THE ISRAELI BASIC LAWS’ (POTENTIALLY) FATAL FLAW*

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1. Introduction

For generations the question of the political form worthy of its apparent telos has occupied the best legal, philosophical and rabbinical minds of the Jewish tradition. Resolution of the political question presupposes resolution of the theological question of whether the Jewish people indeed have a unique telos, and whether this telos is linked to a particular political or social form. This ongoing deliberation is one of the defining features of the inter-generational dialogue within the Jewish heritage.

When the Zionist movement declared its intention to initiate the founding of a Jewish State in Zion, this decision caused unprecedented turmoil in Jewish communities. For some, the creation of a political entity in the Land of Israel signaled a brash and unwelcome rejection of the Orthodox belief that the return will occur only in the days of the Messiah, until which time political inaction is the appropriate conduct.¹ For other religious Jews, this development offered a welcome opportunity to become active participants in the realization of the Messianic ideal.² Some secular Jews saw in Zionism an opportunity to turn their

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¹ A Ravitzky, HaKetz HaMegulaeh Umedinat Hayehudim (Messianism, Zionism and Jewish Religious Radicalism) (Tel-Aviv, Am Oved, 1993, in Hebrew) 67-84

² Ibid., at 111-200
backs to exilic mentality and its forms of religious discourse, and to participate in the founding of a normal state, a safe haven in the face of oppression and prejudice. From this perspective, political Zionism was primarily a post-Emancipation phenomenon, an aspect of the ideas and social structures associated with the French Revolution, modernism and secularism. In terms of the development of Jewish history, political Zionism saw itself as a break from the historical past and a revolutionary beginning of a new historical period: it replaced Orthodox self-identity of Israel as a spiritual idea expressed in religious terms, with a secular self-identity of Israel as a modern nation-state.3

These together with additional, conflicting visions were barely articulated when the death camps of Hitler’s Europe brought these highly-charged debates to a still, yet temporary, halt. The state came into existence as a safe haven for Jews. On the necessity of creating a safe physical place for Jews most could agree. How to define the state’s ultimate telos was postponed for later days.4

Since independence in 1948, it has been a shared, tacit assumption within Israeli society that the ultimate telos of its state is a matter to be continually questioned and renegotiated. The tacit agreement within Jewish culture (when in exile) and within Israeli political culture (after the founding of the State of Israel) has been that resolution of this


4 In 1948, Hitler’s Germany provided an immediate and uncontested historical background for the founding of an independent State for the Jews. But how to interpret this eruption of violence directed at Jews and Judaism is subject to conflicting interpretations within Judaism of its history and end. However, if a community is deeply divided over the details of the “real” history that “guides” its development, a lasting constitution cannot come into being. In this respect, Hanna Pitkin’s comments on the prerequisites to constituting anything come to mind: “Although constituting is always a free action, how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history”. Because the “historical” events leading from the “exile” of the people of Israel to the “founding” of their “independent State” are subject to fierce debate and interpretations widely at odds with one another, Israeli political culture lacks a necessary prerequisite for “creating — together with others — something lasting, inclusive, principled, and fundamental”. In H. Pitkin, “The Idea of a Constitution”, (1987) 37 J. Legal Educ. 168-69. For a wide-ranging discussion of the relevance of historical and cultural contexts to the development of the role of Court’s in public discourse, see Robert C. Post, “The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell”, (1990) 103 Harv. L.R. 601, at 603-686.
question should be postponed indefinitely. This was one background factor that led to the decision to postpone the legislation of a binding constitution.\(^5\)

In the decades since independence, when conflicting visions of the nature and purpose of the state erupted into social and political feuds, political compromises were negotiated on a case-by-case basis. When matters of principle could be translated into state law, laws were legislated. The political ability to negotiate \textit{ad hoc} resolutions to the clash of apparently irreconcilable interpretations of the good life worthy of such a political entity included the important possibility of not deciding. This defining characteristic of Israeli political culture was brought to an abrupt end in 1992. In that year the twelfth Knesset decided to include in basic law legislation a definition of the State of Israel as “a Jewish and democratic State”.

This essay analyzes the deleterious effects of the Israeli legislature’s decision to burden Israeli courts with the responsibility to grant positive meaning to the expression “Israel’s values as a Jewish and democratic State”. By including this phrase in 1992 Basic Law legislation, the twelfth Knesset transferred to the judiciary the responsibility to grant legal (and hence binding) resolution to the political disagreements associated with conflicting visions of the nature, purpose and ultimate end of founding Israel as — what? As a Jewish state? As a state of the Jews? As a democratic state? Each citizen of Israel has his or her own understanding of the meaning and purpose of the founding and existence of their state, and each will find a unique way of filling in the blank.\(^6\) However, since 1992, these essentially philosophical, political or theological understandings are no longer a matter to be debated in civil society, and resolved on an \textit{ad hoc} basis through the practices and institutions of democratic politics. Competing views on these issues,


\(^6\) M.K. I. Levi, a member of the National Religious Party, today the Minister of Education, represented in 1995 the position that the source of Israel’s constitution should be the Torah, rather than the experience of democratic constitutions, such as that of the United States: “We see here a people [i.e., Israel] that is disregarding its constitutional heritage and is engaged in “constitutional revolutions”. [This people] thinks that it will attain normalcy if it totally disregards its tradition and seeks normalcy from [the experience of] this or that continent”. In “The Complete Protocol of the Meeting of the Knesset’s Constitution, Law and Justice Committee that Deliberated the Relationship between the Knesset and the Supreme Court”, (January 1995) 24 \textit{Halishkah} 22.
that until 1992 were granted public form through their representation in competing political agendas, are now a matter for judicial interpretation. The stakes are high, for the Court’s rulings, unlike political compromises, are binding.

The political dynamics of this development are clear. Judicial interpretation of the phrase “Israel’s values as a Jewish and democratic State” must take into account the views prevailing in Israeli society. Consequently, the need to influence the Court’s decision has led competing factions in Israeli society to take extreme positions when representing their views about the meaning of this phrase. The tradition of political dialogue (albeit often acrimonious and emotional) and compromise has been replaced by principled and often one-dimensional political rhetoric. To abruptly end the tacit social agreement to defer to future generations the resolution of Israel’s ultimate telos (and hence values) as a state by suddenly thrusting this question onto the Courts, through constitutional legislation, is simply wrong. In this instance the Israeli legislature exhibited either short-sighted statesmanship (if one wishes to be polite) or irresponsible statesmanship (if one wishes to be clear), or perhaps an unfortunate mixture of both.

So, my primary concern is that the one phrase “The values of the State of Israel as a Jewish and democratic State” has overshadowed the language and practice of rights that the Basic Law legislation of 1992 sought to further. In the period since 1992, the Israeli academic and legal community was immersed in fascinating and important discussions about the role of rights in Israeli law, society and culture, and about ways to “square the circle” between democratic and Jewish values. Yet, the general public is primarily concerned with one issue: Israel as a Jewish and democratic state. Instead of inspiring a public debate about the importance of rights, this legislation has evoked shrill rhetoric about the “true” ends of Israel, and about the legitimacy of the Israeli Supreme Court’s rulings on this and related issues. This rhetoric has created a misplaced, unnecessary, and divisive debate about the very legitimacy of the court in Israeli society, and has become increasingly personal in its focus on the words and rulings of particular judges.7

7 M.K. Benizri, representative of the Orthodox-Sephardic party Shas, currently the third largest parliamentary faction, responded to charges that he engaged in illegitimate personal attacks on Barak P., in the following terms: “If I want to criticize Supreme Court justices, don’t I have the right? Just as he has the right to criticize, so do I. I did not go into personal matters. I have heard that he is a very pleasant person, very nice, very intelligent, very smart, and all of the beautiful definitions. I
My essay thus seeks to establish the rationale for my conclusion, that the “purpose” section of existing and future Basic Laws ought not include the expression, “The State of Israel’s values as a Jewish and democratic State”. As such, my practical conclusions and implied criticism are addressed to the legislature and not to the judiciary.8

2. The “Purpose“ Section and its Problematic Linkage

Basic Law legislation establishes a linkage between protection of individual rights and the values of the State of Israel “as a Jewish and democratic State”. This linkage is established in the “purpose” sections of Basic Law: Human Dignity and Liberty9 and Basic Law: Freedom of Occupation.10 The section reads as follows:

The purpose of this Basic Law is to protect human dignity and liberty [or, in the case of the other Basic Law, “to protect freedom of occupation”] in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic State.11

do not engage in a personal argument with him. It is my right to criticize. In this country you even criticize God. For me, the Supreme Court is certainly not above God, for sure below him. I am criticizing, and don’t you call me vulgar ... I want to tell you that the interference of the Supreme Court in personal matters, in wrecking all walls of religion, in its interference in the [religious-secular] status quo, if continued, is not a threat to democracy, it is a challenge to Judaism.” In “The Complete Protocol”, supra n. 6, at 26.

8 For a critique of the most serious judicial attempt (that of Barak P.) to infuse meaning into the phrase “Israel’s values as a Jewish and democratic state,” see my article “The ‘Enlightened Public’: Jewish and Democratic or Liberal and Democratic?”, (July 1996) 3:2 Mishpat Umimshal 417-452.
11 Itzhak Zamir and Allen Zysblat, Public Law in Israel (Oxford, Clarendon Press, 1996) 154, at 157. On p. 157, where one reads a translation of Basic Law: Freedom of Occupation, they mistakenly translate the Hebrew word “le’agen” as “to establish” rather than as “to anchor” (as correctly translated in p. 154, where one reads the translation of the identical “purpose” section in Basic Law: Human Dignity and Liberty). In translating “le’agen” as “to establish,” they follow the imprecise translation in Deputy Attorney General Shlomo Guberman and Dr. Carmel Shalev, transl., The Constitution of the State of Israel 1996 (Jerusalem, Jerusalem Center for Public Affairs, 1996) 90. My following analysis will point to the significance of the word “le’agen” — “to anchor” and not merely “to establish” — as a key to fathoming the intrinsically flawed wording of this section.
On the face of it, this wording implies that protection of fundamental human rights in Israeli Basic Law is not an end in itself. Rights are metaphorical anchors of a higher normative framework that is embedded in the State. This linkage implies that protection of rights serves a dual purpose: to protect individual rights from possible abuse by the powers of the State, and to ensure that the State’s values are anchored by these very same rights. What happens if the link does not hold? What is paramount? Protection of individual rights or enhancement of the State’s values as a “Jewish and democratic State”?

To begin analyzing this linkage, the metaphor of the anchor will be considered. The anchor is rigidly fixed to its place of rest at the bottom of the ocean. Anchors stabilize ships in safe havens, but also in the event of stormy waters. In both cases the anchor enables the ship to move in circumscribed directions, restricted in its movement only by the length and durability of the chain that links it to the ocean bed. Yet we know that under excessive pressure, links of the anchor’s chain may snap. The anchor is then left to corrode, and the ship is left to the whims of nature and to the talents of its crew. The anchor is forgotten, for its function is secondary to that of the ship it serves. If the ship floats away, the anchor is immediately rendered useless.

The analogy is clear. If the values of “the State” move in a direction that creates unbearable pressure on the rights that anchor them, it is rights that are then left behind as the values go their way. Was this possibility taken into account when protection of rights in the Basic Laws was legislated with such linkage in place? I am sure that this is not the outcome that those who phrased this section had in mind. In democratic constitutions, rights are protected precisely in order to safeguard individual liberties in the event that the powerful State decides to trample individual rights in the name of overriding “State” interests or values.

So much for using rights as anchors. Let us now address an additional puzzling feature of the “purpose” section, equally troubling in terms of democratic theory: the implicit assumption that democratic states have values.

Democratic theory does not support the proposition that established, modern, democratic states have values that are prior to, or independent of, the values of their citizens and society. The established, modern, democratic state reflects, embodies (in its institutions and procedures), enforces and re-enforces (by legislation and by its administrative apparatus) the values of the democratic citizens and their society. In such a
state, it is assumed that persons and societies are those who have values and it is *they* who articulate them or re-enforce them through the institutional arrangements that constitute the participatory, deliberative, and representative features of democracy.\(^\text{12}\)

Of course, the structure, institutions, agencies and procedures of the democratic state do reflect, embody and enforce social values. But, in principle, such arrangements are ordered in a manner that safeguards a democratic society’s core values: protection of human liberties, respect for human rights, periodic opportunity to change the rulers of the hour, the principle of majority rule, diffusion and separation of powers, and the equality of all in the face of law. That is why modern political democracy “is a system of government in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives”.\(^\text{13}\)

Stated in different terms, democratic states are a form of government. They administer public services. They serve persons, — “persons” in the sense of live human beings, and in the legal sense of legal

\(^{12}\) It is worth adding that in democracies not only are values located in the citizenry, but the very creation and maintenance of the regime is dependent on the citizenry. In the words of Jean Hampton, “this creation-and-maintenance process involves the creation and maintenance of a set of authoritative norms that define the legal system and the obligations of the officials who work within it. However, democracies operate so that people have continual control over the process of creating and maintaining the regime.” See J. Hampton, “Democracy and the Rule of Law”, in I. Shapiro, ed., *The Rule of Law* (New York, N.Y.U. Press, 1994) 32. With this comment in mind, one may consider the fact that the area of the world directly responsible for the evolution of the modern form of democracy, Western Europe, is now undergoing a period of change in its political form, from the nation-state as the primary political unit, to a combination of local regions on the one hand, and the European Union on the other hand. This process demonstrates the fluidity of democratic political forms, that are not eternal and thus — in the context of the present discussion — do not and should not have, values that are detached from the values of the citizens that they ought to serve. For developments of new political forms in Europe, see J.P. Olsen, “Europeanization and Nation-State Dynamics” in S. Gustavson and L. Lewin, eds., *The Future of the Nation State: Essays on Cultural Pluralism and Political Integration* (London, Routledge, 1997) 245-285. For a series of excellent discussions of evolving types of citizenship currently being practiced in Western democracies, see Bart van Steenbergen, ed., *The Condition of Citizenship* (London, Sage, 1993).

personae. Democratic states (at least liberal democratic states) do not determine for persons or groups preferences regarding their value systems. They are neutral in respect of the outcomes of the social competition over allocation of values, or in respect of the outcomes of debates regarding the “good” life and its overriding values. Constitutional protection of rights reflects this basic understanding. Rights are protected in the service of individual liberties, not in the service of a value system embedded in the State. The State’s values, manifest in its institutions and in its policies, reflect this underlying normative background. The values granted practical form in state policies change as the citizen’s perceptions of their common values change. The wording of the Israeli basic law implies otherwise, that the changing values or norms of a democratic society are subject to the review of an over-arching normative framework that is situated in “the State”. This is a dangerous assumption insofar as one refers to a democratic society and a democratic form of government.

3. The “Purpose” Section and Democratic Constitutions

A democratic constitution should be crafted in a manner that not only ensures routine management of state affairs and the ability to conduct ordinary politics, but also safeguards democratic values that may be threatened in moments of national crisis. Indeed, the values of a society and the power of its constitution are tested and revealed in moments of crisis, when it seems that the regime — the regime, not only the government of the day — cannot ensure the well-being and liberty of its citizens. I believe that the “purpose” section does not pass either the test of enhancing democratic normalcy, nor the test of providing safeguards against threats to the democratic nature of the State of Israel. I now turn to support these propositions.

Let us begin with the normalcy test. I have postulated that a permanent feature of Israeli society, or rather, of the culture of its Jewish majority, is its reluctance to determine for eternity the exact nature of its political form. Since the Jewish heritage includes a wealth of opposing interpretations of the political form most commensurate with the age-old dream of “the return to Zion”, it is a mistake to embrace a

constitution that in one swift move burdens the judiciary with the enormous responsibility of formulating the resolution of a schism that is an immanent feature of Jewish social existence. The negative effects of this misguided expression are already apparent. The Israeli Supreme Court has not yet submitted a binding ruling about the positive meaning of the “purpose” section, and it is already attacked from all social quarters. The arguments have disrupted friendships: scholars and judges, politicians and rabbis, Jews and non-Jews find themselves forced to simplify their statement about Israel’s national identity, in order to provide the courts with apparently clear-cut positions on an issue whose complexity is still far from consensual resolution within the Jewish majority, and between the Jewish majority and the Arab minority of citizens of the State of Israel. So in terms of the normalcy test, we see that this section exacerbates social conflict. This is hardly a function worthy of a constitution in a democratic polity.

Now let us consider possible uses of this defining statement when Israeli society will encounter a moment of national crisis, when decisions related to peace and war, or when protection of basic individual freedoms seem to clash with vital State interests, may cause a constitutional crisis in the sense of a crisis of democracy. Here, inclusion of the word “Jewish” in the definition of the State’s values complicates matters greatly. If Israeli society is not united in its definition of the State as primarily a democratic state, then we may encounter the possibility that the definition of the State of Israel as a Jewish and democratic State will serve to legitimize a regime that is far from democratic. This point may be clarified by quick reference to the nature of non-democratic regimes that have ruled societies in this century.

Three examples come to mind: the communist State, the theocratic State and the fascist State. I mention these three examples as extreme instances of systems of government whose constitution does not draw the necessary distinction between state and society, and moreover, whose values may at once be both religious and civic. In terms of my critique of the “purpose” section, these examples draw attention to unintended consequences of overlooking the elementary distinction between society and state, and of assuming that values implied by the word “Jewish” are probably commensurate with values implied by the word “democratic”.

In the communist State, the public sphere is not differentiated from the political sphere, and society is not distinguished from State. The outcomes of such an assumption are clear. Instead of the state serving
society, the order is overturned, and society is mobilized in the service of the State. The State, like our metaphorical ship, has a destination of its own, and society is mobilized in the service of this destiny. I cite this example in support of the proposition that to assume that society and State are indistinguishable, an assumption that is implicit in the wording of the Basic Law, is a major flaw in a constitution of a democratic polity.

That the Israeli legislature overlooked the elementary distinction in democratic theory between state and society is particularly surprising when one brings to mind the fact that it is absent from a primary source of inspiration for the legislation which we are analyzing, the Canadian Charter of Rights and Freedoms.

The Canadian Charter of Rights and Freedoms is often cited in Israeli legal discourse as a source of inspiration for the wording of the basic laws that protect rights. However, the words of the Canadian Charter underwent a dramatic transformation when penned by the Israeli legislature. We read that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Canadian Charter is attentive to the fact that the key words of a Charter of Rights in a constitutional democracy are "free and democratic". The hub of freedom and democracy, of the core values that guide and limit the state's activities, is in society. Yet in the hands of the Israeli legislatures, "free" became "Jewish", and "society" became "State". Had the Israeli emulation of the Canadian precedent been faithful to the source, then we should have read that the Canadian Charter guarantees rights and freedoms "as can be demonstrably justified in a Christian and democratic State". That, of course, strikes us as an odd and jarring expression when relating to Canada. Yet, why should its Jewish corollary be acceptable in modern, democratic Israel?


16 Cited in E. McWhinney, Canada and the Constitution 1979-1982: Patrization and the Charter of Rights (Toronto, University of Toronto Press, 1982) 173. It is interesting to note that Supreme Court Justice Aharon Barak does not take these obvious differences into account in his interpretation of the constitutional implications of sec. 8 of the Basic Law: Human Dignity and Liberty. See his use of the Canadian Charter in "Protected Human Rights", supra n. 15, at 269-270.
Evidently, the Israeli legislature was not sufficiently attentive to the importance of retaining in a democratic constitution the distinction between state and society, and to the importance of keeping the values of a particular religious creed out of the defining phrase of a democratic constitution.

The Canadian Charter is also attentive to Spinoza’s insight that the primary threat to individual liberty comes from base interpretations of religious beliefs, that when transformed into the rule of the land may be detrimental to the exercise of human rights and freedoms.\(^1^7\) It seems that this is the reason that immediately following the section just cited, there appear in the Charter a list of fundamental freedoms (sec. 2). The first is “freedom of conscience and religion”.

This leads us to my second point regarding the potential for interpretation imbedded in the “purpose” section. Consider the theocratic State, where the dominant religion, not society, grants purpose and direction to the State’s institutions. Of course, here we already assume that the state exists independently of its society, but unlike the communist State, its goals are determined by religious dogma. Individual values are thus further distanced from the values of society, for the dominant religion is the source of the values that matter. In such States, official interpretations of the religion’s core values determines the fate of those subject to the States’ rule.

Take for example the 1931 constitution of Afghanistan:

The faith of Afghanistan is the sacred faith of Islam, and the official religion and that of the population in general is the Hanafi religion ... Followers of other religions, such as Hindus and Jews, who live in Afghanistan, provided they do not infringe the ordinary rule of conduct and propriety, also enjoy protection.\(^1^8\)

I am not denying the right of the Afghani people of 1931, or of any people, including the Jewish, to determine that its State be ruled according to the dictates of religious dogma. However, I do not delude myself into thinking that such a determination will necessarily result in a democratic regime. It may create a tolerant and benevolent regime.

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But when in theocracies democratic values clash with religious beliefs, institutionalized dogma overrides individual freedoms. Such a regime, authorized to determine “ordinary rule of conduct and propriety”, is ultimately authoritarian.

I bring the Afghani example in order to criticize the implicit assumption that when reading an expression such as “Israel’s values as a Jewish and democratic State”, one can rest assured that for all eternity the word “Jewish” will be interpreted as representing the democratic values that can be found in the Jewish heritage. That assumption, or wishful thinking, is presently the norm in the judicial rulings and in the scholarly papers that analyze the “purpose” section. Yet the Basic Law, whose privileged constitutional standing is being continually reinforced by Supreme Court rulings, is open to other interpretations. How can one ensure that this phrase will not be interpreted by future elites in Israel as justifying non-democratic activities in the name of “Jewish values” that supersede respect for human rights and other core democratic values?

Finally, the third example, that of the fascist State. In the fascist State, the individual’s identity and interests are molded in the shape of the “State”. In the words of Mussolini:

Liberalism denied the state in the interests of the particular individual; Fascism reaffirms the State as the true reality of the individual ... Therefore, for the fascist, everything is in the State, and nothing human or spiritual exists, much less has value, outside the State ... [The] fascist State, the synthesis and unity of all values, interprets, develops and gives strength to the whole life of people.\textsuperscript{19}

I do not suggest that the Israeli legislature intended the Basic Law to “reaffirm the State as the true reality of the individual”. However, I do think that Israeli society includes influential individuals and groups who think that the State is an entity that represents “the synthesis and unity of all values”. There are in Israeli society those who see in the State a God-given tool that must be allowed to fulfill its historical role as part of a divine plan, unfettered by petty considerations of autonomous (atomized) individuals. I object to such base interpretations of

Judaism. But that is beside the point. I think that a constitution that does not clearly define the limited functional role of the state is a poor constitution that may not withstand social pressures to grant the State a role that is independent of society. I also do not rule out the remote possibility that a later generation of judges — who may one day be appointed according to their political beliefs — may interpret this section as implying that the priority of “Jewish” values of the State overrides the priority of democratic safeguards of individual freedoms.

These examples — the communist, theocratic and fascist States — have been presented in support of my claims regarding the potentially hazardous ramifications of a constitution whose rationale is justified in terms of a “purpose” section that does not distinguish between state and society, and in addition does not distinguish between religious and civic values.

Some may claim that my fears are exaggerated, and that one can count upon the judiciary to further the democratic constitution of the Israeli regime by ruling in a manner that will make clear that democratic values override others. This seems to have been the political logic of the liberal coalition that in 1992 passed these laws.20 It is indeed

20 Basic Law: Freedom of Occupation was passed by a majority of 23 for, without abstentions nor votes against it. Basic Law: Human Dignity and Liberty was passed by 32 in favor, 21 against, and one abstention. See Diurei HaKnesset 22 (1992) 3393 and Diurei HaKnesset 24 (1992) 3793. One of the primary advocates of this legislation, M.K. A. Rubenstein, of the small liberal party Shinui, commented that the parliamentary coalition that managed to pass these laws exploited the “anarchy” that had developed in the 12th Knesset due to the government’s lack of parliamentary leadership. Their purpose, said Rubenstein, was to “change norms through legislation”. In this comment, M.K. Rubenstein seems to have alluded to the liberal M.K.’s tacit assumption that the Supreme Court would forward a liberal-democratic constitutional agenda, including a “democratic” interpretation of the “purpose” section. See interview with Amnon Rubenstein in “The Quiet Constitutional Revolution”, (April 1992) 16 Halishkah 14-15, and my discussion in “The ’Enlightened Public’”, supra n. 8, at 420-423. M.K. I. Levi, representative of the National Religious Party, presented the opposing perspective that sought to balance a potentially liberal-democratic cultural revolution (my terms, not M.K. Levi’s) by including the word “Jewish” in the Basic Law’s definition of purpose: “In the first reading of this bill we encountered a version that included only the phrase ‘a democratic state’. The fact is that the Knesset did not accept this limited definition, and a difficult struggle ensued, focused around our attempt to convince our friends that the State of Israel is also ‘a Jewish state’. ... The State of Israel wants and is interested in retaining its Jewish values and tradition, and we must put this will as a primary priority when determining the normative values of this State’s image”. Interview with M.K. I. Levi, in Halishkah 28.
accurate to portray the court as the most important actor in the evolution of the language and practice of rights in Israel. But to burden the judiciary with the responsibility to resolve a fundamental schism such as that blurred by the word “and” in the expression “Jewish and democratic State”, is to place a political mine not on its doorsteps but in its very courtroom.

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Let me wrap up the argument up to this point. First, I claim that the question of “Jewish values” versus “democratic values” is a feature of Israeli social discourse, and that the prevailing consensus is that it should continue to be resolved in an ad hoc, case-by-case manner. Second, I claim that by imposing on the judiciary the responsibility to resolve this issue, the legislature has abrogated its representative and deliberative function in a well-ordered parliamentary democracy. Third, by imposing this question on the courts, the legislature has created conditions for weakening the power of the court to fulfill its proper role as defender of law and justice in a democratic regime. Fourth, the “purpose” section also creates conditions for elevating the State in public consciousness from an administrative structure to an entity with values of its own. Finally, coupled with the elevation of the State, I have suggested that by confusing religious and civic structures of values, the legislature has created the basis for justifying allusions to the State as representative of some higher power.

I now move to the next section of my essay, where I present an analysis of the court’s diverse ways of responding to the interpretive challenge posed by the “purpose” section. This analysis shows that the court has tread carefully around the constitutional mine embedded in its responsibility to interpret the “purpose” section. But the mine is there, waiting to explode. Following the analysis of the court’s treatment of the Jewish and democratic section, I shall propose a simple solution to the problem — to dismantle the mine. But prior to that, it is essential to supplement the background of this discussion by referring to an additional section of the 1992 Basic Laws, called “violation of rights”.

This is sec. 8 of Basic Law: Human Dignity and Liberty (and its parallel in sec. 4 of Basic Law: Freedom of Occupation).

Sec. 8 establishes the priority of rights protected in these Basic Laws over legislative acts that may violate these rights. This is the section that creates constitutional justification for judicial review of Knesset legislation. The section reads as follows:

There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such Law.

In the context of the present discussion, it is important to note that among other considerations guiding the court when it is requested to strike down laws violating rights, is one that requires it to determine whether a particular law befits “the values of the State of Israel”. The new Basic Laws thus require the court to consider “the State of Israel’s values” when exercising judicial review over ordinary legislation. In the absence of the definition included in sec. 2, determination of “Israel’s values” would have been properly limited to the values upheld by fifty years of judicial activity, including those listed in the Israeli Declaration of Independence. Citizens and members of the legal community who would insist on including a “Jewish” component to “Israel’s values” would have been able to turn to the words of the Foundations of Law, 1980, that determines the role of the Jewish heritage in the Israeli legal system in the following terms:

Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.

22 The original Hebrew word is “she-no’ad”. It has been translated in Zamir and Zysblat, supra n. 11, as “designed,” and by Guberman and Shalev as “enacted.” However, the Hebrew root of the word “no’ad” designates a strong sense of end combined with intention, as in the Greek word Telos. Hence my choice of “intended” as translation of “she-no’ad”.

23 Zamir and Zysblat, supra n. 11, at 91, 93.

24 34 L.S.I. 181, sec. 1. I thank (retired) Justice Gabriel Bach for drawing this solution to my attention.
Unfortunately, the values of the State of Israel are defined in the Basic Law as “Jewish and democratic”, and not as cited above, as “principles of freedom, justice, equity and peace of Israel’s heritage”. The fact that the definition of Israel’s values as a Jewish and democratic State appears in sec. 2 of the same law as sec. 8, creates the reasonable assumption that when sec. 8 refers to “the values of the State of Israel”, this is shorthand for the expression in sec. 2, “Israel’s values as a Jewish and democratic State”. If the court will disregard this apparent linkage between sec. 2 and sec. 8, it will provoke howls of protest from those whose personal identity is vested in a Jewish interpretation of “Israel’s values”. Driven by the Basic Law’s immanent logic, the Court is therefore required to determine the telos of Israel — as a Jewish and democratic State. This is new and politically hazardous interpretive territory. Interpretation of the phrase “Israel’s values as a Jewish and democratic State” lacks grounding in legal precedent, in legislative definitions, and most significantly, has absolutely no reference in terms of social consensus in Israeli society.

The current Israeli Supreme Court is aware of the potentially explosive potential of its rulings on the meaning of the expression “Israel’s values as a Jewish and democratic State”. Its most important statement on the “revolutionary” aspect of the new Basic Laws focuses primarily on the question of its authority and responsibility to exercise judicial review. Eight out of the nine Supreme Court justices who deliberated this issue supported the interpretation that the Basic Laws do indeed authorize them to exercise the power of judicial review over legislation claiming to be inconsistent with it. Yet to date, the Supreme Court has wisely side-stepped the need to tackle head-on the meaning of the politically-weighted phrase criticized in this essay.

4. The Judicial Response

Members of the present Supreme Court are acutely aware of the problematic nature of the “purpose” section. Analysis of rulings that
include reference to this section reveals a variety of interpretive strategies that are, by and large, oriented to prevent interpretation of the Jewish element of the phrase as implying values that are incommensurate with democratic values.

There are three basic strategies in the court’s allusion to the “Jewish and democratic” section:

1. Bypass or skirt the issue;
2. Tackle the issue;
3. Alert the public to problematic aspects of the “Constitutional Revolution”.

A. Bypass or Skirt the Issue

This strategy does not address the substantive issue raised by the problematic expression “the State of Israel’s values as a Jewish and democratic State”. Instead, it deals with questions that are within the commonly accepted boundaries of legal discourse and judicial rulings. This strategy has three primary forms:

(1) Focus on the constitutionality of the Basic Law legislation, and the attendant question of whether the court has constitutional authority to strike down laws that violate protected rights. Its answer to both questions has been affirmative. Although the Basic Law authorizes the court to decide whether an “ordinary” legislative act “befits the values of the State of Israel”, i.e., of Israel as a Jewish and democratic State, the court has not justified its ruling on its authority to exercise judicial review on the basis of a positive definition of Israel’s values as a Jewish and democratic State.

28 See sources in nn. 26 and 27
29 See, for example, Shamgar P in The United Mizrahi Bank, where he discusses the question of whether the claim by creditors that their property rights were violated by Knesset law that did not enable them to collect debts against agricultural settlements. Analyzing sec. 8, he concludes that the values of the State of Israel are Jewish and democratic. However, he continues as follows: “It seems that the lower courts whose decision is before us broadened the role of the court beyond the appropriate measure when it addresses the question whether the legislation befits the values of the State of Israel [original emphasis] The court does not judge in order to manage the country’s economy. It does not re-write the law. It does not transform the secondary into primary in order to assert that a legislative act is in its eyes lacking
(2) Establishment of the Israeli Declaration of Independence as the normative peak of the constitutional order, and thus subordinating the words of the “purpose” section to the higher normative standing of the Declaration. See the words of Levin J. in The United Mizrahi Bank, supra n. 26, at 309: “It has been accepted from earlier days, from the beginning of the growth of our independence, that the Declaration of Independence radiates the clearest expression of the national “I believe” of the people. It can be considered the identity card of the people in Israel as a free people whose government is democratic and enlightened, standing on the basis of values characteristic of a democratic entity and founded on the Jewish essence and its ethical tradition”. While acknowledging the fact that the Declaration of Independence was never granted recognition as a document that has binding constitutional authority, he continues as follows (309-10): “Accordingly, already in the first days this Court saw it fit to determine that the Declaration of Independence is worthy to serve as a primary source in interpretation of law, and beyond and prior to that, it will stand as a projector that lights our path in shaping the basic rights of the citizen and in implementing [these rights] in the life of our community in actual practice”. See also Levin J. in Clal Insurance Co. v. The Minister of Finance (1994) 48(1) P.D. 464-465 (secs. 26-27).

Note that Levin J. seeks to buttress the Declaration's position as the defining normative background of Israel's legal system. As such, he can appeal to that document when considering questions related to rights, while bypassing the words of the basic law that we are examining here. The “Jewish” element is referred to in terms of a cultural and ethical heritage, thus avoiding the need to relate to the notion of “Jewish values” in terms that draw directly from the Jewish halacha.
sion included in the “purpose” section, the court can turn to the democratic elements of the Declaration, and refer to the Jewish dimensions of the Declaration as expressing a “heritage” rather than a religion. Here, the court finds itself on safe ground, dealing with norms that have legal standing in a rich body of legal precedent,\(^31\) while referring to the values of Israel as “Jewish and democratic” as a kind of general declaration whose legal significance is relatively minor. This is an interesting and perhaps ironic move, insofar as that in this interpretation the Declaration of Independence is granted privileged status as the normative background of the emerging constitution, whereas the words of the emerging constitution are granted a declarative status.\(^32\)

(3) Assume that “Jewish and democratic” means “Jewish only if also democratic”. That is, to limit the group of relevant Jewish values only to those that are consistent with core democratic values.\(^33\) This strategy

\(^{31}\) See Kol Ha'am Co. Ltd. v. Minister of Interior (1953) 7 P.D. 871. Translated into English in Zamir and Zysblat, *supra* n. 11, at 55-73.

\(^{32}\) See Shamgar P.'s discussion, *ibid.*, at 96 (sec. 49) where he emphasizes the ceremonial aspect of the opening sections of any constitution, and applies this general observation to the words of sec. 2 (numbered 1A in Basic Law: Human Dignity and Liberty). In that section he too upholds the constitutional status of the Declaration of Independence.

\(^{33}\) This strategy is inmanent in many rulings. Consider as an example Levin J. in *Clal Insurance Co.*, *supra* n. 30, at 444-45: “Basic Law: Freedom of Occupation is grounded in the values of the State of Israel as a Jewish and democratic state. The concern for the welfare of the citizen, to take care of his needs and to ensure that his future develops in a manner commensurate with the values of the State of Israel as a democratic state, and that it befits the values of Judaism, that has always placed paramount importance on taking care of the citizen, his welfare and elementary needs”. The relevant values in this quote are (social?) democratic. The presentation of Jewish values is crafted in a manner that grants support to the primary, democratic, propositions, but do not add to them a uniquely Jewish perspective (or primary source). A different, implicit, way of including reference to Jewish values only if they cohere with democratic values is found in the following quote, from a ruling by Zamir J. in *Kontram Ltd. v. The Ministry of Finance* (HC 164/97, not published). In sec. 42 of his ruling, Zamir J. writes the following: “The State of Israel is a Jewish and democratic state. The Court, as a state agency, has to be guided by the values of democracy and at the same time to advance these values …” In the ensuing discussion there is no reference to Jewish values, only to democratic. The implicit assumption is that what is at stake are the democratic values of “the Jewish and democratic state.” That is why the court has to be active in not only applying them, but in advancing them too. The Jewish values are relevant, one assumes, only to the extent that they cohere with democratic values.
enables the judge to situate the discussion in terms of democratic discourse, while including discussion of Jewish values in the context of “human values” and in light of the experience of “other democratic states”.34

In sum: the “skirt the issue” strategy emphasizes elements of the Basic Law that are within the democratic consensus and are coherent in terms of Israel’s legal tradition, while bypassing or ignoring the need to infuse meaning into the Jewish component of the “purpose” section.

**B. Tackle the Issue**

This strategy assumes that since the law has already been enacted, the court should prepare the form of reasoning and legal language that would serve the judiciary when it will be called upon to resolve apparent conflict between Israel’s “Jewish” values and its “democratic” values. This strategy is more actively involved in addressing problematic normative issues, as it moves beyond the question of the Basic Laws’ constitutionality to the question of how to resolve the issue of potential conflict between the two normative structures implied in the “purpose” section.35 Here too, I would like to point to three distinct forms of this response:

(1) The first form assumes that the two value systems alluded to in the “purpose” section are equal in merit. It represents a position sympathetic to granting the Jewish legal tradition a more prominent standing in Israel’s legal system. It uncouples the link between the words “Jewish” and “democratic”, and refers to the “purpose” section as alluding to two systems of values which are equal in merit: Israel’s values as a Jewish State and Israel’s values as a democratic state. This approach

34 Both quotes are from Shamgar P., in United Mizrahi Bank, supra n. 26, at 143, 146 (n. 13).
35 The most prominent upholder of this position is Barak P. See his comment in United Mizrahi Bank, supra n. 26, at 296 (sec. 101): “The Court is not requested to voice its opinion on the degree of a [legislative act’s] just or wise solution. But the court is still obligated — an obligation from which it cannot relieve itself — to determine whether the legislation fits the values of the State of Israel ... We will have to create, over the years, a comprehensive constitutional understanding, that is based on the values of the State of Israel as a Jewish and democratic state".
is thus oriented to “finding the common denominator and synthesis to the dual \textit{telos} of the Jewish and democratic State. This means that by having one value system illumine the other, a synthesis will be found that will reflect the best of both worlds”.\textsuperscript{36} By postulating that the two value systems are equal in merit, this approach seeks to elevate the status of the Jewish heritage, including its legal tradition, to that of the democratic tradition.

(2) A second form of the “tackle the issue” strategy is the ideologically opposite of the first. It represents the liberal approach. It calls for the creation of a new legal norm that will resolve apparently insoluble conflict between Israel’s “democratic” and “Jewish” values. The resolution of the deadlock would be by turning to norms prevailing in Israeli society. This approach has resulted in a legal standard called “the enlightened public”.\textsuperscript{37} The basis for creating such a standard is presented as follows:

> When the attempt has failed, and the values of the State of Israel as a Jewish state are irreconcilable with its values as a democratic state, there is no way to abstain from decision. This decision has to be arrived at according to the perceptions of the enlightened public in Israel. This is an objective test, that refers the judge to the sum of values that shape the image of the modern Israeli.\textsuperscript{38}

Similarly, an alternative legal standard — stemming from the same logic — is termed “the deep perceptions of Israeli society”.\textsuperscript{39} Whether appealing to the norms of elites or to those of masses, underlying this approach is a belief that either turn will reveal that Israeli society is unified in its support of democratic values. (This approach underesti-
mates the depth of resistance present in some religious sectors to a
turn to secular norms that do not give pride of place to religious
values.\footnote{See the words of M.K. Benizri: "They speak in the name of the enlightenment. Please
note what an offence. He speaks on behalf of enlightenment, which implies that I am
one of those in the dark. I prefer to be called a primitive primordial man with my
excellent values, and you be called enlightened with the values of homosexuals and
all of the values that you [i.e., M.K. Zuker, representative of Meretz Party, that
represents liberal secular values] refer to ... The Supreme Court has to know that
this is a Jewish and democratic state, not only democratic but also Jewish", in
Halishkah, supra n. 6, at 26.}

(3) A third, less polemic, way of tackling the issue is to include in
court rulings — that are essentially steeped in the norms of a constituti-
ional democracy — direct reference to Jewish sources that uphold the
democratic approach. This is a subtle way of including in the body of
judicial rulings a growing stock of Jewish judicial lore that in due course
may develop into a body of references that will support the democratic
nature of the State of Israel by presenting a select reading of the Jewish
sources that supports such a predisposition. This approach reads the
Jewish tradition selectively, oriented to extracting from it sayings and
rulings that support conclusions arrived at by ordinary legal reason-
ing.\footnote{See for example Shamgar P., who alludes to Genesis 1:27 in United Mizrahi Bank,
supra n. 26, at 101 (sec. 51), or Levin J., who alludes to the Jewish halacha in Clal
Insurance Co., supra n. 30, 461-462 (sec. 22) and 476-77 (sec. 37). In both instances,
allusion to the Jewish sources supplements the democratic values upheld by the
justice as he determines the merits of the particular case. This strategy is similar to
one mentioned earlier, referring to Jewish values only if they are also democratic,
yet adds to it concrete sources and references that may be useful in creating common
references for a Jewish and democratic legal language.}

In sum: the “tackle the issue” strategy assumes that the court will
inevitably be obliged to grant positive meaning to the “purpose” section,
and that its present responsibility is to prepare the legal language,
reasoning, and precedent for future rulings on this question.
C. Alert the Public to Problematic Aspects of the "Constitutional Revolution"

This strategy emphasizes troubling defects in the procedure and in the formation of Israel’s constitution.42 It is complemented by the assertion that the court ought to continue its low-profile and careful way of upholding individual rights and freedoms. It is sensitive to the precariousness of Israel’s constitutional tradition, and seeks to keep the court out of social debates that should remain matters for deliberation in the public sphere. This strategy has two primary forms:

(1) Criticism of the legal basis of the claim that the Knesset is a constituent assembly. If this criticism carries the day, then the Basic Laws lose their privileged standing as constitutional legislation. In terms of the present analysis, this implies that the court is not committed to constitutional decisions, and the problems created by the constitutional status granted to the Basic Laws in general, and to the binding resolution of Israel’s values as a Jewish and democratic state, evaporate.43

42 Most members of the Supreme Court who contend with the constitutional standing of Basic Laws have repeatedly criticized the fact that these laws do not require privileged quorum or a minimal majority approval. This fact is the basis for calls that upon its completion, the constitution ought to be ratified in a special national referendum.

43 Cheshin J. represents this approach in a most forceful manner in United Mizrahi Bank, supra n. 26. For example, on p. 409 (sec. 63) he writes the following: "Has the people of today granted its representatives in the Knesset the authority to bind the people of tomorrow in constitutional matters? ... We are referring to the people of today: has it granted it representatives in the Knesset authority to legislate a constitution today? When did it grant its representatives in the Knesset a mandate to legislate a rigid constitution for Israel?" Cheshin J. rejects the majority of justice’s agreement that the Knesset continues to serve as a constituent assembly when it deliberates and passes Basic Laws (in an ordinary legislative process and without having to pass Basic Laws with a privileged majority). See also his comments in pages 415 (sec. 69) and 419 (sec. 73).
(2) Exposure of the empty content of formal expressions such as “The Constitutional Revolution”\textsuperscript{44} and — one may deduce — of the phrase “Israel’s values as a Jewish and democratic state”. Rather than attempt to infuse meaning into empty expressions, this approach seeks to alert the judicial and political system to the fact that the legislature has transferred to the judiciary the task to interpret a phrase that should be granted meaning through the democratic political process.

* * *

Reading the diversity of opinions offered by his colleagues in \textit{The United Mizrahi Bank} case, Goldberg J. commented: “It is possible to see in every legal option [a legitimate interpretation]”. That being the case, he concludes that:

It is worthy to prefer the one that upholds more than others the standing of human rights, when this preference is called for from the normative issues of the case. A thesis that is possible, yet may weaken the standing of the norm, necessarily diminishes the stand-

\textsuperscript{44} “The concept of ‘revolution’ heralds a traumatic change in the life of a person, in the life of a people. A change from one end to another. Such was the revolution of Yeroba'am Ben-Nabat, such was the French Revolution, such was the Bolshevik Revolution. And if we are told that in March 1992 there occurred a ‘Constitutional Revolution’ in relation to human rights, it is as if the speaker adds to the event the fact that in that month a deep change occurred — a change from one end to another — in human rights in Israel”. Cheshin J. in \textit{United Mizrahi Bank, supra} n. 26, at 478 (sec. 134). Cheshin J. goes on to refute this assumption, showing that the Basic Laws do indeed reflect commitment to rights, but that such commitment had been present prior to the legislation of these laws. In terms of this strategy, Cheshin represents the approach that calls for a more moderate and low-key approach to effecting social change through legislation. Citing Dworkin’s analogy of the development of law to chapters of a story that is written continually, he cautions against judicial rhetoric that goes against his notion of gradual evolution of legal standards in a manner that is closely related to normative changes in Israeli society (p. 480, sec. 136). See in this respect the words of caution also voiced by Zamir J. on p. 341 (sec. 3). It is interesting to note that Cheshin J., although decidedly liberal in the value-system he presents, uses biblical and midrashic Hebrew more than any of his colleagues on the Supreme Court. His use of biblical language reflects sensitivity (or perhaps enhances sensitivity) to the diverse interpretations of legal and social reality that are available in Israeli society due to the Babel of Jewish tongues and traditions that co-exist within Israeli society.
ing of rights themselves. The orientation that should guide us is the opposite.45

I think that this statement reflects the dominant sentiment in the current Supreme Court. It is the voice of judges acutely aware of the ramifications of the responsibility thrust upon them, and it is the voice of judges steeped in the intricacies of constitutional discourse. Above all, it is the voice of judges who cherish individual freedoms and civil and human rights. Their language is the language of legal precedent, and their primary reference is the body of norms and practices developed in established democratic societies.

Analysis of the court’s strategies in response to the interpretive challenge posed by the wording of the “purpose” section leads me to conclude that there is no magical formula that can be articulated by the judiciary as it deliberates the meaning of the expression “Israel’s values as a Jewish and democratic State”. All of the justices are committed to upholding democratic values, as befits their office. Most of them are aware that the legislature has encumbered them with a mission impossible: to grant positive meaning to the expression included in the “purpose” section. Under these circumstances, the most the judiciary can do is to prepare the legal language and justifications that will guide them when they will have no choice but to enter the public arena and determine how to reconcile Israeli society’s core conflict.

5. Summary and Conclusions

In these concluding comments, I wish to raise seven possible “worst-case” scenarios that deal with the possible de-stabilizing of Israeli democracy. In these scenarios I situate the negative political effects of the “purpose” section as a definition that exasperates existing conflicts and tensions within Israeli society. I leave out of these reflections scenarios that include positive conclusions to this riddle, for my goal here is to highlight the potential pitfalls.

1. The wording of the “purpose” section has inadvertently shifted the focus of public debate about Israel’s evolving constitution from the importance of internalizing rights to the question of the meaning of Israel as a Jewish State.

45 United Mizrahi Bank, supra n. 26, at 488-89 (sec. 1).
The heightening of stakes about the nature of Israel's *telos* is related to a host of political developments that are not directly related to the question of rights legislation. The most salient stimulus for this national soul-searching is the need to decide the State of Israel's final boundaries (peace talks with the Palestinians, Syrians and Lebanon). Many political positions regarding this issue are based on interpretations of Judaism's mission and on the lessons of Jewish history.

However, additional processes are at work. The strengthening of religious parties in Israel is accompanied by the growing power of individual rabbis and of Rabbinical Councils as the ultimate sources of legitimacy for the positions adopted by their political representatives in parliament and in the government. This is a development that is perceived by many liberal-democrats as a threat to the legitimacy of democratic processes.

An additional issue that reflects fundamental disagreement about the norms which are guiding Israeli society is the one referred to in Israeli politics as "The Who Is a Jew?" question. In its most recent version, it focuses on the concern of the Jewish establishment in Israel (of all sorts: both rabbinical and governmental) with the fact that between thirty to fifty percent of immigrants to Israel in the past decade are non-Jews. These percentages imply that there are at least 100,000 non-Jewish Israeli citizens (some estimate the number as high as 200,000) who are waiting for the resolution of the extremely acrimonious quarrel between Orthodox and non-Orthodox Jewish establishments regarding the question as to who is entitled to convert to Judaism.

46 See I.S. Lustik, "Israel as a 'Non-Arab' State: The Political Implications of Mass Immigration of Non-Jews". Paper prepared for presentation at the Annual Meeting of the American Political Science Association, Boston, Mass., September 2-6, 1998. This excellent paper surveys the question of the exact number of non-Jews who entered Israel as legal immigrants since the beginning of immigration from the former Soviet Union in the late 1970's.

47 The immediate political question is that of conversion. However, the long-term implications of this debate relates to the prospects of marriage between Jews, whose status as "Jews" is subject to future question by diverse rabbinical authorities. Lustik writes that "regardless of what Haredi [ultra-Orthodox Jews] may say in public, in private many Haredi groups do not consider the Russian and Ethiopian immigrants to be reliably Jewish, and hence maintain intra-communal "blacklists" for purposes of approving marriages between members of their communities and these immigrants". This observation is based on an interview with Rabbi Moskovitz, Director of the Department of Eruv Affairs, Tel-Aviv-Jaffo, 31 January 1998. In Lustik, "Israel as a 'Non-Arab' State", supra n. 46, at 13, n. 29.
There is an additional background factor. In 1995, Prime Minister Rabin was assassinated by a religious zealot. This event provided proof to many non-religious Jews who are fearful of politics that are embedded in messianic visions. It raised walls of distrust between secular and religious Jews in Israel, and is currently in the psychological background of secular-religious relations in Israel.

These four issues are the more salient examples of political controversies that tend to be (superficially) divided along secular and religious lines. Such controversies erupt precisely because the Israeli polity has not agreed on the contours and contents of its fundamental value system. They reflect the fact that many decisions that arise in the course of “normal” politics in Israel become political crises precisely because they are interpreted in terms of divergent normative presuppositions that are often widely at odds. Traditionally, the Israeli political process has yielded results that reflect the balance-of-political-power of the hour. This balance also includes the implicit understanding that at the end of the day political compromise has to be attained. At times, a liberal-democratic approach carries the day, at other times political outcomes are determined by religious and traditional values. The compromises are usually hammered out between political representatives, on a case-by-case basis. In such a charged political atmosphere, it is simply irresponsible to include in the evolving constitution a definition of Israel as a Jewish and democratic State, itself a continually negotiated balance that cannot and should not be settled by binding words of judicial rulings.

2. An unintended effect of the “purpose” section is that there has been no dramatic change in the extent and intensity of public awareness of the importance of upholding rights in Israeli democracy. To the extent that the 1992 legislation provoked public debate, its focus is on the definition included in the “purpose” section. This is an extremely unfortunate development, for Israeli political culture could greatly benefit from a focused, ongoing discussion on the meaning and significance of human rights. However, discussion of rights continues to be the concern of liberal elites. In the general public, discussion of rights is overshadowed by arguments over the apparent tension (or conflict) between Israel’s Jewish and democratic values.

3. In addition to enabling the court to exercise judicial review over its legislation, the Knesset has also asked the court to reveal to Israeli society the content of its core values. From an institutional perspective, by transferring to the judiciary the responsibility to deal with deeply-
contested normative issues lurking behind the phrase “Israel’s values as a Jewish and democratic State”, the Knesset has given up on its proper role as the hub of decisions pertaining to resolution of fundamental normative conflicts in Israeli society. The latter responsibility creates an imbalance in terms of the relation between the legislature and the judiciary in a well-functioning parliamentary democracy.

4. An evident, unintended, consequence of the wording of the “purpose” section is that the legislature has thrust upon Israeli society and politics the need to adopt clear-cut and uncompromising decisions on issues best left to ongoing dialogue. The fact that the rule of law is still respected in Israel, as are the words of the Supreme Court’s justices, compels social factions to compete in the world of effective rhetoric in order to create the appropriate “public opinion” regarding the relative importance of Jewish and democratic values. This is an unnecessary development. Relieve the courts from the need to determine this issue, and the stakes are lowered. Lower the stakes, “normal” politics, with their ill-defined values yet with their practical compromises will return to be the cultural norm.48

5. By attributing to the State of Israel values that are embedded in the State rather than in society, the legislature has inadvertently strengthened the perception that the State is an independent ontological entity with an agenda of its own that may be independent from, and prior to, the agenda of its citizens and society. This, I submit, is unacceptable in a democratic constitution, and can have long-term and deleterious effects on education for democracy in general, and for appreciation of human rights in particular.

6. Conflicting visions of Israel often give rise to creative and fruitful tension. This creative tension is currently being transformed into divisive conflict. The Court is perceived to be at the center of this conflict. Accordingly, there are increasingly vocal and influential calls to change the composition of the Supreme Court, and to include political consid-

48 Some critics may claim that I place too much emphasis on the effects of the “purpose” section on political discourse in Israel. In my understanding, this section has become part of the political horizon, in the form of a future decision that has considerable political consequences. Astute politicians detect this probable development, and are preparing the background for influencing the future decision. Astute politicians in Israeli politics are often also shrill. Taking this into account, my point is that if one removes the “purpose” section from Israel’s political horizon, then the political stakes invested in this issue will greatly diminish.
erations in the process of selecting judges to this high office. In addition, there are calls to create a Constitutional Court whose composition will reflect Israel’s diverse social factions. This political agenda, originating primarily in right-wing and religious quarters, is being balanced by initiatives to reform the administrative structure of the courts in a manner that will enable the Supreme Court — in its existing format — to have more time to deliberate constitutional issues.\(^49\) I do not intend to debate the relative merits of these and similar initiatives. I do think that it is wrong to transform the judiciary into a politically balanced institution, particularly in light of the fact that not all social groups in Israel are committed to democratic norms. In the limited context of this discussion, I wish to point to the fact that these initiatives, while grounded in serious justifications, are also related to the wording of the “purpose” section and to fears and hopes associated with future rulings on its meaning.

7. Finally, an issue that is presently absent from the public (predominantly Jewish) debate about the definition of the values of Israel as a Jewish and democratic State. What will be the long-term effect of such a definition on the allegiance to the State of its non-Jewish citizens? This issue is not paramount in the present discussions, but will inevitably arise in the future, as non-Jews question their place in a democracy that defines itself in these terms. Here, too, we can intuit a potentially destabilizing effect of the words of the “purpose” section.

6. What is to be Done?

I stated my civic goals in my introductory comments: to create intellectual justifications for dropping the expression “Israel’s values as a Jewish and democratic State” from Basic Law legislation. In these final comments, I wish to propose some alternative, practical, ways of translating this basic purpose into legislative action.

1. Reduce the expression included in the “purpose” section to “the values of the State of Israel”. This will justify reference to the “fund-
mental principles” (sec. 1 of the Basic Law) as the basis for interpreting the expression. This section reads as follows:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.50

Had the legislature left this declaration of intent as the sole declaration of purpose of the new Basic Laws, there would be no basis for the critique voiced here.

2. An alternative solution, that takes into account the political need to include a Jewish element into the “purpose” section would be to change the wording of the “purpose” section in a manner identical to the words of the first section of the Foundations of Law: “the principles of freedom, justice, equity and peace of Israel’s heritage”.51

3. A less desirable solution, yet one that takes into account political compromises that the Knesset can negotiate, is to soften the normative significance of the expression “Jewish and democratic” by adopting the formula that is included in a private bill currently on the Knesset agenda. This formulation is as follows:

This Basic Law’s purpose is to protect [the relevant right, e.g., “the human dignity and liberty”] of the state’s citizens and inhabitants, in the spirit of the State of Israel’s values as a Jewish and democratic State.52

By using the expression “in the spirit of the State of Israel’s values” rather than the expression “to anchor in basic law the values of the State of Israel as a Jewish and democratic State”, this formulation decouples the fatal linkage which I criticize in this essay.

4. Since the executive branch has prepared three additional new Basic Laws dealing with protection of rights, I suggest that the Ministry

50 Zamir and Zysblat, supra n. 11, at 154, 157.
51 See supra n. 24.
of Justice initiate change of the “purpose” section along the lines aforementioned.\footnote{The Ministry of Justice has circulated three new Basic laws dealing with human rights: Basic Law: Rights in the Legal Process, Basic Law: Freedom of Speech and Association, and Basic Law: Social Rights. All three include a “purpose” section, worded in terms identical to the “purpose” section analyzed in this essay.}

5. Finally, a word about the civic responsibility of the judiciary. My analysis of the Courts’ interpretive strategies demonstrates that most judges are sensitive to the problematic and politically explosive nature of their interpretations of the “purpose” section. I think that attempts to sidestep this issue, while continuing to justify rulings on the basis of democratic values, should continue. I also welcome the third strategy, whereby the court expresses reservations regarding the task accorded to them in reconciling an unresolved normative tension that is at the roots of the Israeli experience.\footnote{See the sharp critique of the former President of the Supreme Court, Landau P., in “The Supreme Court as Constitution Maker for Israel”, (July 1996) 3:2 Mishpat Uminshal 697-712.} However, the best response would be for the judiciary to assert that infusion of positive meaning into a phrase fiercely contested in Israeli politics is simply beyond the reach of judicial activity, and that this is the one instance where the assertion that “everything is judicable” simply does not apply.

A final note: a skeptical critic may suggest that even if the purpose clause be removed from the wording of Basic Laws (my recommendation in this article), the courts are still confronted with the need to resolve dilemmas immanent in the tension between their responsibility to protect universal human rights in the face of religiously Jewish political power and legislation. According to this logic, if my intention in this essay is to promote a lower political profile for the courts, such a critic of my argument may wonder whether I am placing inordinate emphasis on the limitations of the purpose clause, while neglecting the fact that the basic tension exists whatever the Knesset (or the courts) decide to do with the purpose clause.\footnote{I thank Prof. Frances Raday for drawing this point to my attention. See her discussion of the pervasive violation of the right to equality which resulted from the status quo on state and religion in the pre-1992 period in “Religion, Multiculturalism and Equality” (1996) 25 Is. Yrbk Human Rights 193-241.}

My response to this possible objection is that in terms of the structure of government in Israel, the tension between universal rights and the
political power of Jewish religious groups and parties should be uncoupled by redefining the boundaries between the judiciary and the legislature. Rights should continue to be established and developed as an integral element of the normative background guiding Israel’s judiciary. The political power of religious and other social groups that compete for cultural and political hegemony in Israel should be tested and exercised in the parliament. It is precisely this imbalance — creating within the courts a structured tension between rights (legal discourse) and political struggles (legislative and representative discourse) — that I recommend be undone, by returning to the parliament the political conflict generated by conflicting interpretations of the purpose clause. The courts will then continue to uphold individual human rights in a gradual, specific (case-by-case) precedent-creating basis.