ Standing under Section 24 is thereby limited to a person whose rights have been infringed.

PROFESSOR MALVINA HALBERSTAM: They're all subject to a standing requirement?

MR. IRWIN COTLER: Yes, but not Section 52. We have developed a public interest doctrine, which means that when some organization or body can demonstrate that there is a serious question as to the validity of a law, that the organization is affected by or has a legitimate interest in the law, and, furthermore, that the controversy would not otherwise come before the court in the form of an individual's litigation, then the court can assume jurisdiction to hear it.

³³ Constitution Act, 1982, § 52(1), being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

³⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 24(1), being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

The constitutionalization of judicial review in terms of rights protection began with the Charter of Rights and Freedoms. It had existed previously under the rubric of federalism, the allocation of power between the federal government and the provinces. That was what might be called the powers process. The advent of the Charter gave us the rights process, and that's when rights protection became constitutionalized. In that vein, we just had a very important decision that came down on the issue of political questions in a case in which I was involved, the *Khadr* case.³⁵

In *Khadr*, issues of justiciability and standing were dramatically enhanced by the constitutionalization of rights protection under the Charter. Ironically, in Israel, even without constitutionalization, you had the notion that everything was justiciable. We in Canada, even with constitutionalization, did not have the notion that everything is justiciable. Another example of the development of this notion in Canada was the issue of same-sex marriage, which could not have arisen before the Charter existed. It would not have been seen to be justiciable, nor would anyone have had standing to bring the matter before the courts. Because of the constitutionalization of rights protection with the Charter of Rights and Freedoms, it became justiciable as an issue and opened up the question of standing. But I'll deal with this later.³⁶

JUSTICE MORRIS FISH: Just a note regarding justiciability: Canada has largely rejected the political question doctrine. This approach provides that the courts should choose not to entertain certain disputes whose subject matter is better resolved through the political process. Our Court's most explicit discussion of the doctrine is found in Justice Wilson's concurrence in *Operation Dismantle*.³⁷ There, Justice Wilson held that it was inappropriate for the Court to decline jurisdiction over matters with political consequences, so long as the question raised before the Court is a genuinely legal one.

The doctrine still has some life in Canadian jurisprudence, however. The Court will still refuse to hear cases that do not have a cognizable legal content, or cases that involve disputes that Parliament intended to be resolved through the political process. What Canadian courts generally will not do, however, is to decline to hear a case for the prudential reason that resolving the legal issues at stake would have political consequences.

A case I mentioned earlier, the *Secession Reference*,³⁸ touched on

³⁵ Canada (Justice) v. Khadr, [2008] 2 S.C.R. 125 (Can.), available at <http://csc.lexum.umontreal.ca/en/2008/2008scc28/2008scc28.html>.

³⁶ See *infra* Part IV.C.

³⁷ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (Can.).

³⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

the political question issue. In that case, interveners urged the Court not to answer the questions posed on the ground that they were nonjusticiable political questions. The Court determined that, in general, reference questions *were* justiciable unless answering them “would take the Court beyond its own assessment of its proper role in the constitutional framework” or “if the Court could not give an answer that lies within its area of expertise: the interpretation of law.”³⁹ The Court noted that the issues raised on the reference combined difficult legal and constitutional questions with complex political questions. The Court determined that it was appropriate for the Court to address the legal issues, which did no more than set the framework within which political decisions were to be taken.

In the recent *Same-Sex Marriage Reference*,⁴⁰ the Court was thought by some to have departed from the rule that it will decide questions that have sufficient legal content, irrespective of prudential considerations.

The fourth question posed in the reference was whether the old law defining marriage as between people of the opposite sex was unconstitutional. The Court declined to answer that question because of the unique circumstances in which it was submitted to the Court. In particular, the Court pointed to (1) the fact that the government planned to proceed with the proposed equal marriage legislation irrespective of the Court’s decision and (2) the fact that the reference question was identical to the issue that would have been raised had the government chosen to appeal the various decisions of the courts of appeal striking down the old definition of marriage. Moreover, prior to the arrival of the reference at the Supreme Court, four provincial courts of appeal (Yukon, Manitoba, Nova Scotia, and Saskatchewan) had already ruled that the opposite-sex requirement for marriage was unconstitutional.⁴¹

C. *Israel*

MINISTER MICHAEL EITAN: The basis of judicial review is legislation. In 1995, the Supreme Court held in the *United Mizrahi* case⁴² that the *Knesset*, in enacting the Basic Law of Human Dignity and Liberty⁴³ three years earlier, established a formal constitution for the State of Israel. By declaring that, the Supreme Court laid the

³⁹ *Id.*

⁴⁰ Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

⁴¹ See Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, at para. 66 (Can.).

⁴² CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. [1995] IsrSC 49(4) 221, available at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.htm.

⁴³ Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

foundations for its prerogative to conduct substantive judicial review of *Knesset* legislation. I would like to refer to what Justice Barak said a few months after the adoption of this legislation. He remarked, “the new legislation passed by the *Knesset* limits the *Knesset* and subordinates it to the fundamental principles. From this point on the Court cannot only interpret a statute that is contrary to the fundamental principles, it can also nullify it.”⁴⁴ In doing so, Barak says, “the people have given its judges a powerful tool. Now that the people have given us tools, we shall do the work.”⁴⁵ I’m sorry; I was in the *Knesset* in 1992. I clashed with the Chairman of the Constitution, Law and Justice Committee when he brought the law to the final reading and I can testify personally that the word “constitution” was not mentioned by anyone of the members of the *Knesset*. Ninety-five percent of them never thought that they had a constitutional power. It’s the first time I hear that a country can get a constitution retroactively. At the time of the legislation, the members of the *Knesset* did not know that they were adopting a constitution for the State of Israel, nor did anyone else. How do I know? In the newspapers the day after the enactment of the law, no one mentioned it. It came to our knowledge that we made the constitution a few months later, when Barak said the words I quoted, in a speech and later in an article. But, no one contemplated it at the time the law was enacted. So, what is the basis for the declaration of the constitution? In one judgment the Supreme Court combined two errors: declaring that we have a constitution and that from this day on the Court is also going to have the jurisdiction to nullify laws of the Israeli *Knesset*. I’m sure this is one of the brilliant maneuvers of judicial activism.

DR. JANICE SOKOLOVSKY⁴⁶: My comments refer to the easy access of political non-governmental organizations (NGOs) to the Israeli Supreme Court via the *Bagatz* procedure, in which the Court sits as a High Court of Justice. The Judiciary Statute grants the Court very broad powers in these cases, in particular the power to order any public official “to do or refrain from doing any act [with]in the lawful exercise of [his] functions” for the sake of justice.⁴⁷ Access to the *Bagatz* is today completely open. Since there is no need for standing, anyone who sees injustice in any act by any public official, whether or not he personally is affected by that act, can file a petition for redress.

Political advocacy NGOs file *Bagatz* petitions challenging critical

⁴⁴ Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL [LAW & GOV'T] 9, 34 (1992) (Isr.) (Hebrew).

⁴⁵ *Id.*

⁴⁶ Dr. Sokolovsky is a member of the bar both in the United States and in Israel, where she has lived for the past twenty-three years.

⁴⁷ Basic Law: The Judiciary, § 15(d)(2), 1984, S.H. 78.

policy or political issues that are not to their liking. Should they have standing to file *Bagatzim*? There are now about twenty NGOs that regularly file such actions. They also lobby, prepare well-publicized reports on political issues, and receive permits for highly controversial demonstrations on political issues. Some are not even registered in Israel, and many are heavily funded by foreign governments, particularly European governments. In the United States, under the Foreign Agents Registration Act,⁴⁸ such foreign-funded organizations would be required to register and identify themselves as agents of the funding foreign governments with respect to any political activity in which they engage, such as lobbying, or on any material they disseminate. And of course, they would not be able to file political petitions in the U.S. Supreme Court without standing.

PROFESSOR SHLOMO SLONIM⁴⁹: I sympathize with Minister Eitan's position that the Israeli Supreme Court took the law of Human Dignity and Liberty and ran away with it and established judicial review, but in a certain sense it was an open invitation. In speaking to people who were involved in the legislation, they seem to have recognized at the time that there would be some form of judicial review, perhaps not as extensive, not as broad as what we have today, but it was very clear that the Court was going to do something. However, having said that, we must also recognize that there are serious problems about the basis of judicial review in Israel. Where did the *Knesset* obtain the authority to pass a law, which is considered to be a Basic Law? In the *United Mizrahi* case, there were two opinions that were expressed, one by Chief Justice Shamgar and the other by Justice Barak. Shamgar held that the *Knesset* was sovereign and had power to create a Basic Law of this nature. Justice Barak said that the original *Knesset* was a constituent assembly empowered to formulate a constitution, that this power of being a constituent assembly was passed on to each of the subsequent *Knessets*, and that they were, therefore, able to adopt the Basic Laws.

Both of these theses are problematic. The most important problem is that the public has no say in the matter. Bear in mind that this law on Human Dignity and Liberty was adopted not by a majority of the *Knesset*, but by a majority of those present. Out of the entire *Knesset*, composed of 120 members, 32 voted in favor of the law—so there was no true majority that supported this. It is, I think, incumbent on any fundamental change in a constitution that the public be consulted. It's interesting that in the United States, James Madison, known as the father of the Constitution, maintained that all the state constitutions

⁴⁸ 22 U.S.C. §§ 611-621 (2006).

⁴⁹ James G. McDonald Professor (Emeritus) of American History, The Hebrew University of Jerusalem.

were in fact invalid at that time when they were adopted in 1776 and subsequently since they were never presented to the public for ratification. It was only subsequently, when they received ratification by the public, that they were in a certain sense in his eyes validated. That is what is unique about the Constitution and the Bill of Rights of the United States, that the Constitution was ratified by the minimal number of nine states, as stipulated in the Constitution, and the Bill of Rights was adopted and ratified by a two-thirds majority of the state legislatures; so you have the involvement of the people in the process of endorsing a Constitution in the United States, something which, unfortunately, has been entirely lacking in the Israeli experience. In any thought of confirming judicial review and in making it a permanent part of the Israeli Constitution, it would be desirable if some consultation with the general populace would be undertaken.

JUSTICE ELYAKIM RUBINSTEIN: I was quite—I wouldn't say surprised—but saddened by what Minister Eitan was saying, because whoever reads the text of the two Basic Laws that have been the basis of the Israeli equivalent of *Marbury v. Madison*, called *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*,⁵⁰ decided in 1995, can identify that they include a constitutional power of judicial review, even if it is not stated explicitly, just as happened with the U.S. Constitution. The text, in my view, is clear. You just have to read the limitation clause. On June 13, 1950, two years after our independence, the *Knesset* decided that instead of promulgating a full-fledged constitution, we should enact Basic Laws, that would finally be incorporated into a constitution. The first nine Basic Laws were mainly on government branches—legislative, executive, judicial—as well as on Jerusalem as our capital. The last two, enacted in 1992, are Human Dignity and Liberty and the Freedom of Occupation.⁵¹ The limitation clause says, “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.”⁵² What does that mean in simple words for any jurist, with all due respect to the *Knesset*? It means that laws could be examined through the lenses of the limitation clause. I would have definitely preferred that what Professor Slonim said, that the constitutional laws should be accepted in a ceremonial way, would have materialized. I agree with him on that. But this is not what happened, and the two Basic Laws on human and civil rights were accepted. What do you do? Obviously, they must be applied and interpreted. Who interprets any law? This is the role of the

⁵⁰ CA 6821/93 *United Mizrahi Bank*.

⁵¹ Basic Law: Human Dignity and Liberty, 1992, S.H. 150; Basic Law: Freedom of Occupation, 1992 S.H. 114.

⁵² Basic Law: Human Dignity and Liberty § 8, 1992, S.H. 150.

Court. And if a law affects rights and is not in conformity with the Basic Laws, it cannot stand. Here is the foundation of judicial review. The *Knesset* wrote it into a legal text, a constitutional law, a Basic Law. Who is going to interpret it? It's the court of law. While I can argue with this or that decision of President Barak, a great jurist, I would never agree with what Judge Posner said about usurpation. Judicial review was accepted in the *United Mizrahi* case by a nine-Justice panel, including retiring President Shamgar, who is not known necessarily as an "activist," and President Barak, who was just coming in as President.

My bottom line is simple: The *Knesset* may not have thought of it in constitutional terms the way it should have, but what it gave us, what it produced, is a constitutional text. And when it produced a constitutional text, which clearly refers to the examination of laws per their content, judicial review, which has had origins even before, was definitely proclaimed—not by the Court, but by the *Knesset*.

PROFESSOR MALVINA HALBERSTAM: If I understood Professor Slonim, he was saying the *Knesset* didn't have the authority to create constitutional values. You're saying the *Knesset* did?

MINISTER MICHAEL EITAN: I'm an eye witness that none of the *Knesset* members exercised any constitutional power. There was one member who was shouting that it is usurpation. "You take power illegitimately from the *Knesset* and transfer it to the Supreme Court." Uriel Linn—then-Chairman of the Constitution, Law and Justice Committee and the member who brought the bill—replied, "We are not transferring the balance of power to the Supreme Court. No constitutional authority is established. Nor does it establish a special constitutional court that is given special power to newly filed statutes." And later on the Chairman, to convince the members of the *Knesset*, said again, "Power will not be transferred to the Court. The power will remain in this House."⁵³ You have to understand that the Basic Law until that point was an ordinary law, it had no superiority. People looked at this as a declaration, not as something substantive. That's why the majority of the *Knesset* members didn't bother to come to debate or vote on it.

The Chairman of the Constitution, Law and Justice Committee welcomed the law and voted for it at the second and third (final) readings, even though he objected to the establishment of a constitutional court because he thought that doing so would give far too much power to a small group of judges whose interpretation would invalidate statutes, and he convinced the member of the *Knesset* that this statute would not do that. That's what he said a few minutes before the vote. Three years later in his opinion in the *United Mizrahi* case,

⁵³ These statements are from debates during Plenum No. 398 of the 12th *Knesset*, as reported by Minister Michael Eitan.

Justice Barak described these comments as supporting the idea that “the Basic Law is part of the State constitution.”⁵⁴ What is this?

III. LIMITATIONS OF JUDICIAL REVIEW

PROFESSOR MALVINA HALBERSTAM: What I would like to do now is discuss cases that panel members think should not have been decided by the Court or in which the Court’s assertion of jurisdiction was particularly controversial. This is, of course, especially true in Israel, but there may be other cases that panelists want to raise in that connection for the United States and Canada as well. Judge Posner, did you want to discuss some cases? You raised some in an article that you wrote regarding the Israeli Supreme Court which you thought went beyond what courts normally decide or should decide.

A. *Cases in the United States*

JUDGE RICHARD POSNER: Sure, I’ll say a few words, except that I do want to make clear that I’m not an expert on the Israeli political or judicial systems, and I’m reluctant to talk about foreign judiciaries about which I know very little. Justice Barak—in a book which I reviewed critically⁵⁵—did not purport to be speaking just about Israel. He was laying down what he considered to be universal principles of proper adjudication and the proper scope of judicial power, and I disagree with his conception as a general matter. Maybe it’s something Israel needs, although I’m very impressed by the statements by Mr. Eitan and Professors Slonim and Friedmann, criticizing those views in the Israeli context. But I don’t like to say that a specific Israeli decision is wrong, because it arises in a political context and a juridical context that is pretty alien to my understanding.

One could divide Professor Halberstam’s question into two. There’s a question concerning cases in which the Supreme Court has exceeded its jurisdiction, in the sense of not honoring these principles of standing, ripeness, and so on that are basic to the Anglo-American judicial tradition. And then there are cases that are just mistaken decisions or reckless decisions.

PROFESSOR MALVINA HALBERSTAM: You mean substantively mistaken?

⁵⁴ CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. [1995] IsrSC 49(4) 221.

⁵⁵ Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53 (reviewing AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006)).

JUDGE RICHARD POSNER: Substantively mistaken, but I take it you're not interested in those.

PROFESSOR MALVINA HALBERSTAM: No, but I think that there may be some cases, even beyond the standing and political question doctrine, which are just beyond what a court should do.

JUDGE RICHARD POSNER: One example would be the standing issue that was presented in *Roe v. Wade*⁵⁶ because human beings do not have the same gestation period as elephants. It's really hard to litigate an abortion case to judgment in nine months, or in six months if you discovered you were pregnant after three months. So the Supreme Court created a doctrine that if a case is capable of repetition but evades review because the individual case will become moot before it can be decided, still there is standing. So the woman who seeks an abortion and might become pregnant in the future and want another one is permitted to litigate her right to abort the first pregnancy even if she's already given birth to the child. I think that's mistaken actually. I think the standing requirement should be enforced very rigorously. That would not have precluded a challenge to the abortion laws, but it would have had to be a challenge by an abortion clinic or by a doctor who was prosecuted for violating laws against abortion, and that I think is significant because we really want—it sounds cruel—but we really want people to pay a price in order to sue, to subject themselves to a risk of prosecution or the actuality of prosecution before they can get into court, because it's very important to limit access to the courts.

Listening to Justice Rubinstein about the 11,000 cases reviewed in the Israeli Supreme Court each year, the United States has roughly fifty times the population of Israel. So imagine 550,000 cases being submitted directly to the nine Supreme Court Justices. You'd need hundreds of Supreme Court Justices.

It's a strange thing about government, but you can't scale up every level of government to adjust to changes in population. You can't have hundreds of Supreme Court Justices even if you have 300 million people in your country. You can't have dozens of Presidents even though you have an immense population. So you need to have elaborate structures for screening. It's like the brontosaurus with the tiny head.

Other cases that strain the concept of standing involve the exception to standing that allows an individual federal taxpayer to challenge a congressional appropriation for religion. If the United States decided to make Islam the official religion of the United States and appropriated money to build mosques, taxpayers would be allowed to challenge that as a violation of the Establishment Clause of the First Amendment. But it wouldn't really be legitimate from a standing point

⁵⁶ 410 U.S. 113 (1973).

of view because the harm to the individual taxpayer from a particular appropriation is negligible. The exception is a rule that's been adopted in order to permit certain types of legal issues—which happen, in the establishment context, to be very controversial—to be litigated.

PROFESSOR MALVINA HALBERSTAM: Implicit in what you are saying is that you think standing is a desirable limitation. Would you like to say a little about that?

JUDGE RICHARD POSNER: Yes, and I'll give an example of a case—the *Newdow* case.⁵⁷ The Ninth Circuit, which is the most liberal federal court of appeals, held that the phrase “under God” in the Pledge of Allegiance was unconstitutional. It struck God from the Pledge of Allegiance, causing a scandal, but since it was just applicable in the western states that comprise the Ninth Circuit, it wasn't cataclysmic. But it was appealed to the Supreme Court, and the Supreme Court in an implausible opinion by Justice Stevens ruled that there was no standing to challenge the “under God” provision because the person who brought the case, Mr. Newdow, was the father of the child who was being forced to say “under God” in her public school and he didn't have custody of her (he was divorced from her mother). Justice Stevens is not a big standing buff. So it was an inauthentic decision and I think just reflected the fact that the Supreme Court did not want to be accused of removing God from the Pledge of Allegiance. It's a real strength of the Supreme Court that it has all sorts of ways of ducking controversial issues. And the most important thing really is not the little tricks played in a case like *Newdow* but the fact that you can't even get into the Supreme Court without a case. And a case takes a long time to get to the Supreme Court, so that the Supreme Court doesn't have to intervene and maybe invalidate some very popular law for years. By the time the case finally gets to the Supreme Court, the popularity of the law may have waned, or the circumstances may show that as it's actually administered it's not as bad as it seemed when it was enacted.

So our system—I'm not saying it's the right system for every country, but it has enabled the Supreme Court to be powerful but also to be restrained so that it fits our constitutional conception of a balance of powers. We don't want any branch to be all powerful. It's been a successful balancing process.

PROFESSOR MALVINA HALBERSTAM: Mr. Lewin, do you want to add either American or Israeli cases that you want to comment on?

NATHAN LEWIN: Sure. Let me say preliminarily that it seems to me that there is a significant difference between the things that we were discussing earlier, which is the assumption of power on the part of the

⁵⁷ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

Supreme Court to declare certain acts of the *Knesset* illegal unless the *Knesset* re-enacts those over the rulings of the Supreme Court. By comparison, in the United States, judicial supremacy controls regardless of what Congress thinks. My colleague here, Professor Hamilton, was successful in persuading the Supreme Court to declare unconstitutional an act of Congress that was enacted unanimously.⁵⁸ Congress did not have a single dissenting vote when it enacted a law that said that religious freedom should be protected even after Justice Scalia wrote an opinion under the Free Exercise Clause that really eliminated protection for religious observance against neutral standards. Had Congress had the power that the *Knesset* has to overrule what the Supreme Court said, I think, given that it voted unanimously for that law, Congress would probably have overruled the Supreme Court. So, I am not as troubled by the notion that a Supreme Court can say an act of the legislature is presumptively contrary to some very basic principles on which the country stands. I think probably in the British system that's permissible even in the absence of a written constitution, and it doesn't offend me so much.

On the other hand, what does offend me in terms of the decisions of the Barak Court are areas that the Barak Court and the Israeli Supreme Court have gone into which to an American lawyer are bizarre. There's been a lot of things in the press, for example, about the criminal prosecution of a former president of Israel, Mr. Katzav, and the Israeli Supreme Court vacated a plea agreement entered between him and the prosecutor. That a decision by a prosecutor to enter into a disposition of a criminal case with the defendant should be subject to court review I find bizarre. U.S. prosecutors are given broad power to conclude dispositions under which people plead guilty. There's a reduced sentence and unless there's some extreme reason such as bribery of the prosecutor, the courts have no business going into that.

The Israeli Supreme Court actually enforces political agreements between parties in election campaigns. There are written agreements, and there have been cases by the Israeli Supreme Court in which such agreements are treated, subject to certain reservations, almost as if they were contracts between private parties.⁵⁹ If there's ever a political question, I would think that an agreement between two political parties regarding how ministries should be divided up or other things is not enforceable in the courts and should not be reviewed by the courts. The Israeli Supreme Court has invalidated appointments; the *Ginossar* case⁶⁰ invalidated an appointment because the Supreme Court decided that the person who was appointed was just not appropriate for that particular

⁵⁸ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵⁹ *E.g.*, HCJ 1635/90 *Zerzewsky v. Prime Minister* [1991] IsrSC 45(1) 749.

⁶⁰ HCJ 6163/92 *Eisenberg v. Minister of Bldg. & Hous.* [1993] IsrSC 47(2) 229.

position. That's not a function of courts. These are all questions, which I think are plainly nonjusticiable because courts have no business getting into those areas. And yet the Israeli Supreme Court has gotten into it with Justice Barak.

There are other areas that the Court has gotten into after it resisted doing so for a long time on standing grounds. For example, deciding whether exemptions for Yeshiva students from the military was, I think, rejected three times on the ground that the person who brought the lawsuit had no standing. Finally, Justice Barak in a leading case, the *Ressler* case,⁶¹ said, "no, I don't like standing. There's no reason why the court shouldn't look into it," and it found a basis for entertaining that lawsuit. I think in the United States we could have found parties that could have brought that to court and satisfied the standards for standing so that the decision on the merits, which ultimately sustained the exemption for Yeshiva students, could have been reached in the United States.

Let me just very briefly tell you about a very particular case involving standing and justiciability that I am litigating. I am presently in the middle of a lawsuit that involves exactly these issues of standing and justiciability.⁶² The Department of State of the United States has refused to allow American citizens born in Jerusalem to have "Israel" on their passports. They say the passport can only say "Jerusalem." It can't say "Israel." Congress passes a law and tells the Secretary of State you have to say "Israel" for any American citizen born in Jerusalem who wants his passport to say "Israel." We bring a lawsuit based on the congressional statute. Along comes a district court and sustains the government's motion to dismiss the case on the ground that there's no standing on the part of our client, the youngest client of our firm. He's now six years old. We brought this lawsuit six years ago when he was two months old. The district court says no standing. He has a perfectly valid passport. He doesn't have standing. That's a misuse of the standing principle. We take it up to the court of appeals. The court of appeals says the district judge was wrong on standing. There is standing because Congress said his passport should say "Israel." They reverse it and send it back to the district judge. This time the district judge dismisses it on the ground that it's a political question.

We say it's not a political question. Congress has enacted a statute that says that the passport should say "Israel." The case is now before

⁶¹ HCJ 910/86 *Ressler v. Minister of Def.* [1988] IsrSC 42(2) 441, available at http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf.

⁶² *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *reh'g denied*, No. 07-5347, 2010 WL 2572934 (D.C. Cir. June 29, 2010) (en banc).

the court of appeals.⁶³

In my view, these are instances of misuse of standing and justiciability in the United States.

B. *Cases in Israel*

PROFESSOR SHLOMO SLONIM: Judicial review, the power of a court to declare the actions of a legislature or executive unconstitutional, is an American invention that, in the words of the noted American historian, Charles Beard, constitutes “the most unique contribution to the science of government which has been made by American political genius.”⁶⁴ It has earned widespread global respect and admiration and has been increasingly adopted in recent decades by other democratic regimes, including Israel. That Israel has adopted judicial review is, on its face, puzzling on several counts. Israel has no formal written document that can be labeled a constitution; Israel’s legislative body, the *Knesset*, like its British model, controls the jurisdiction of the courts; and no Act of the *Knesset* has expressly endowed the Court with the necessary competence.

Supporters of judicial review point to two Basic Laws enacted in 1992—Human Dignity and Liberty, and Freedom of Occupation⁶⁵—as acts that implicitly guarantee human rights and entitle an injured party to have recourse to judicial remedies, including a declaration that legislative or executive action is unconstitutional. Critics have felt that the Court was too self-aggrandizing, and they have sought occasionally to narrow the scope of judicial review. Most notably, this occurred in 2008, when Professor Daniel Friedmann, then-Minister of Justice, proposed restrictive legislation that aroused the ire of the Supreme Court Justices.

To understand how differently judicial review is applied today in the United States and in Israel, it is instructive to examine judicial approaches to such matters as standing to sue and justiciability; the handling of national security matters, especially in the context of an ongoing conflict; and intervention in the internal operation of the legislature or the executive.

The U.S. Supreme Court’s power of judicial review derives from no specific constitutional grant. But very early on, the Court assumed the power to have the final say about the validity of the acts of the other,

⁶³ *Id.*

⁶⁴ CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 162 (1913).

⁶⁵ Basic Law: Human Dignity and Liberty, 1992, S.H. 150; Basic Law: Freedom of Occupation, 1992 S.H. 114.

theoretically co-equal, branches of government in the separation-of-powers governmental system. The Court instituted a doctrine of self-restraint, most notably by adopting the political question doctrine. The principle was already enunciated by Chief Justice John Marshall in *Marbury v. Madison*, the case that established the power of judicial review. Marshall said: "Questions, in their nature political, . . . can never be made in this court."⁶⁶

The Israeli governmental framework is quite different. Like the British Parliament, the *Knesset* was, in theory, subject to no restriction on its legislative capacity. The Israeli Supreme Court exercises jurisdiction in two capacities: as a Court of Appeal in all cases dealt with by the lower courts, and as the High Court of Justice, where it rules as a court of first and last instance on any administrative or constitutional question brought before it "in the interests of justice." It is in the latter capacity that the Court has instituted a virtual revolution in the constitutional framework of the State, evoking thereby a powerful reaction in the other two branches of the government to rein in the judiciary.

1. Standing to Sue and Justiciability

For Israel, in the initial decades, standing was basically on par with the American pattern. Thus, in a 1971 case, Justice Sussman ruled:

We will not hear the petition of a man complaining that the authority acted illegally, if he cannot show why he and no one else should request the correction of the irregularity. For it must be emphasized that the Court is not competent to stand guard over the observance of the law and the prevention of injustice in general. This is not the task of the judge.⁶⁷

In order to understand how the reach of the Court has extended so far that practically everything is justiciable and virtually everyone has standing to sue, it is necessary to trace one source of jurisdiction that is uniquely available to the Israeli Supreme Court. In addition to exercising appellate jurisdiction over lower courts, the Supreme Court exercises original jurisdiction as the High Court of Justice to rule on administrative and constitutional questions.

For some forty years the Supreme Court employed this jurisdiction rather sparingly, and only in the more egregious cases did it intervene to

⁶⁶ 5 U.S. (1 Cranch) 137, 170 (1803).

⁶⁷ *Ass'n of Life Ins. Cos. v. Minister of Fin.* [1971] IsrSC 26(1) 230, 234, cited in Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 613-14 (1994).

administer justice. Standing was limited by the generally accepted standard requiring evidence of injury.

With the entry of Justice Aharon Barak to the Supreme Court, and particularly after he became President of the Court in 1995, the jurisdiction of the High Court of Justice was vastly expanded, both by eliminating practically every restriction on standing and by the adoption of a policy of activism designed to promote greater “democracy” in Israel. The Court, in Barak’s view, was to serve as the guardian of justice and morality in Israeli society. The standard by which these values were to be defined and assessed were those of the majority of the Court. This approach represented an extraordinary innovation for the role of a court and exceeded the pattern prevalent in Western democratic states. It constituted an assumption of competence that was never bestowed on the Court by the *Knesset*, nor sanctioned in any way by public acclamation or plebiscite.

2. Judicial Directions to the Military in an Ongoing Conflict

The basic approach of the U.S. Supreme Court regarding judicial intervention in an ongoing conflict is reflected in the 1950 case of *Johnson v. Eisentrager*, where even dissenting Justice Hugo Black declared:

It has always been recognized that actual warfare can be conducted successfully only if those in command are left the most ample independence in the theatre of operations. Our Constitution is not so impractical or inflexible that it unduly restricts such necessary independence. It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefield. Active fighting forces must be free to fight while hostilities are in progress.⁶⁸

More recent decisions of the U.S. Supreme Court, while they extended rights, such as habeas corpus, to prisoners held in Guantanamo, have in no way modified the basic principle enunciated by Justice Black that American courts do not presume to intervene and issue directives to fighting forces in an ongoing conflict. As one writer has said:

In the United States, it would have been unthinkable for the Supreme Court to intervene in the military strategy of American forces in Iraq or Afghanistan. . . . [A] strong commitment to separation of powers (manifested, in part, through the doctrines of justiciability or political

⁶⁸ *Johnson v. Eisentrager*, 339 U.S. 763, 796 (1950).

questions), would have made any review of such operations highly improbable.⁶⁹

In Israel, in stark contrast, judicial intervention in military affairs during the course of an actual conflict has been far from rare. Ever since the Israeli Supreme Court adopted the position that everything is justiciable and practically everyone has standing, the Court has become a forum in which contesting parties vie to extract directives from the Court regarding the conduct of the organs charged with national security. The Court has deemed itself qualified, indeed obligated, to issue orders regarding ongoing military operations. Thus, during Operation “Defensive Shield” in April 2002 in Judea and Samaria following the terrorist Passover Seder massacre, the Court intervened with respect to several military decisions, including the fighting in Jenin and the army siege of the Church of the Nativity in Bethlehem in which Palestinian terrorists had taken refuge. A vivid illustration of the Court’s new role was provided by the *Rafah* case, decided on May 30, 2004.⁷⁰ The judgment by Court President Aharon Barak, on behalf of the three-Justice panel, noted that combat activities by the Israeli Defense Forces (IDF) had been going on in Rafah since May 18, i.e., for twelve days. Rafah is located in the Gaza Strip, and the military action was designed to arrest terrorists operating in the area, to locate arms caches, and destroy tunnels used to smuggle in arms and weapons from Egypt to Gaza. The suit before the Court was instituted by B’Tselem and several other Israeli NGOs active in the field of human rights. They petitioned the Court to order the IDF to facilitate the entry of medical teams and ambulances into Gaza to treat wounded civilians; to restore damaged water and electricity supplies; to allow provision of food and water for the residents of Rafah; to investigate an incident in which civilians were killed by shellfire; and to allow civilians to attend the funerals of their deceased relatives.

In his opening remarks, Barak stressed that the Court would not interfere in the midst of actual combat when the lives of soldiers are at stake. But he did not consider that the present situation was of such a nature, and he went on to declare: “Israel is not an isolated island. She is a member of an international system. . . . There are legal norms—of customary international law, of treaties to which Israel is [a] party, and of the fundamental principles of Israeli law—which set out how military

⁶⁹ See Gabriella Blum, *Judicial Review of Counterterrorism Operations*, JUSTICE, Spring 2010, at 17, 19, available at http://www.intjewishlawyers.org/main/files/Justice_all11_3b-final.pdf. See also, in this regard, the dissenting opinion of Justice Scalia, to which Chief Justice Rehnquist and Justice Thomas subscribed, in *Rasul v. Bush*, 542 U.S. 466 (2004).

⁷⁰ HCJ 4764/04 Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip [2004] IsrSC 58(5) 385, reproduced in JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW 182 (2005), available at http://www.jewishvirtuallibrary.org/jsourc/Politics/terrorism_law.pdf.

operations should be conducted.”⁷¹ On the role of the judiciary, he stated:

We do not review the wisdom of the decision to take military action. We review the legality of the military operations. . . . The question before us is only whether these military operations adhere to domestic and international law. . . . We examine the legal import of [the military] decisions. That is our expertise.⁷²

The IDF, Barak said, “must act with integrity . . . , with reasonableness and proportionality, and appropriately balance individual liberty and the public interest.”⁷³

It is to be noted that in advance of the engagement, the IDF had taken steps to minimize any harm or injury to civilians. A “hotline” to resolve urgent humanitarian problems was set up; an officer was designated to maintain contact with the Red Cross and Palestinian hospitals; and a liaison officer was stationed with every battalion to attend to humanitarian needs among the civilians and the evacuation of the injured.

The Court stressed that it was incumbent on the army to refrain from operations that might entail civilian casualties even in the search for terrorists who are integrated in the civilian population. Given this basic principle, even though the military campaign was still in operation, the Court ruled that the army had to allow convoys to bring in food and water, to make provision for the evacuation of the wounded, and to allow civilians to attend the funerals of relatives as an accommodation for the dignity of the dead. All of this judicial activity occurred while military operations were being pursued.

Although the IDF had striven to avoid harming civilians, and had even permitted supplies to reach areas in the combat zone, the Court had deemed these measures insufficient, and had substituted its own, far more stringent standards of necessity and proportionality for those of the military. Any disruption of normal civilian life had to be justified by these standards, notwithstanding the fact that terrorists exploited Israeli leniency in order to launch attacks against Israeli forces and civilians.

It is clear that the Israeli Supreme Court’s position during Israel’s current sustained and ongoing conflict differs markedly from that enunciated by Justice Black in the *Eisentrager* case, and from the restrictive operative doctrines, even today, of the U.S. Supreme Court. But Israel’s domestic and international position is far more difficult than that of the United States, and the Court therefore feels compelled to

⁷¹ *Id.*, reproduced in JUDGMENTS OF THE ISRAEL SUPREME COURT, *supra* note 70, at 185 (internal quotation marks and citation omitted).

⁷² *Id.*, reproduced in JUDGMENTS OF THE ISRAEL SUPREME COURT, *supra* note 70, at 187.

⁷³ *Id.*

engage in a delicate balancing act. On the one hand, Justice Barak has stressed that “this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers’ lives are in danger, these decisions will be made by the commanders.”⁷⁴ Nevertheless, it would be difficult to conclude that judicial intervention does not impinge on the freedom of action and movement of military forces. But counterbalancing this is the conviction that the Supreme Court’s intervention shields Israel from much foreign criticism and its ministers and commanders from subjection to criminal prosecution before the International Criminal Court and before the judicial tribunals of states invoking universal jurisdiction to try violations of international criminal law. The infamous Goldstone Report, however, underscores the fact that even strict supervision of military actions by the Israeli judiciary organs, including the Supreme Court, cannot be relied on to deflect harsh and unjustified criticism of Israel’s self-defensive measures against an unrelenting terrorist foe, whose actions defy all the norms of international humanitarian law.

3. Judicial Review of Parliamentary Proceedings

In the United States, the Supreme Court studiously avoids becoming embroiled in the internal affairs of either the legislature or the executive. Such restraint contrasts with the attitude of the Israeli Supreme Court in recent years in relation to the other two branches of government, in accordance with its generally expansive notion of justiciability.

Thus, in the 1981 case of *Sarid v. Chairman of the Knesset*, the Court undertook to investigate a decision of the Speaker to schedule a motion of no-confidence at 5 P.M. rather than at 11 A.M., the usual hour for such motions.⁷⁵ The applicant, an opposition member of the *Knesset*, charged that the hearing of the motion was postponed so as to allow absent government members to return in time for the vote. The Court declined to act in this case, but the decision to accept the case and investigate set a pattern for subsequent interventions in the affairs of the Parliament. In the 1981 case of *Flatto-Sharon v. Knesset Committee*, the Court disallowed an attempt by a *Knesset* committee to deny a member of the *Knesset* whose appeal against a criminal conviction was

⁷⁴ HCJ 3114/02 Barakeh v. Minister of Def. [2002] IsrSC 56(3) 11, reproduced in JUDGMENTS OF THE ISRAEL SUPREME COURT, *supra* note 70, at 77.

⁷⁵ HCJ 652/81 M.K. Sarid v. Chairman of the Knesset [1982] IsrSC 36(2) 197, available at http://elyon1.court.gov.il/files_eng/81/520/006/Z01/81006520.z01.pdf. For discussion of this case, see RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, JUDICIAL ACTIVISM, FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY 40-41 (2000) (Hebrew).

pending before the Court the right to be seated in the *Knesset*.⁷⁶ In a 1985 case, the Court decided that a long-standing rule of the *Knesset* that a single member could not move a motion of no-confidence was unconstitutional because it discriminated against a faction of one.⁷⁷ Furthermore, an attempt by the Speaker in 1984 to bar the submission of a draft law to the *Knesset* on the ground that it was racist, was declared unconstitutional.⁷⁸ A member of the *Knesset*, it was held, was free to submit legislative proposals, and the Speaker was not at liberty to discriminate between one draft law and another. In the 1985 *Miari* case, the Court ruled that the *Knesset* could not remove the immunity of a member for participating in a public meeting in which the terrorist leader, Arafat, had been present.⁷⁹ The immunity of a *Knesset* member extended beyond his immediate work in the *Knesset*, and his participation in a public meeting of this kind was legitimate. Hence, he could not be tried for such action, and stripping him of his immunity was unconstitutional.

These cases are merely illustrative of the willingness of the Court to intercede in a domain that has traditionally been deemed, in separation-of-powers doctrine, the preserve of the legislative body—whether at the level of parliamentary committees or that of the House Speaker. Similarly, the Court has occasionally sat in judgment on decisions of the government and declared some of these to be unreasonable. In his book, *The Judge in a Democracy*, Justice Barak lists several instances where the Court applied the test of reasonableness as a basis for invalidating governmental decisions.⁸⁰ Thus, on application by a public-minded institution, the Court compelled a minister and deputy minister charged with serious crimes to resign, before any trial had taken place.⁸¹ On the other hand, the Court determined that a lame-duck government was not barred from negotiating a peace agreement. The Court said that such authority for a transitional government was reasonable.⁸²

In its handling of administrative affairs, the Israeli Supreme Court has unquestionably fulfilled a valuable task by nullifying grossly unpalatable decisions and demanding an exemplary standard for governmental appointments. And to the extent that judicial intervention and the threat of such intervention have induced the government to

⁷⁶ HCJ 306/81 Flatto-Sharon v. Knesset Committee [1981] IsrSC 35(4) 118, 141.

⁷⁷ HCJ 73/85 Kach Faction v. Knesset Speaker [1985] IsrSC 39(3) 141, 152.

⁷⁸ HCJ 742/84 Kahane v. Knesset Speaker [1984] IsrSC 39(4) 85.

⁷⁹ HCJ 620/85 Miari v. Knesset Speaker [1985] IsrSC 41(4) 169.

⁸⁰ AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 250 (2006).

⁸¹ HCJ 4267/93 Amitai v. Prime Minister [1993] IsrSC 47(5) 441, 473.

⁸² See HCJ 5167/00 Weiss v. Prime Minister [2001] IsrSC 55(2) 55, available at http://elyon1.court.gov.il/files_eng/00/670/051/a13/00051670.a13.htm, discussed in BARAK, *supra* note 80, at 250-51.

adopt higher standards in its selection of personnel and its decision-making process, the Court's judicial review has had a salutary effect. Yet, there is a danger that the too-ready availability and exercise of this judicial role may ultimately attenuate the necessary self-discipline of the governmental administrative apparatus. As Professor Stephen Goldstein, a prominent liberal, once observed: "I don't think judges have a roving commission to do right. And in the long run, [judicial involvement in governmental appointments] has an undesirable effect of weakening other agencies"⁸³

When judicial review of *Knesset* laws is invoked, the danger is that sooner or later, the legislative-judicial clash of perspectives may spawn a major constitutional crisis. The better part of wisdom might therefore lead the Court to adopt a self-disciplining political question doctrine based on the American model.

PROFESSOR MALVINA HALBERSTAM: Doctor Sokolovsky, you had some cases that you were going to discuss.

DR. JANICE SOKOLOVSKY: I'm going to address the security fence issue, the sanctions in Gaza case, and a few others. But, before I do that, I want to put my thesis out: I am concerned not only with the issues themselves, but also with *who* is bringing these political cases—in particular, those cases that affect national security. And I have learned that most are filed by approximately twenty NGOs, each of which maintains varying levels of legitimacy in Israel.

In Israel, a non-profit organization is called an *Amuta*, and the law regulating non-profit organizations is called the *Amutot Law*.⁸⁴ In order to be registered as an *Amuta* and to receive an identification number, the organization must complete a registration form—which requires disclosures concerning financing, activities, and personnel—and then file annual returns. It then has a legal identity. In order to receive funding from the Israeli government, the *Amuta* must make more detailed disclosures and receive a Certificate of Proper Management (in Hebrew, *Nihul Takin*). Virtually all high-quality *Amutot* in Israel have the Certificate of Proper Management. However, there are many politically active groups that are not even registered in Israel—meaning they have no status as a legal entity in Israel—that nevertheless are able to file *Bagatz* petitions in the Israeli High Court. Of even greater concern, many *Amutot*, even those which are properly registered in Israel, receive significant funding from foreign governments. I'm not talking about foreign charities or foreign individuals; I'm talking foreign governments, including the governments of England, Holland, Switzerland, Sweden, Norway, Germany, Austria, and the European Union.

⁸³ See Evelyn Gordon, *The Arm of the Law Grows Longer*, JERUSALEM POST, July 26, 1993.

⁸⁴ *Amutot* [Non-Profit Organizations] Law, 5740-1980, 34 LSI 239 (1948-89) (Isr.).

And my contention is this: I don't think that any non-profit organization, any NGO, should have access to file a *Bagatz*—particularly on political or security issues—unless it meets two non-ideological criteria, which would apply equally to right-wing and left-wing groups. First, it should be properly registered as an *Amuta* in Israel and have received a Certificate of Proper Management. Second, it should be disqualified if it receives funding from a foreign government. This would be similar to what prevails in the United States, where there are restrictions on lobbying and other forms of political activity by groups funded by foreign governments. For example, the Foreign Agents Registration Act⁸⁵ requires transparency for the political activities of such organizations so that if they disseminate a report, they must identify themselves on the cover of the report as being agents of their funding governments. That is my basic thesis—that any NGO that files a *Bagatz* in Israel, or even lobbies (although I'm not talking about lobbying now), should meet these two criteria.

Now, I want to discuss some of the cases that Professor Slonim talked about, for example, those cases regarding the security fence issues. The security fence was planned to be 831 kilometers, of which only 490 have been built to date. One particular route of 60 kilometers was changed because of rulings of the High Court and another 100 kilometers are still under dispute, which means 160 kilometers of the planned 831 are in limbo or have been changed because of rulings in *Bagatz* cases. That's twenty percent of the route of the security fence, which is a matter of life and death for those of us who live in Israel. We know that the security fence works; we know it.⁸⁶

Another case was a *Bagatz* petition against the small Shomron community of Migron filed primarily by two NGOs, one of which was Peace Now,⁸⁷ an extremely active filer of *Bagatz* petitions. However, Peace Now is not registered in Israel. It does not have any legal standing whatsoever and is, therefore, ironically immune from being sued. In fact, not long ago, Peace Now wrote some very unflattering comments about a fellow in Israel. He sued the organization for defamation and won—perhaps 50,000 shekels—in a lower court. Yet when he sought to collect the damages award, Peace Now successfully

⁸⁵ 22 U.S.C. §§ 611-621 (2006).

⁸⁶ In an early 2004 report, the Israeli Ministry of Foreign Affairs stated that in 2003—the first year in which a section of the wall was completed—the number of terrorist attacks decreased by 30% from 2002, and the number of victims murdered in terrorist attacks decreased by 50% from 2002. ISRAELI MINISTRY OF FOREIGN AFFAIRS, SAVING LIVES: ISRAEL'S ANTI-TERRORIST FENCE—ANSWERS TO QUESTIONS 17 (2004), available at <http://www.mfa.gov.il/NR/rdonlyres/6706D746-F400-4215-A678-EF1A39B775F9/0/savinglives.pdf>.

⁸⁷ See Petition for an Order Nisi, Razek el-Nabut v. Minister of Def., HCJ 8887/06 (Oct. 2006) (Isr.), available at http://www.peacenow.org.il/data/SIP_STORAGE/files/8/2528.doc.

contended that it could not be forced to pay because it is not registered in Israel—that is, since the organization doesn't legally exist in Israel, it cannot be sued there. Hence, Peace Now is permitted to file a *Bagatz* petition that affects the route of the security fence—ultimately affecting the placement of settlements—yet is simultaneously immune from paying a libel claim because it is not registered. That is amazing. Furthermore, Peace Now has been investigated for financial irregularities regarding the manner in which it receives its funding. Despite these investigations and its non-existence in Israel, Peace Now continues to file *Bagatz* petitions. To me, this is not proper procedure. No organization that is not registered properly in Israel should be allowed to file a *Bagatz* petition.

PROFESSOR MALVINA HALBERSTAM: Do you want to tell us a little bit about the legislation you are proposing on this?

DR. JANICE SOKOLOVSKY: That is the gist of the legislation.⁸⁸ My proposed legislation would say that no group is allowed to lobby or to file a *Bagatz* petition unless it meets those two criteria—that it is properly registered in Israel with a Certificate of Proper Management, and that it does not receive funding from foreign governments. To show you how standard the requirement of *Nihul Takin*—proper management—is, I will give you an example. Recently, I nominated someone for the President's Award for Volunteerism. The nominations form stated that if you are nominating an *Amuta* rather than an individual, you must attach its Certificate of Proper Management. So, if a group needs a Certificate of *Nihul Takin* in order to receive an award for volunteerism—which doesn't affect life and death—a fortiori, it should be required to attach such a certificate to its *Bagatz* petition. This would demonstrate to the High Court that the petitioner is a legal entity in Israel, and has made the required disclosures about its activities and administration.

By imposing the two criteria I have proposed on NGOs that seek to file *Bagatz* petitions, we could limit the quite inappropriate effect of unregistered or foreign funded organizations on sensitive policy and security issues.

PROFESSOR MALVINA HALBERSTAM: Judge Posner stated that he did not want to comment on the Israeli Supreme Court here. I would, therefore, like to read from his review of Justice Barak's book. Judge Posner wrote, "What Barak created out of whole cloth was a

⁸⁸ Several months after this Conference, Minister Michael Eitan initiated a bill entitled "The Duty of Disclosure for Someone Supported by a Foreign Political Entity, 5770-2010," and Dr. Sokolovsky participated in the drafting. On December 1, 2009, the bill was presented at a seminar in the *Knesset* entitled "Foreign Government Funding for NGO Political Activity in Israel," at which Dr. Sokolovsky was one of the speakers. The bill was then tabled in the *Knesset*.

degree of judicial power undreamed of even by our most aggressive Supreme Court justices.”⁸⁹ He goes on to say, “Among the rules of law that Barak’s judicial opinions have been instrumental in creating that have no counterpart in American law are,” and he lists quite a number, but I’ll just read a few: “that any government action that is ‘unreasonable’ is illegal (‘put simply, the executive must act reasonably, for an unreasonable act is an unlawful act’).”⁹⁰ In other words, the Court can determine any act to be unlawful if it thinks it’s unreasonable. And further:

[T]hat a court can countermand military orders, decide “whether to prevent the release of a terrorist within the framework of a political ‘package deal,’” and direct the government to move the security wall that keeps suicide bombers from entering Israel from the West Bank.

These are powers that a nation could grant its judges. . . . But only in Israel (as far as I know) do judges confer the power of abstract review on themselves, without benefit of a constitutional or legislative provision.⁹¹

IV. INDIVIDUAL PRESENTATIONS

A. *Professor Daniel Friedmann: The Judge as Philosopher-King*

The Israeli Supreme Court began to function shortly after the establishment of the State in 1948. For the first forty years the Court was fairly activist, yet it maintained a number of basic rules that led to restraint and enabled it to reach a highly balanced approach.

All this has changed in a process that began some twenty-five years ago after the appointment of Justice Meir Shamgar as President of the Supreme Court. Meir Shamgar served as President from 1983 until his retirement in 1995. During this period there was considerable expansion in the power of the Court. Yet, the Court remained cautious in matters of defense and security and some restraints remained in force. Upon Shamgar’s retirement, Barak became President of the Supreme Court and whatever restraint remained on the Court’s jurisdiction was rapidly to disappear. The following points reflect the extent of the change.

⁸⁹ Posner, *supra* note 55.

⁹⁰ *Id.*

⁹¹ *Id.*

1. The “Constitutional Revolution”

In 1992, the *Knesset* adopted the Basic Law of Human Dignity and Liberty. It protects a number of human rights, but certain rights, notably the right to equality and the right of marriage were not included. This was done on purpose in order not to raise the opposition of the religious parties who insist on the continuation of religious monopoly in the field of marriage and divorce. Section 8 of the Basic Law, the limitation clause, provides that: “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.”⁹² Members of the *Knesset* who voted for the Basic Law hardly thought that they had revolutionized the legal system. But shortly afterwards the idea that we have had a “constitutional revolution” was greatly publicized. Justice Barak strongly advocated this theory in his lectures and writings. In the *United Mizrahi* case,⁹³ decided shortly after Shamgar’s retirement, all the Justices agreed that there was no ground to invalidate the Law in question. This, however, did not prevent the Court from embarking upon a lengthy discussion of a host of constitutional questions, some of which remain unresolved to date, including the power of the *Knesset* to bind itself (can the *Knesset* legislate a Basic Law that can only be changed by unanimous vote?). The end product acquired the form of an obiter of about 350 pages. Many questions remained open. But the bottom line became clear: The Court has power to invalidate *Knesset* legislation. The fact that all this was mere dicta was drowned in the lengthy dissertations.

Barak’s presidency thus opened with the legal revolution. It is questionable whether the limitation clause in the Basic Law was intended to grant the Court power to invalidate *Knesset* legislation. It was clearly possible to offer a more modest interpretation, since there are no express words in the Law that authorize the Court to review legislation.⁹⁴ But, it is at least arguable that the Court’s interpretation can be anchored in the language of the Basic Law. The next question

⁹² Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

⁹³ CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.* [1995] IsrSC 49(4) 221. Shamgar himself was able to participate in accordance with the rule that allows a judge to deliver a decision within three months after his retirement.

⁹⁴ Section 11 of the Law provides that “[a]ll governmental authorities are bound to respect the rights under this Basic Law.” It is not clear whether the Hebrew term that has been translated “governmental authorities” includes the *Knesset*—so it was an open question whether the Basic Law was also directed by the *Knesset* to the *Knesset* itself. In addition, it does not follow that it is the Court that was granted the power to supervise *Knesset* legislation nor is it clear that legislation that is not in line with the limitation clause becomes automatically void. An interpretation is conceivable that requires the *Knesset* to deal with this matter.

which arose related to the position of all the Basic Laws that were enacted in the past.⁹⁵ Most of the provisions in the Basic Laws are not “entrenched” and traditionally Basic Laws were not considered as being on a higher normative level than any other *Knesset* legislation and could be changed by “ordinary” legislation.⁹⁶

But all this seems of no avail against the Supreme Court’s unlimited power of creative interpretation. Encouraged by its decision regarding the Basic Law of Human Dignity and Liberty, the Court stated that the mere title “Basic Law” endows the statute with constitutional standing, and grants the Court the power to invalidate legislation that, in the Court’s view, is not in line with the Basic Law.⁹⁷ Hence, the Court without having even a shred of legitimacy, has endowed hundreds of provisions enacted in the past with constitutional standing and thus created a “constitution” where none existed before.

2. Unreasonableness

Traditionally, “unreasonableness” had a very limited role in judicial review. It was usually combined with other causes of action or served in a number of specific situations—notably in the context of by-laws of local authorities.⁹⁸ Justice Barak in a series of cases that began shortly after his appointment to the Supreme Court succeeded in turning it into a general cause of action upon which judicial review can be founded.⁹⁹ Initially, this development met considerable resistance,¹⁰⁰

⁹⁵ There are altogether some ten Basic Laws, most of which preceded the Basic Law of Human Dignity and Liberty.

⁹⁶ HCJ 148/73 Kniel v. Minister of Justice [1973] IsrSC 27(1) 794. There was a quasi-exception to this approach: HCJ 98/69 Bergman v. Minister of Fin. [1969] IsrSC 23(1) 693. It concerned Section 4 of the Basic Law of The Knesset, which provides that election will be direct and equal and that this provision can only be changed by a majority of the *Knesset* Members (at least sixty-one). The question that arose related to a law dealing with the finance provided by the State to parties that participate in the election. This law denied any finance to new parties and it was argued that this infringed the requirement of equality included in the Basic Law. The Court answered the question in the affirmative and held that the law on party finance can only be valid either by changing it to ensure equality or by passing it again with the required majority. It should be noted that the Court had doubts whether the question of *Knesset* legislation is justiciable, but the Attorney General was not willing to raise the point. In addition, the decision related to an “entrenched” provision in the Basic Law, namely one that specifically requires a special majority in order to be changed. Most provisions in the Basic Laws do not have such a provision. Finally, the Israeli Supreme Court recognized that there is no need to change the Basic Law itself. It suffices that the modifying law is passed by the required majority, even if it is an “ordinary” law.

⁹⁷ HCJ 212/03 Herut Nat’l Movement v. Chairman of Cent. Elections Comm. for the Sixteenth Knesset [2003] IsrSC 57(1) 570; EA 92/03 Mofaz v. Chairman of Cent. Elections Comm. for the Sixteenth Knesset [2003] IsrSC 57(3) 793, 810-11. The statements were mere obiter.

⁹⁸ HCJ 21/51 Binnenbaum v. Municipality of Tel-Aviv [1952] IsrSC 6, 375, 386.

⁹⁹ HCJ 840/79 HaKablanim. v. Gov’t of Israel [1979] IsrSC 34(3) 729; HCJ 389/80 Dapei

but gradually it became well established.

This cause of action led to a Court decision that ordered the Attorney General to prosecute and quashed his decision that there was no public interest in the indictment.¹⁰¹ In another case, the Court held that an appointment by the government of the Director General of the Ministry of Building was extremely unreasonable and should be quashed on the ground that the person appointed was involved in a serious crime for which he was reprieved before trial.¹⁰² An appointment may also be quashed as being unreasonable if the candidate expressed racial views (although he later apologized).¹⁰³ Over the years the cause of action of unreasonableness continued to grow, and in fact overshadowed all the traditional grounds for judicial review. It is deceptively simple, it has no bounds, and it endows the Court with almost unlimited discretion. Consequently, every governmental or administrative decision becomes in fact appealable and every appointment can be challenged in court on the ground of some misconduct in the candidate's history.

3. Abolition of the Requirement of Standing

The traditional rule provided that in order to submit a petition against a public authority the applicant must have "standing." The explanation was that "[i]t is clear that there is no legal process unless there is a dispute. A person must come and claim his own right or injury. In this respect the process in court differs from that before the legislative or the executive branch."¹⁰⁴ However, Justice Barak rejected the traditional approach, and posed the rhetorical question: "[W]hat is the moral basis for the approach that he who claims that his money was unlawfully stolen can apply to the court, but he who claims that the public's money was unlawfully stolen cannot do so?"¹⁰⁵ The requirement of standing has thus been abolished.

Zahav Ltd. v. The Broad. Auth. [1980] IsrSC 35(1) 421.

¹⁰⁰ Moshe Landau, *On Justiciability and Reasonableness in Administrative Law*, 14 TEL AVIV U. L. REV. 5 (1989) (Hebrew); see also M. Shaked, *Comments on the Review of Reasonableness in Administrative Law*, 12 MISHPATIM 102 (1982) (Hebrew).

¹⁰¹ HCJ 935/89 Ganor v. Att'y Gen. [1990] IsrSC 44(2) 485.

¹⁰² HCJ 6163/92 Eisenberg v. Minister of Bldg. & Hous. [1993] IsrSC 47(2) 229.

¹⁰³ HCJ 4646/08 Lavi v. Prime Minister (not yet published).

¹⁰⁴ HCJ 40/70 Becker v. Minister of Def. [1970] IsrSC 24(1) 238, 246.

¹⁰⁵ HCJ 910/86 Ressler v. Minister of Def. [1988] IsrSC 42(2) 441, 465.

4. Justiciability

In *Ressler v. Minister of Defense*, the Court dismissed a petition against the Defense Minister on the ground that the matter was nonjusticiable, but Justice Barak in a very long obiter expressed his views on justiciability.¹⁰⁶ He distinguished between “normative” and “institutional” justiciability. As far as the normative aspect is concerned, every human act be it political or any other is justiciable. Barak was willing to concede that there is a question as to which institution is to deal with the matter. Yet, this concession seems to be of little moment. It is almost impossible to find any situation which in his view will be beyond the institutional competence of the Court. Indeed, he expressed clear reservation regarding the decision in *Reiner v. Prime Minister* on diplomatic relations with Germany, posing the question as to why it could not be examined on grounds of reasonableness.¹⁰⁷ In that case, Barak’s obiter remained a minority view. President Shamgar supported the doctrine of justiciability,¹⁰⁸ and the Vice President Ben-Porat considered that there is no need to decide the boundaries of justiciability, though she was inclined to accept the approach of President Shamgar.

When Barak became President of the Supreme Court, Shamgar and Ben-Porat had already retired. In fact, none of the Justices that opposed Barak’s expansive views remained on the Court and the field became completely open. The issue of justiciability was not expressly decided. But since then it has hardly ever been mentioned and it is practically impossible to find modern cases dismissing an application on the ground of nonjusticiability. In reality, every governmental action, including military actions, can be litigated. Indeed, even the highly political issue of evacuating the Gaza strip and the legislation that implemented it became the subject of a lengthy decision.¹⁰⁹ Hence, in reality, this limitation upon the Court’s jurisdiction has been wiped out.

What is behind all this? The crux of the matter is very clear and simple. The basic idea has been to transform the function of the Court. The Court should no longer be merely concerned with justiciable issues and with resolving disputes between parties. The basic function of the Court, and this is the idea, is *to oversee how the country is being run*

¹⁰⁶ The part in Barak’s decision dealing with justiciability is over thirty pages long. *Id.* at 472-507.

¹⁰⁷ *Id.* at 477-79 (discussing HCJ 186/65 *Reiner v. Prime Minister* [1965] IsrSC 19(2) 485, 487).

¹⁰⁸ President Shamgar continues to this day to support the *Reiner* decision and he reaffirmed his position in his interview in *Yedioth Ahronoth*. See *infra* note 112.

¹⁰⁹ HCJ 1661/05 *Regional Council of Gaza Beach v. The Knesset* [2006] IsrSC 59(2) 481.

and to take part in the way that it is governed. This is the reason why the Court accepts any application from any source. The Court does not mind who brings it. The Court says its function is to see that the country is being run properly. Mr. Nathan Lewin mentioned that the Israeli Supreme Court has gone into areas which to an American lawyer are bizarre, such as reviewing the plea bargaining agreement with Mr. Katzay, the former President of Israel. It also sounds bizarre to many Israelis. But it all stems from the same approach. The Court wants to control the way the executive, including the prosecution, functions. And this is the basic issue, namely what kind of Court has been created and what is its function.

PROFESSOR MALVINA HALBERSTAM: Can you also tell us about the legislation that you proposed to limit the Supreme Court in Israel?

PROFESSOR DANIEL FRIEDMANN: I tried to reintroduce the idea of justiciability and I made a list of matters that are not justiciable, for example, the way the government is formed. It is unfortunate that the reintroduction of the idea of justiciability has to be done by way of legislation. One would have expected the Court to reach it on its own, but if it does not, I think eventually there will have to be legislation.

PROFESSOR MALVINA HALBERSTAM: Were there specific issues that you said would be nonjusticiable?

PROFESSOR DANIEL FRIEDMANN: In the bill that I prepared, which was not submitted to the *Knesset*, I included certain matters of war and peace, certain matters of foreign relationship, and a general provision saying that the Court should not deal with nonjusticiable matters, leaving it to the Court to at least address the issue. Currently, the Court does not even recognize that there is an issue. It assumes automatically that everything is justiciable.

The Court's approach did not remain unchallenged. Let me refer to two interviews that were given by former Presidents of the Supreme Court. One was given by former President Moshe Landau, who retired in 1982. He gave the interview eighteen years later.¹¹⁰ Landau leveled a devastating attack on Aharon Barak and the Supreme Court. I would say that the review by Judge Posner of Barak's book seems very moderate in comparison. President Landau spoke of Barak leading the Court the wrong way and that the Court is assuming governmental power and that it gets involved in a morass of political opinions and beliefs, which is dangerous both for the State and for the Court. To the question as to whether the Court has lost its humility, Landau replied:

Most definitely. It displays arrogance and pretension. In *The Republic*, Plato suggested entrusting the government of the republic

¹¹⁰ See Ari Shavit, *Judgment Day*, HA'ARETZ (Tel Aviv), Oct. 6, 2000, available at <http://christianactionforisrael.org/isreport/septoct00/landau.html>.

to a class of elders who were specially trained and educated for this purpose. It sometimes seems to me that most of the justices on the Supreme Court see themselves more or less as governing elders.¹¹¹

Another former President of the Supreme Court, Meir Shamgar, in a more recent interview stated:

I consider that not everything is justiciable. There are topics that belong to the province of other branches—the legislative or the executive. . . . I think that separation of powers should be maintained and that each branch should be allowed to deal with its own matters. . . . I do not think that there is a tendency to weaken the Court. There is a tendency to prevent the Court from dealing with matters that it should not deal with.¹¹²

Shamgar gave the famous example of *Reiner v. Prime Minister*,¹¹³ which was concerned with the government decision to establish diplomatic relations with West Germany. The Germans appointed Rolf Pauls, who was an officer in the German army in World War II, as their first ambassador. Mr. Reiner applied to the Supreme Court for an order to prevent Mr. Pauls from entering the country. Justice Sussman, in a brief decision less than one page long, stated:

This is not a legal matter but a purely political one; it cannot be scrutinized by legal standards. The question of confirming or rejecting a foreign ambassador is a political matter to be decided by the Minister of Foreign Affairs or possibly the whole government. This is not a legal matter that can be examined in court.¹¹⁴

This was the end of the matter. But then came Barak, who said that everything is justiciable. Since we have this fantastic cause of action of unreasonableness, which by the way is itself unreasonable, it is possible to adjudicate everything. It is even reasonable for the Court to decide whether it is reasonable to establish diplomatic relations with Germany, or to confirm the German ambassador. The *Reiner* case is the product of the “old” Supreme Court. And I would say that for about forty years we had an excellent Supreme Court which acquired enormous prestige and had unequalled moral power. It knew when it should be active, but it also realized its limits. Now, all of this is over. It has been erased by the Court of Barak—part of it already in the days of Shamgar, but much of it in the days of Barak.

What happened to our Supreme Court is that it appropriated great legal power, but lost most of its moral power. If you look at the kind of

¹¹¹ *Id.*

¹¹² Arik Carmon & Amira Lam, *Not Everything Is Justiciable*, YEDIOTH AHRONOTH (Tel Aviv), Apr. 17, 2009, at 19 (translation from Hebrew).

¹¹³ HCJ 186/65 *Reiner v. Prime Minister* [1965] IsrSC 19(2) 485, 487. Justice Sussmann became President of the Supreme Court and upon his resignation due to illness he was replaced by Justice Landau.

¹¹⁴ *Id.*

support that the Supreme Court had when Barak came into office and the kind of support that it had when he left the office, you can see the drastic fall in public support of the Supreme Court.

There's another point that I shall briefly mention. It relates to the Attorney General. It is relevant because the Court's power is also reflected in the position of the Attorney General. The Attorney General is the government's legal advisor. Yet it was held by the Supreme Court that the government is bound to follow his advice.¹¹⁵ Thus, the opinion of the Attorney General is no longer advice but a command. Consequently, since unreasonableness is a ground for judicial review and everything is justiciable, the Attorney General can intervene in any governmental action. He can tell the government that in his view a certain appointment or some governmental decision is unreasonable, and the government will have to abide by this kind of advice. That's the kind of situation in which the government finds itself.

Finally, the question is how could all of this have happened? Why has there been no parliamentary reaction? This is an important question, but I have no time to expand on it, so it will have to await another day.

B. *Justice Elyakim Rubinstein*

To a great extent, this Conference has so far been imbalanced. As you can see, our Court has been attacked by most of the Israeli participants except myself and also by Professor Posner, and Professor Halberstam in a way. It is a pity because the picture that has been drawn here is, in my view, much distorted, despite the fact that not only is criticism of the Court or any other institution legitimate, but it could also be constructive, and my colleagues and I learn a lot from what people write.

Unlike the United States or Canada, our country is still coping with existential problems, and this is besides the internal problems between Jews and Arabs, religious and non-religious Jews, and left and right. And the complexity of all of that must be borne in mind when you come to review the work of the Court.

Israel is a Jewish and democratic State. It is so defined in the two Basic Laws on human rights promulgated in 1992, the Basic Law of Human Dignity and Liberty and the Basic Law of Freedom of Occupation. In the Declaration of Independence of 1948 it was proclaimed as a Jewish State, but it was democratic from the beginning. Indeed, the Jewish population in the pre-state period had democratic

¹¹⁵ HCJ 4267/93 Amitai v. Prime Minister [1993] IsrSC 47(5) 441, 473.

institutions, sometimes named “state-on-the-way” or “state-in-the-making.” And the democratic principles are explicitly embedded in the Declaration of Independence, which serves in the Basic Laws of 1992 as a statutory-constitutional source of interpretation. Beyond that, a democratic state is relatively easy to define. What is a Jewish State is of course very complex, very difficult from many aspects.

The Supreme Court was established in the beginning of the State of Israel and it had to cope for its status in those days. The gap that existed between the first generation of the Justices and the government was great. For the first fifteen years of independence, David Ben-Gurion, the founding father, was at the helm while the Court had to establish its place, being composed of important lawyers and scholars, but not at all publicly recognized or well-known. But it did a marvelous job, as even in those days it dealt with cases concerning human and civil rights, including the freedom of expression, the situation of Israeli Arabs, etc., and had the courage to face the government and insist on those rights. The Court became the guardian of human rights before any legislation. In 1992, the two Basic Laws dealing with civil rights were promulgated—raising rights proclaimed by the Court to a constitutional level. Based on these, the Court in 1995 established its power of judicial review, in *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*.¹¹⁶ I believe it was a very proper decision, even if the *Knesset* made a mistake from its point of view, or did not pay attention to the meaning of its legislative act. It is too late to change today, and the *Knesset* will not do it, in my view. But the application of judicial review has been very meager, in a few cases, most of them really matters which are not at the center of public interest. The Court has shown great restraint in constitutional judicial review, and I do not think anybody could argue about that.¹¹⁷

Other than constitutional questions, we constantly look at humanitarian problems, which are within the regular work of the Court. Civil and human rights are high up on our docket. The Court has tried to balance between the need for erecting the security fence between Israel and the Palestinian Authority territories to protect our population from murderous terrorism, and the difficulties that it created to non-combatant Palestinians, passage to their fields, and the like. So what the Court did was to insert changes in the route of the fence that would enable easier movement for Palestinians. There is no Guantanamo in Israel, but cases of the Guantanamo type would have come to our Court in a matter of days, and would be decided quickly.

¹¹⁶ CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.* [1995] IsrSC 49(4) 221.

¹¹⁷ In December 2009, the Court abolished a law privatizing a prison. See HCJ 2605/05 *Academic Ctr. of Law & Bus. v. Minister of Fin.* (Nov. 19, 2009), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf.

Indeed, you could argue that this or that case should or should not have been taken by the Court. I would like to repeat, and this is something which is said responsibly, and I myself have been a student of the Court for many years—at the end of the day, the involvement of the Court has had a very positive effect on our government and its quality. The Court has decided many times on questions of inequality of Israeli Arabs, on improper government appointments, budgeting inequality, and inequality in general. Personally, I support these decisions.

I support, for instance, going into appointments issues because in such cases, you help the government to avoid appointing people whose backgrounds demonstrate that they could not serve the public. It usually has to be not just unreasonable, but extremely unreasonable, for the Court to interfere. “Extremely unreasonable” means that no honest government could appoint this person to that particular job. All such decisions are transparent and available for any criticism.

Two last words, one about President Barak. Barak has been attacked here. He is not here. Barak is a great jurist; in my view, he’s in a league by himself. He is not only that. He was a great judge. He could make mistakes. All of us can make mistakes. I think that demonizing his work in a way is unfair to him. I was in a minority against his view in certain cases when we sat together. Barak has been a judicial leader, but he has also been part of a group. He has contributed a lot to the State of Israel. He is one of the most respected and recognized jurists in the world. He has earned his proper place in history.

Criticism of the Court is legitimate. It is an integral part of the democratic discourse and the democratic discussion. The dialogue between branches of government is vital; so is the media debate. The problem lies elsewhere—it lies with the effort to delegitimize the Court by certain circles. By portraying the Court—a hard-working professional institution which renders an important service to the country and to the public—sometimes as a power-mongering group of people, sometimes as a corrupt body, the confidence of various segments of the Israeli society is being eroded. That is highly unfortunate. The Court will in any way continue its work to the best of its abilities and carry the load. It may make mistakes—who doesn’t—but definitely its existence is vital for the State and its citizens, for human rights, and for civil rights. I am proud to be part of it.

Finally, the institution of the Attorney General of Israel was mentioned. Having served in this position for almost seven years, let me add that the convention according to which the government and all its agencies on all levels are bound by the legal opinions of the Attorney General (subject to judicial scrutiny) has proven itself in preventing

irresponsible and illegal decisions and actions, not to mention (not too often, of course) corruption.

PROFESSOR MALVINA HALBERSTAM: Thank you. I just wanted to say that Justice Barak was invited to the Conference. In fact, the initial impetus for this Conference was a report by Steve Greenwald, the President of the American Association of Jewish Lawyers and Jurists (AAJLJ), to the AAJLJ Board, of a conversation he had with Justice Barak in which Barak told him that the Israeli Supreme Court was under attack. Mr. Greenwald suggested that we adopt a resolution supporting the Court. Following the discussion that ensued, we decided to organize this Conference. Steve Greenwald spoke to Justice Barak several times to ask him if he would participate. We even offered to schedule the Conference at a date of his choosing. Had he come, it wouldn't have been unbalanced. But at the end, he decided not to come. So, it's not our fault that he's not here and that the panel is unbalanced.

JUDGE RICHARD POSNER: I'm a Darwinian, and I believe that all organs, including artificial ones—institutions—are engaged in a struggle for survival, and that the losers become extinct. So courts will try to maximize their political power, and if the other branches are weak, then the courts will become extremely powerful. And it's possible—that's why I have reservations about criticizing Justice Barak not for his general jurisprudence but for his activity in the Israeli context—that the Israeli Supreme Court is filling a vacuum of some sort in the politics of Israel. That is, I think, an implication of what Justice Rubinstein was just saying. One reason that this hasn't happened in the United States is precisely the *political* character of Supreme Court appointments. Our Supreme Court is very aggressive, and it would like to increase its power and fill political vacuums like everyone else. But when the Supreme Court has overplayed its hand, as it did before the Civil War, as it did in the Great Depression of the thirties, and as it did in the sixties (the Warren Court), there was always the possibility for the other branches to strike back, particularly through the appointments process. If our Supreme Court gets to be an overmighty subject of the separation of powers, there is the possibility of a political retribution and change. And that is very important and healthy.

If you have a system in which the Justices appoint their successors, which I gather is the *de facto* system in Israel, that will reduce the power of the other branches. It will unbalance the balance of powers, and it will make the Court exceptionally powerful and that can be a serious mistake and a source of great political strife.

MINISTER MICHAEL EITAN: I wholly agree with Justice Rubinstein's comments that the Israeli Supreme Court has had an important, positive impact on Israeli democracy, probably more so than

any other branch in the political system. And despite differences in our world views, I acknowledge that Justice Barak has made major contributions to Israeli democracy.

Let's take, for example, the issue of freedom of speech. To this day, no Israeli legislator has managed to pass a law protecting the basic right of freedom of speech. Nevertheless, Israeli citizens enjoy a high level of freedom of speech, based on court decisions resulting from the judicial activism of the Israeli Supreme Court. Even in the early days of the State, when the executive branch was very powerful under the leadership of Ben-Gurion, the Israeli Supreme Court chose to confront the executive branch on this issue and developed the right of freedom of speech through its rulings.

Still, I think something is wrong with our balance of powers. The judicial branch succeeded—via a judicial activist strategy and the weakness of the other two branches—in accumulating political power at the expense of the other branches. For example, the Basic Law of Human Dignity and Liberty has been interpreted broadly by the Israeli Supreme Court, which in many cases has generated resentment among the majority of the members of the *Knesset*. While hypothetically the *Knesset* could refute such rulings of the Israeli Supreme Court by passing legislation, it refrains from doing so due to its weak public image.

Ultimately, all three branches need to work in balance for the people. Each branch needs to understand its powers and limits. The equilibrium of the governmental system is dependent on the self-restraint of each branch. Certainly, there are overlapping areas of authority and gray areas. Nevertheless, there are clear cases of distortion of the separation of power between the branches—for example, when the Israeli Supreme Court interprets the scope of its authority to permit instructing the government to act illegally. In such cases, where judges put themselves above the law and thereby destroy the sensitive equilibrium, the other branches should act to rein in the judiciary.

PROFESSOR MALVINA HALBERSTAM: I just want to make two very brief points. One, I want to make it very clear that, as I heard the attacks on the Supreme Court, they were not attacks on the Justices of the Supreme Court or even in many cases on its decisions. They were attacks on the fact that the Court takes certain cases—a disagreement about the proper role of the Court. There was nothing personal in it. The other point I would like to make is the point that Judge Posner made. Because it is a political process in the United States, the composition of the Court swings back and forth and it's balanced. The Court may go a little too far in one direction and then a different President appoints different Justices and then the Court may go

a little too far in the other direction. But, it keeps going back and forth. That's a limitation that does not exist in Israel at this point.

I'll ask Mr. Cotler to sum up and give us his views.

C. *Hon. Irwin Cotler*

I'm going to speak about Canada's constitutional revolution, at the center of which was the Canadian Charter of Rights and Freedoms.¹¹⁸ My basic thesis is that the Charter of Rights and Freedoms—a parliamentary enactment—has had a transformative impact not only on our laws but on our lives, not only on how we litigate but on how we live. Canadians now enjoy a panoply of rights and remedies that were inconceivable in pre-Charter law.

Life and law before the Charter, from 1867 up to 1982, was a narrative of discrimination against disadvantaged groups in Canada, whether they be aboriginal people, women, racial and religious minorities, disabled individuals, or, more recently, gays and lesbians. But more than that, it was state-sanctioned discrimination. Very often these discriminations were institutionalized at law, and so from a legal perspective there was no constitutional right to equality. There were no entrenched constitutional rights of any kind and no constitutional right to a remedy.

If you were to look at the first 115 years of Canadian constitutional history, it would reveal a preoccupation with the division of powers between the federal government and the provinces rather than with limitations on the exercise of power, whether federal or provincial. As our former Chief Justice Bora Laskin summed it up, anytime a question of civil liberties came before the courts, the real question was which of the two levels of government had the power to work the injustice, not whether the injustice itself could be prohibited. In other words, it was a powers process, a question of jurisdictional trespass, but not a rights process. Then came the Charter of Rights and Freedoms, and, on its tenth anniversary, a subsequent Chief Justice of the Supreme Court, Justice Lamer, spoke of it as “[a] revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser.”¹¹⁹ You'll never find a legal act that has such a set of metaphors attached to it in terms of its purported revolutionary impact. Still another former Justice of the

¹¹⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

¹¹⁹ David Taras, *Mass Media Reporting of Canadian Supreme Court Decisions: Mapping the Terrain*, 25 CANADIAN J. COMM. 397 (2000), available at <http://www.cjc-online.ca/index.php/journal/article/view/1166/1085>.

Supreme Court intimated, on the fifth anniversary of the Charter, that in Canada the cords of liberty had been stretched more in five years than they had in the United States in two hundred years.

Such a constitutional revolution could not happen without controversy. There were concerns then, and there are concerns now. First, that the Charter of Rights and Freedoms would inhibit police and prosecutorial work—that it effectively coddled criminals and undermined the government's ability to protect national security. Second, that unelected, unaccountable, unrepresentative judges would usurp the power of Parliament on fundamental questions of public policy or core values. Third, largely on the part of the Quebecois separatist party in Parliament, that the Charter effected not only a transfer of power from the courts to Parliament but a transfer of power to a federal institution—as they termed it—namely, the Supreme Court of Canada. Fourth, largely on the part of critical legal theorists, that the Charter was in effect the instrument of corporations because they had the resources to invoke it whereas the disadvantaged did not. Fifth, that the Charter of Rights spawned a kind of industry of rights claimants, and that this would undermine the communitarian ethos of Canada.

All the same, the Charter's revolutionary impact was and is evident. Specifically, it was a revolution in five acts. Act one was the announcement of the Charter project. With that, Canada declared its intention to move from being a parliamentary democracy to being a constitutional democracy. The courts moved from being the arbiters of federal-provincial jurisdictional concerns to being guarantors of rights. Through the Charter, Parliament vested in them that power.

Act two was the transformative role played by civil society in this process. The adoption of the Charter was preceded by a year of joint Senate and House of Commons committee hearings on the proposed new constitutional document. It was referred to as the year of the constitution. Hundreds of groups came to Parliament Hill to testify, and every single section of the resulting document bore the imprint of that process. For example, with regard to Section 15, the Equality Rights Section, women's groups found the language of protection proposed by the government to be vague. The draft Section spoke of every individual having the right to equality before the law. Civil society wanted every individual to be accorded the right to equality before the law and under the law, as well as equal protection and treatment of the laws, and, in particular, protection against discrimination. As a result, twelve grounds were enumerated on which discrimination would henceforth be prohibited.

Subsection 2 of Section 15, relating to affirmative action, likewise flowed from this consultative process. What the United States has not been able to do, if you will, in 200 years, we constitutionalized in our

Charter of Rights. Express protections for aboriginal people were incorporated, as well as a general reference to Canada's multi-cultural society, elevating such protections into a constitutional norm.

Section 11(g) is an interesting, indeed unusual provision. It states that retroactivity shall not avail as a defense against prosecution where the crimes are criminal according to international law or according to the general principles of law recognized by the community of nations. That provision resulted from the concern of community groups that prosecution of Nazi war criminals might be struck down on grounds of retroactivity.

Act three is the impact of the global human rights movement and international human rights law on the rights protection principles articulated in the Charter. Judgment after judgment by the Supreme Court of Canada has affirmed that international law shall be a relevant and persuasive authority with respect to the interpretation and application of the Charter of Rights and Freedoms. Whereas in the entire pre-Charter law there was only one case that applied international human rights law to rights protection in Canada, since 1982 there have been countless more. Indeed, the second edition of Professor William Schabas's book on the impact of international rights on domestic law listed forty such cases. In the third edition of the same book, the author stopped counting.¹²⁰ He said there was no longer any point.

Act four is certain unique cases, of which I will cite just one because it goes to all the key questions of justiciability, standing, and the like. The case was decided within a year of the Charter's advent. It was called the *Operation Dismantle* case.¹²¹ It involved a coalition of disarmament and other activist groups seeking to enjoin the flight testing of U.S. cruise missiles over Canadian territory on the ground that such tests would escalate the Cold War arms race. The coalition argued that allowing such tests would violate every individual's right to life, liberty, and security under Section 7 of the new Charter. The government lawyer at the time, Ian Binnie, who now sits on the Supreme Court, asked that the case be dismissed on the grounds that it was a frivolous and vexatious abuse of process that failed to disclose any reasonable cause of action. But the case's crux was the question whether the Charter of Rights and Freedoms applies to the executive branch of government. A literal reading of the Charter arguably indicated that it applied only to acts of Parliament. But the courts concluded that it applied to the executive branch of government.

¹²⁰ WILLIAM A. SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER* (3d ed. 2006).

¹²¹ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (Can.), available at <http://gw-sec.lexum.umontreal.ca/en/1985/1985scr1-441/1985scr1-441.html>.

Act five is the Charter's impact on the role of the Minister of Justice and Attorney General. This is manifold. First, the Minister of Justice was given responsibility for certifying every prospective act of Parliament as comporting with the Canadian Charter of Rights and Freedoms. If a prospective act is not so certified, it cannot proceed. This requirement applies to every parliamentary initiative of every agency and department of government. Second, the Minister of Justice bears responsibility for any interventions before the Supreme Court. Third, the Minister must insure that all prosecutions in fact comport with constitutional obligations, full disclosure, and the like. Fourth, the Minister has the unique responsibility in matters of wrongful convictions. As Minister of Justice, I handled the fallout of the wrongful conviction of a man named Stephen Truscott, forty-six years after the man had originally been convicted. Fifth, extradition is also an exclusive power of the Minister, along with the particular responsibility of making sure any decision to extradite comports with the Charter.

For all of these reasons, I conclude that the Charter of Rights and Freedoms has had a transformative impact not only on our laws but our lives. It has attracted its share of controversy as a result, but what is uncontroversial is that the Charter has made for a revolutionary experience.