A COMMUNICATION

Dr. Likhovski's interesting article (see this issue, pp. 61–9) attempts two things: to predict, and to present a theoretical thesis. He predicts that the adoption in Israel of a Constitution which would be the supreme law of the land "is most unlikely". His thesis is to the effect that the doctrine of parliamentary sovereignty in the British sense of preventing the legislature from binding itself or its successors obtains in Israel and that therefore such a Constitution, even if adopted, would hardly be binding on the Knesset and the courts. Whether his prediction is correct, the future will tell. But the thesis which, if accepted, will improve the chances of the prophecy, cannot go unchallenged.

To justify the thesis, we must assume either that "parliamentary sovereignty" in the above sense is a generally accepted legal maxim, or that it forms part of the positive law of Israel. The assumption that it represents a generally valid or at least a widely accepted maxim is certainly wrong. The doctrine is a peculiarity of the British political system and is rejected by practically every other State in the world, whatever its legal traditions and whatever its social and political set-up. Even British courts reject its relevance vis-à-vis other countries, including those whose public law structure otherwise derives from British conceptions, notably South Africa and Ceylon. In trying to graft this quite exceptional and insular conception on Israel, Dr. Likhovski is, then, *plus royaliste que le roi.* Indeed, to arrive at the desired conclusion, he is compelled to argue in a circle: the fact that no Constitution and only one strict case of entrenchment have been instituted in Israel, proves, according to him, an underlying "political theory" that no restraints on legislative authority are contemplated in the country; *ergo,* should such restraints be imposed by a Constitution (or by further entrenchment clauses, which he himself seems to recommend in the case of individual rights?) they would be invalid by dint of that political theory.... What it all amounts to is that, while rejecting a Constitution as possible supreme law of the land, he virtually assigns the position of supreme law, of a rigid and unassailable constitutional rule, to a non-enacted "theory" of dubious character.

The only other basis for affirming the validity of the concept in Israel would be to assert that it constitutes part of the positive law of the land by way of sec. 11 of the Law and Government Ordinance, 1948, and art. 46 of the Order-in-Council, 1922. This construction, too, is untenable, and this on the following grounds:

1. Art. 46 of the 1922 Order incorporates "the substances of the common law and the doctrines of equity in force in England" only. The proposed concept is certainly no doctrine of equity. It is extremely doubtful whether it forms part of English common law. Most likely, it is a "constitutional convention" and as such not enforceable in English courts and in relation to the United Kingdom, let alone in the courts of Mandatory Palestine or of the State of Israel.

2. Were the concept part of the common law, any reasonable interpretation would exclude it from reception in Palestine, since that territory had no Parliament, and this under the limitation of art. 46 which introduces the common law "so far only as the circumstances of Palestine . . . permit . . . ." Accordingly, it was not part of "the law which existed in Palestine on the 14th May 1948" and which alone was received into Israeli law under sec. 11 of the 1948 Ordinance.

3. Were we to disregard the above, the concept would still be excluded from the reception clause of sec. 11 of the 1948 Ordinance since it certainly clashes with "the establishment of the State and its authorities" under the same section, the said "establishment" including provision for a Constitution and a Constituent Assembly, as provided for in the "Declaration" of May 14, 1948 from which the Ordinance expressly derives its authority. Furthermore, *subsequent* ordinances continue to deal with a Constituent Assembly to be elected.

4. If, in the teeth of all the foregoing, we assume the concept to be part of the common law valid in Israel, common law under art. 46 is only a subsidiary source to be applied if there is no statutory or other authoritative local law governing the matter. If a Constitution (and/or entrenched provisions) were enacted by the Knesset or under a special procedure sanctioned by statute, it would be as untenable to maintain that the Knesset is prevented from doing so as it would be to assert that art. 46 prevents any other exercise of legislative authority conflicting with prior law.

5. Stretching our imagination to the utmost, we might say that the proposed concept is a rule of interpretation under British common law. As such it could claim no other standing than any other rule of interpretation. Well, any statute conflicting with a rule of interpretation would certainly prevail over the latter. *Cf.* Mr. Justice Silberg in *Knoll* v. *Rabbinical Court* (1958) 12 *P.D.* 1622, regarding "territorial sovereignty" as a rule of interpretation.

6. Under Dr. Likhovski's construction, any entrenchment by the Knesset of a particular provision, including the entrenchment of individual rights seemingly endorsed by himself, would be pointless, since it would represent a limitation on legislative authority.[1] And so would the entrenchment already pronounced in secs. 4 and 44–46 of the Basic Law: The Knesset. Thus, Dr. Likhovski's construction compels us to encroach upon that other rule of interpretation according to which no statutory provision is deemed to be void of meaning—a rule which undoubtedly does form part of the common law received in Israel.

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None of the above settles the question, how the courts in Israel, unless given express authority, would deal with a statute that oversteps the bounds of an entrenching clause or of an eventual Constitution. The courts may decide that, given the choice between the earlier "higher law" provision and the later statute, they would apply the latter under the rule of *lex posterior,* leaving it to the legislature and the electorate to deal with the disregard of the "higher law" as one of a "political" or "non-justiciable" nature. They may, following Chief Justice Marshall in the United

[1] I wonder whether, under this reasoning, a provision instituting a minimum quorum for passing legislation, one stating or modifying the number of "readings" of a bill, or even one requiring that more *pro* than *contra* votes are required to pass legislation, would not be regarded equally as invalid restraints on the legislature.

States and the Privy Council in dealing with Canadian, Australian, South African and Ceylonese cases, decide to give preference to the entrenching or constitutional clause. Universal twentieth-century practice certainly supports the latter position. Taking it would not necessarily mean "invalidating" the conflicting provision of the later statute; it would only mean that, faced by a choice between conflicting provisions, they would apply to the issue at hand the provision which, on its face, claims to represent "higher law". But Dr. Likhovski seems to hint that even if given *express* authority to deal with issues in the light of the Constitution (or of entrenching clauses), the court or courts given this authority should rather follow a conflicting *lex posterior*. If this is really his meaning, then, I fear, Dr. Likhovski has been carried away by his dialectic skill to a position of sheer sophistry.

Benjamin Akzin