

## *Correspondence*

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### **The Supreme Court**

TO THE EDITORS:

The excellent series of comprehensive, incisive and insightful articles published in various issues of *AZURE* on matters concerning the judiciary, by Evelyn Gordon, Hillel Neuer and Evan Gahr, portrays a whole that is surely greater than the sum of the various articles' respective parts. What emerges is a view that something has gone drastically wrong during Israel's formative first half-century. Without a written constitution or an engrained democratic cultural heritage in the country, the judges have exercised their necessarily broad powers without restraint to supplant the popularly elected legislature and executive. Moreover, in the face of peaceful dissent and protest against judicial usurpation of power, the country and its leaders lack an appreciation for the central role of such activity to the democratic vitality of the country. This has resulted in unjustified attacks, ironically including charges of being "undemocratic," on those raising their voices in peaceful protest of what they see as excessive governmental action, in this case judicial over-activism.

Given that the judicial function is intended to resolve disputes, should

there be limits on the scope and extent of judicial power in order to preserve for the legislative and executive powers some realm of authority and discretion? The companion doctrines of justiciability and petitioner standing (discussed in some of the articles) reflect a fundamental value in reposing in the other, supposedly co-equal branches of government confidence in their superior abilities, respectively, to set overall social policy and direction, and to administer on a day-to-day basis the effectuation of that policy—militarily, domestically and in foreign affairs. The Gordon and Neuer articles document the Israel Supreme Court's widespread arrogation to itself of powers that traditionally and more appropriately belong to the Knesset and Government, both of which are directly answerable to the electorate, unlike the court.

What the court's decisions amount to, in their totality, is an abandonment of the rule of law. Under this concept, everyone in a society (including its institutions and governmental officials) is subservient to the mandates of duly enacted law, as opposed to the subjective whims of men and women who happen to be in positions of power. While the Supreme Court purports to compel others in Israel,

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particularly the executive, to conform to the rule of law, the court has liberated itself from any such constraints. Elsewhere, but not in Israel, judges are constrained by limits imposed upon the powers they wield, either by constitutional mandate, through legislation or by self-restraint (sometimes in reaction to public outcry). In the absence of such limits, increasingly the rule of men—particularly the rule of one man, President Aharon Barak—has taken hold in the new Supreme Court building. This unbridled exercise of judicial power is manifested by the overbreadth of court-sanctioned standing and justiciability; resort to such all-encompassing concepts as Barak’s “the world is filled with law”; invocation of such vague, ultimately undefinable—and hence subjective—standards as “the views of the enlightened community in Israel”; and the like.

The series of articles also documents a gaping hole in the appreciation by the leaders of Israeli society of what democracy is really all about. Their shallow understanding—even by law professors—is reflected in comments that are hostile to any criticism leveled at the Supreme Court, irrespective of the content (and, of course, possible validity) of that criticism. These have most recently been chronicled in Gordon’s article about the delegitimization of peaceful protest by the Haredi community (“The

Creeping Delegitimization of Peaceful Protest,” *AZURE* 7, Spring 1999).

Surely, it is healthy that Israelis accept robust debate about governmental policy and actions in the context of elections. The frequency and general acceptance in Israel of mass demonstrations over all sorts of issues attest to an acceptance, on some level, of the role of public protest in a democracy. The question, therefore, is why does the society brook no criticism of *judges* when *they* exercise governmental power?

The answer may lie in the absence of any fundamental agreement in Israel about how the state is to operate. As Neuer observed in his article, “Aharon Barak’s Revolution” (*AZURE* 3, Winter 1998), “the absence of a written constitution ... injects a constant element of uncertainty.” With no written constitution as an expression of agreed-upon principles of governance, the society has unquestioningly swallowed the Supreme Court’s pronouncements as the only “port in the storm” of political controversy and uncertainty.

Until there is a written constitution addressing the allocation of governmental powers, the Knesset should enact laws—they could be Basic Laws—imposing moderate limits upon the jurisdiction of the courts, especially the Supreme Court sitting as the High Court of Justice. This is certainly not

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an extreme proposal; the highest courts of other Western democracies are subject to at least some forms of externally imposed jurisdictional limitations. These restrictions could, for example, establish substantive standards of judicial review of administrative action (for example, for what is called abuse of discretion), impose standing requirements by which a litigant must show some form of personal stake in the outcome of the case, or even place certain kinds of actions by correlative branches of government (such as the appointment of a particular person to serve in a position) beyond judicial purview. Various forms of these and other limits on judicial power can be found in respected democracies around the world.

Before any such proposal could become law, however, the government and Knesset would need to comprehend how vital such limits on the judiciary are to a proper balance among the branches of government. It is doubtful whether the same governmental leaders who have so recently attacked, rather than upheld, the right of peaceful demonstrations and protest aimed at the judiciary comprehend the need or have the political will to restrict the exercise of judicial power in order to restore balance among the judicial, legislative and executive powers of the state. Absent such legislation, only sustained public protest can correct the present imbalance.

In the realm of law, government and politics, spoken and written criticism and peaceful protest are not undemocratic; they are, rather, the lifeblood of democratic governance. Dissent by yesterday's minority frequently has evolved into today's accepted majority view. If Israel cares for its well-being tomorrow, it needs to develop now a positive acceptance of peaceful protest and criticism of judicial actions as an essential, indeed desirable, ingredient in protecting the future of democracy.

**David H. Weinstein**

Merion Station, Pennsylvania

TO THE EDITORS:

I am happy to see that in *AZURE* 7 (Spring 1999) your contributors are continuing in their efforts to make the Israeli public aware of the dangers of an intrusive, provocative and excessively "activist" Supreme Court. The large Haredi Jerusalem demonstration was a valuable and effective political and social protest of the court and its recent rulings. A quarter million demonstrators is an impressive number by any standard, and the results of the last election certainly went far towards vindicating the demonstration.

All of the blame for these developments in the judiciary, however, cannot be laid at the door of Aharon Barak and the Supreme Court. Throughout

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Western democracies, similar anti-democratic trends are emerging. Jason Elbaum, in his essay “Global Pillage” (AZURE 5, Autumn 1998), detailed the transfer of power in the European Union from the citizens and sovereign governments to faceless and nameless bureaucrats in Brussels. And in the last American presidential election, less than half of the eligible voters exercised their democratic prerogative to vote. In Israel, the Knesset is now so fragmented and partisan as to be just about totally ineffective. And what passes for the executive branch, the governing coalition, is so disorganized and weak that it can barely govern.

As nature abhors a vacuum, and since the Israeli legislative and executive branches cannot or will not deal in an orderly and productive manner with social, cultural or religious matters, no one should be surprised that the Supreme Court is successfully ruling on religious and cultural norms and values and forcing the government to implement these rulings as laws. That the Supreme Court is actually doing this with no legal basis or precedent, but rather as a result of the “enlightened” opinion of the justices is what your commentators decry, and rightly so. Beyond the obvious danger to democracy, judicial rulings not firmly grounded in either law or legal precedent are, in fact, nothing less than contempt for the law, and ulti-

mately contempt for the public that the law is supposed to protect.

As your commentators make clear, the public discussion of this matter has been farcical. Those who support the Supreme Court’s activist stance have either disparaged, slandered or just ignored their opponents. This, by the way, is just a variation on one of the legal profession’s most fundamental principles: When the facts are on your side and the law is against you, argue the facts; when the law is on your side and the facts are against you, argue the law; and if both the facts and the law are against you, yell a lot and bang on the table.

**Ken Besig**  
Kiryat Arba

TO THE EDITORS:

I enjoyed reading the article “Everything Free in America” (AZURE 7, Spring 1999) by Evan Gahr, but I would like to make a few comments.

My first comment refers to the nature of the Haredi critique of the judicial system. Criticism of the Supreme Court is desirable and essential in a democratic regime as a part of the public discourse between citizens and the various governmental authorities. This can only work, however, when the critics accept the rules of the democratic game and act accordingly, as is

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the case in the United States. Even when President Franklin Roosevelt attacked the Supreme Court and attempted to change its composition, he never thought of another type of government than democracy. In contrast, the criticism leveled by the Haredim is based in non-recognition of the democratic rules of the game and the desire to replace democracy with a theocracy, which is an entirely different matter.

To what may this be compared? To a game of chess, the goal of which is the elimination of the opponent's king. There is a tremendous difference between attaining this goal in accordance with the rules of the game, winning by tactical moves, checkmating the opponent, and winning the game by smashing the opponent's half of board with a hammer, crushing the king in the process.

Second, in my opinion Israeli secularism errs when it claims that there are only two sides to the coin, one side that is secular and democratic, and the other consisting of Judaism and totalitarianism, thereby essentially denying any possibility of the existence of a "Jewish and democratic state." Besides the essential error at the root of this analysis, it is also liable to push religious and democratic individuals (mainly from the national-religious camp) to the Haredi side, by confronting them with a single alternative that

includes, along with democracy, total secularism.

My feeling, as a religious Zionist who believes in both Jewish and democratic principles, and who is intimately involved in the Israeli experience, is that of someone who integrates religion with democracy on a daily basis. Consequently, on the day that two demonstrations were held in Jerusalem, one against the Supreme Court and the second in favor of secular democracy, I stayed home, since I could not fully sympathize with either side. Neither represented my worldview, or that of many others who believe in the possibility of a Jewish and democratic state.

**Dan Turjeman**

Beth She'an

## **The Jewish State**

TO THE EDITORS:

I have read through quite a few of the essays on "The Jewish State: The Next Fifty Years" (AZURE 6, Winter 1999), and I was unusually struck by Yoram Hazony's piece. I was looking for those articles which would help me consolidate my own views, but this essay served as a slap in the face for me. I thought I was in favor of a Jewish state, and this essay came along and told me that I did not know what I

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was talking about; that a “Jewish state” may sound good, but is actually vague and unclear, and that we have been quite negligent in addressing what this phrase means.

Over the past few years there have been various voices calling for founding a constitution in Israel. This appeared to me as either aping the United States, or else yet another trick with which to coerce the Haredi population into submission: “No, you can’t close Bar-Ilan Street, it’s unconstitutional.” This article presented the idea of a constitution as a tool that could be used to clarify what the Israeli people wanted their state to look like.

In addition, the final paragraph leaves us with ponderous homework—to get the idea of our Jewish state into order. I wish us all luck, and would be happy if further enlightenment, articles and lines of thought on this issue should come from AZURE in the near future.

**Evan Feinsilver**  
Jerusalem

## **Art in Israel**

TO THE EDITORS:

This is in response to Avraham Levitt’s essay, “Israeli Art On Its Way to Somewhere Else” (AZURE 3, Winter 1998). I am inclined to accept the “parade of wandering” concept of mainstream Israeli art; only it misses the reason why establishment art here has largely been both an escape from the “national past” and an indigenous response to the land. The intention is to avoid the provincial label and opt instead for the International Style, whatever that is at the moment, in the so-called centers of culture.

The Israeli museums have offered key support for this “departure from the land in spirit.” Twenty years or so ago the curator Yona Fisher whispered in my ear that he doesn’t believe in this stuff, but it makes the museums look good abroad. The mechanism is taught in art schools as well.

**Ivan Schwebel**  
Jerusalem

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