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Law in Society: A Unifying Power or a
Source of Conflict?*Daphne Barak-Erez**

Preface: A Divided Society in a Search for a Unifying Force

At the dawn of the twenty-first century, society in modern countries is heterogeneous and split by economic, ethnic, and religious divisions. Therefore, there is an understandable aspiration to identify unifying factors that may contribute to better social cohesion. Prima facie, law presents itself as a feasible means for achieving such unity. First, law and justice enjoy universal support, at least in principle. Secondly, law purports to bridge over disputes and presumes to establish a rule for harmonious social conduct. Thirdly, in democratic discourse law often enjoys an elevated, *quasi*-religious status.¹ Fourthly, in practice, numerous problems that are not solved by other institutions find their way to the legal system. In other words, the centrality of the legal system in public life is an additional factor making it a candidate for the role of society's unifying element. In fact, thinking of law as a tool of social integration is not new. Durkheim argued that as modern society lacks the natural solidarity which characterized simple and homogenous early societies, law can serve as modern society's basis of social solidarity.² Another approach relevant here is that of Habermas, who pointed out that law provides a problem-solving mechanism capable of replacing social processes when the latter fail.³

* The author wishes to thank Yishai Blank, Roy Kreitner and Shai Lavi for their comments and the Cegla Center for the Interdisciplinary Research of the Law at Tel-Aviv University for its support.

¹ Compare Lior Barshack, 'Civil Religion and the Court' (2001) 5 *Hamishpat* 35 (Hebrew).

² Emile Durkheim, *The Division of Labour in Society* (trans by George Simpson, Glencoe, 1933).

³ Habermas writes in this context that: 'Where other regulators—for example, the coordination patterns operating through settled values, norms, and routines for reaching understanding—fail, politics and law raise these quasi-natural problem-solving processes above the threshold of consciousness, as it were. In feeling in for the social processes whose problem-solving capacities are overtaxed, the political process solves the same kind of problems as the processes it replaces'. See: Jurgen Habermas, *Between Facts and Norms—Contributions to a Discursive Theory of Law and Democracy* (trans by William Rehg, Cambridge, Mass, 1996), 318.

At the same time, there are reasons for scepticism regarding the resort to the law as a medium of social unification. Law is first and foremost an arena of conflict. The practical function of the law is to resolve disputes and any resolution of a dispute, irrespective of its benefit in terms of public order, is by nature harsh and unpleasant, at least from the perspective of one if not both litigants. In that sense, law is more naturally identified with conflict and division. Moreover, channelling serious social disputes into the legal system may jeopardize the consensual nature of the legal system itself.

This chapter proposes to evaluate the prospects of the recourse to law as a basis for social unity. It will describe the manner in which law served as a unifying force throughout history and will then evaluate normative arguments against its utilization for that purpose. In the second part, the chapter will evaluate these arguments against the background of a case study, focusing on the impact of law on the cohesion of society in Israel.

The Unifying Function of Law

Any discussion of law's potential as a unifying mechanism in society should first recognize the impact law had on the unification of societies throughout history. Law has played a constitutive role in the formation of the polity.⁴ Law applies to those considered as part of the polity, or at least subject to its jurisdiction, and excludes others. Normally, its application is determined by geographical borders, within which there are people who are already interconnected by other fibres of practical communal life. There are also special cases of legal systems whose application is not limited to community within a defined territory, but these systems too are special to communities defined by other criteria (for example, religious communities). In the usual case, the law of the state or the community is expressed by the use of an official language. Therefore law's contribution to unification is also expressed in the incentive it gives to the use of a shared common language.

The current position of international law against changes in the applicable law in occupied territories can also be understood against the recognition that law can be used as a tool for unification. International law opposes the unification of the occupied territory with the occupying state, and therefore opposes the unification of their legal systems. In the past, the conquering of foreign territories by imperialist forces was invariably accompanied by introducing the conquered countries to the law of the mother country; and the application of the conqueror's law was the first step towards unification of the conquered territory with the conquering state.

⁴ The complementary aspect of this proposition is that law is also the product of a community—namely of the society and its culture. See: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (trans by Klaus A. Ziegert, New Brunswick, 2002) ('Every legal proposition is shaped out of the materials furnished by the society, but the shaping is done by the jurist').

In the Roman Empire, Roman law was applied in the provinces, although the provinces were usually allowed to maintain cultural and religious freedom. The result was that until this very day Roman law serves as a shared cultural denomination throughout Europe. A more recent historical example is the Napoleonic conquest. The French military conquest was also accompanied by the dissemination of the 'Napoleon code' which subsequently influenced the legal cultures of many states both inside and outside of Europe.

At a later stage, modern state law served as an important factor in national projects. The emergence and crystallization of nation-states was accompanied by the creation of their separate legal systems, ostensibly expressive of the nation's values.⁵ In our time too, the aspiration for harmonization and unification of European law is an integral part of the project of Europe's unification. Law is once again a medium for the merging of different states into a single, unified European entity.⁶

National constitutions are generally regarded as festive expressions of the unifying role assigned to the law. The constitution is the fundamental document of the legal system. In addition, it is an educational document, expressing the 'national spirit'. In the United States, the American Constitution is the constitutive document of American society, although upon acceptance it failed to protect all of its addressees, among them racial minorities and women. The American Constitution and its tradition have been viewed by many as the foundation of the 'civil religion' of American society,⁷ despite bitter disputes over its interpretation.⁸ In its famous decision in *Brown v. Board of Education*,⁹ the US Supreme Court not only abolished segregation in education, but also facilitated American society's recovery from institutionalized racism, and ultimately promoted interracial reconciliation, despite the disputes attendant to that process.

It is important to note that the concept of law as an expression of the shared values of society is also consistent with the perspective guiding the courts themselves. When courts establish norms they also tend to describe them as social norms. In the realm of private law, the concept of 'reasonableness' is interpreted in accordance with the values of each society.¹⁰ Reference to social norms is even more prevalent in public law litigation, for example when the court has to define unjustified discrimination, in contrast to a relevant and justified distinction.

⁵ Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, 2001), 132–3. Regarding the connection between civil codification and the nation-state see also: Daphne Barak-Erez, 'Codification and Legal Culture: In Comparative Perspective' (1998) 13 *Tulane European and Civilian Law Forum* 125; Stephen Jacobson, 'Law and Nationalism in Nineteenth Century Europe: The Case of Catalonia in Comparative Perspective' (2002) 20 *Law and History Review* 307.

⁶ See: Fitzpatrick, n.5, above, 136–7.

⁷ See: Sanford Levinson, *Constitutional Faith* (Princeton, 1988); John E. Semonche, *Keeping the Faith—A Cultural History of the U.S. Supreme Court* (1998).

⁸ On the phenomenon of conflicting traditions each of which regards itself as constitutionally based, see: Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

⁹ 347 U.S. 483 (1954).

¹⁰ It is precisely for this reason that criticism was levelled against the concept of the 'reasonable man', for not being sensitive to heterogeneity in society.

Critiques of the Unifying Role of Law

The aspiration to utilize law as a unifying force is based on the assumption that a united society is a prominent goal. However, this assumption is no longer consensual. The idealization of unity is now under attack, and this attack is also directed against social institutions that are associated with it, including the legal system.

Multiculturalism

A central critique of the yearning for unity originates in multiculturalism. In general, multiculturalism challenges the desirability of the melting pot ideal. It calls for respect for different cultures and customs and for ensuring their preservation. Therefore, it does not necessarily accept the desirability of shared social values. For example, multiculturalism challenges the idea of standardized education for all, and as a result opposes also its establishment by law (like the secular state education sanctioned in France). Multiculturalism also recognizes the minority's right to preserve its language and even to aspire to non-participation in frameworks that may threaten its unique character (such as military service of members of distinct religious communities).¹¹ More generally, law's ability to function successfully as a medium for the preservation and propagation of shared values is always contingent upon the continued predominance of the ideal of shared values. To the extent that this ideal has worn thin, a legal system attempting to establish its hegemony is liable to find itself on the defensive. Therefore, in a multicultural society in which Muslim girls are forbidden by law to wear scarves in public schools, the prohibiting legal norm serves as a tool of division and not of unification.

The Political Concept of Law

Another important critique of the values ingrained in the legal system is more specific to the legal arena and expressed by critical legal theorists, who point to the inherently ideological and political nature of legal norms. According to this critique, throughout history, law has expressed the values of the power holders in society, both economically and politically. As such it provided an ostensibly neutral cover-up for ideological and interest-related decisions.¹² This critique points, for example, to

¹¹ In this context it is important to remember the distinction made by Yael Tamir between 'thin' multiculturalism, representing the meeting of cultures which share underlying liberal democratic values and 'thick' multiculturalism, representing the meeting between liberal and non-liberal cultures. See: Yael Tamir, 'Two Concepts of Multiculturalism' *Multiculturalism in a Democratic and Jewish State* (Menachem Mautner et al. (eds), Tel-Aviv, 1998 (Hebrew)) 79.

¹² For representative writings, see: Roberto Mangabiera Unger, *The Critical Legal Studies Movement* (Cambridge, Mass, 1983); Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, Mass, 1997).

the fact that the American Constitution expressed the values and interests of white property-owners. In the same manner, the traditional offence of rape did not protect women from sexual violence committed by their legal spouses, just as criminal law in general restricted itself to interference in the public sector and therefore exposed the weaker members of the family (primarily women and children) to violence and domestic terror. The more general conclusion derived from critical legal theory is that law cannot be sanctified as the representation of shared, common values. According to this view, law is no more than a mirror reflecting hegemonic social mores and powerful interests. In other words—there are no neutral principles.¹³

Critiques on the Unifying Role of the Courts

A more specific criticism is not aimed at the idea that law is a tool in the service of social unity, but rather at the expectation that the courts (in contrast to other institutions) will serve as the agents of unity through law by declaring society's basic values.¹⁴

An important distinction has to be drawn between harnessing the legal system as the harbinger of social unity by way of legislative acts on the one hand and judicial actions intended to establish shared values in the context of particular judicial decisions on the other. The legislative process is far better equipped to serve as a tool for engendering social unity. It encompasses representatives of the entire public (at least in principle) and provides a platform for public dialogue.¹⁵ In contrast, the judicial process does not involve participation of all the social groups potentially affected by it. In addition, even when it raises fundamental social questions, they are normally discussed through the prism of a particular dispute and a particular set of facts.

When the court becomes a forum for resolution of value-laden controversial questions, it generates opposition to the legitimacy of its rulings and the values expressed thereby. The result is that judicial decisions, which are aimed to give a solution to questions in social controversy, usually achieve opposite results.

¹³ The term 'neutral principles' was first coined in the context of American constitutional law in the wake of Herbert Wechsler's important article, which tried to promote judicial review guided by them. See: Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.

¹⁴ A representative writer advocating the idea of judicial decision-making based on shared principles is Ronald Dworkin. For this purpose, Dworkin assumes the existence of such common principles. He writes that: 'People are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise'. Ronald Dworkin, *Law's Empire* (London, 1986), 211.

¹⁵ This description of legislation is close to Waldron's argument regarding the special weight that should be attached to it as the product of an overall process which recognizes and addresses existing disputes in the society. See Jeremy Waldron, *The Dignity of Legislation* (Cambridge, 1999); Jeremy Waldron, *Law and Disagreement* (Oxford, 1999).

A conspicuous example of this process is the US Supreme Court precedent on abortion,¹⁶ a ruling that split the entire American society.

From Substance to Procedure: Agreement on the Procedure for Resolving Disputes

Given the disputed nature of society's shared values, the expectations that the legal system will be a source for social cohesion and solidarity should be redefined and diminished. If society's core values are disputed, the mere rehashing of certain values in legal texts will not eliminate the actual dispute surrounding them. Conceivably, this dictates a change of emphasis regarding the social consensus embodied in the legal system—not a consensus on substantive values but rather a consensus that it is the right forum for resolving disputes and controversies. In other words, members of society may not agree on any set of substantive norms, but they can still agree that disputes and conflicts among them should be brought to the courts and decided by them, or more generally that the legal system defines the appropriate procedures for the resolution of these disputes. The expectations from the legal system are thus diminished somewhat in terms of their ability to promote social cohesion. According to this narrower version regarding the contribution of law to social unity, court decisions do not necessarily express any collective consensus, but rather reflect an underlying agreement to be bound by them.

Unfortunately, it seems that even this limited version of law's contribution to unity may not easily command a consensus. Contemporary political debates focus also on the question of the scope of legitimate judicial decision-making, i.e. which substantive issues are legitimate topics for adjudication. More specifically, the controversial question is which conflicts should be presented for judicial resolution, and which conflicts should be left for the decision of the political system. For example, should the court only hear petitions submitted by directly affected parties, or also hear petitions filed by public petitioners? Should it eschew any adjudication of political matters, or be more lenient in this context, in order to promote the rule of law?

From Substance to Procedure: Litigation as a Basis for a Social Dialogue

An even more limited proposal regarding law's contribution to social unity focuses upon the public and political processes that invariably accompany litigation. Litigating a petition in court is never confined to the strictly professional aspects

¹⁶ *Roe v. Wade* 410 U.S. 113 (1973).

of 'preparing the file'. The litigation of a publicly disputed subject is invariably conducted against the backdrop of a heated public debate where each side attempts to 'win' the battle for public support. In other words, judicial litigation contributes to the development of public dialogue, which is an important pre-condition for better mutual understanding.

Ideally, questions of crucial importance to society ought to merit clarification and discussion that is unconnected with and not dependent upon their litigation in court. Democratic theories extol the importance of the vigorous public dialogue.¹⁷ Nonetheless, in practice, the public arena is highly conducive to noisy clamour and slogans that lack the critical dimension of serious argumentation, with factual and normative support. Litigation in court over the same issues compels the parties to present their claims in an orderly manner and to confront counterclaims. The result is that the deficiencies of the dialogue conducted in the public arena are supplemented by the dialogue conducted in the shadow of the legal proceedings.

Therefore, although public discussion does not have to go hand by hand with litigation in court, the substantive confrontation dictated by judicial litigation engenders valuable incidental profits.¹⁸ For example, the litigation in the *Brown* case forced American society to confront the tension between its ethos of equality and the tradition of segregation.

On the other hand, it is important to note that the adjudicative context may limit the substantive boundaries of the public dialogue. It may silence claims based on value judgments or social-cultural claims to the extent that these have no 'legal' expression either in terms of legislation or case law. It encourages confrontation as opposed to cooperation, emphasizing 'rights' at the expense of dialogue, reciprocity, and consideration for others. This point was made by Avi Sagi who stated that the legal discourse promotes a 'dialogue of rights' as distinct from a 'dialogue of identities' in which each party has to consider the other party, his aspirations, and his concerns.¹⁹

The Israeli Case Study: Law between Nation-Building and Social Conflicts

At this point, I intend to analyse the theoretical considerations presented thus far by an evaluation of one legal system in the form of a case study. The legal system

¹⁷ The writings of Habermas may serve a representative example of these. When presenting 'procedural paradigm' of law, he explains that: 'The forces of social solidarity can be regenerated in complex societies only in the forms of communicative practices of self-determination'. Habermas, n.3, above, 445.

¹⁸ In this context, mention should be made of the proponents of judicial minimalism, which avoids ideological decisions of broad scope, thus leaving room for continued public dialogue. See Cass R. Sunstein, *One Case at a Time—Judicial Minimalism on the Supreme Court* (Cambridge, 1999).

¹⁹ Compare Avi Sagi, *Society and Law in Israel: Between a Rights Discourse and an Identity Discourse* (Ramat-Gan, 2001).

chosen for this purpose—that of Israel—is an ideal candidate in the present context, because of the multicultural and highly divided nature of Israeli society, usually described as a ruptured society, chequered by numerous ethnic, cultural, ideological and social schisms. These include a religious–secular split, an Arab–Jewish split, as well as socio-economic and ethnic divisions even within the Jewish population.²⁰ Consequently, there is a strong desire to find uniting denominators which may contribute to a better social cohesion. In the past, Zionist ideology succeeded in providing a shared and unifying ethos for the majority of the Israeli public (more accurately, the Jewish Israeli public) but today, it is no longer capable of bridging the gaps and the internal tensions within Israeli society.²¹ Furthermore, since the 1980s the Israeli judiciary has become a panacea for problems that have not found a solution in other forums. Clearly, the process of ‘legalization’ that has engulfed Israel is indicative of Israeli society’s disenchantment with the divided world of politics, and its hope to find answers by having recourse to its legal system.²² As a result, the centrality of the legal system in Israeli social and political life makes it a worthy candidate to serve as a tool of social unification.

Israeli Legislation in the Service of Unification and Nation-Building

After the establishment of Israel in 1948, legislation served an important tool in the service of the Israeli nation-building project. Israeli law was based on the heritage of the British Mandate legal system, but the first years of the State, mainly during the 1950s, were characterized by intensive legislative activity intended to crystallize and solidify the nascent ‘Israeli’ society. It is interesting to note that the political system also chose to utilize legal tools in realizing the goals of unity and solidarity in addition to initiatives in other arenas. Ben-Gurion’s conception of ‘Statehood’ (*Mamlachtiyut*)²³ assigned an important role to the law as a normative system of general application, which embodies the connection between the

²⁰ Over the years, the ethnic divide within the Jewish population (between European and non-European Jews) has been absorbed into the broader problem of economic stratification of Israeli society. In practice, there is a relatively large proportion of Jewish immigrants from Arab countries in the economically weaker social strata.

²¹ See Baruch Kimmerling, ‘The New Israelis—Cultural Plurality without Multiculturalism’ (1998) 16 *Alpayim* 264 (Hebrew).

²² In this context, Nir Kedar wrote that the ‘legalization’ of Israeli society is also part of the process in which certain groups in the Israeli society consciously attempt to present an alternative, which they regard as an ‘objective’ clean, and efficient alternative to the disappointing political system, characterized as corrupted and impotent. In this process, law and the interpretive dialogue as its agent, become both the method of proposing an alternative to politics and the alternative itself. See Nir Kedar, ‘Interpretative Revolution: The Rise of Purposive Interpretation in Israeli Law’ (2002) 26 *Tel-Aviv University Law Review* 737 (Hebrew).

²³ Eliezer Don-Yehiya, ‘Political Religion in a New State: Ben-Gurion’s *Mamlachtiyut*’ in *Israel—The First Decade of Independence* (S. Ilan Troen and Noah Lucas (eds), Albany, 1995), 171.

individual and society.²⁴ As noted by Horowitz and Lissak, the adoption of a legal system with general application also had the effect of limiting, though not eliminating, potential for factional-partisan arrangements between the central political institutions and groups or individuals.²⁵

Legislation Regarding National Institutions

The establishment of the State of Israel went hand in hand with the establishment of its national institutions. Apart from their functional purposes, these institutions were also intended to serve as consolidating forces in Israeli society. Naturally, the imposition of compulsory military service fulfilled an existential need for the State of Israel. Yet, the Defense Service Law 1949 was enacted in a manner that intended to accommodate the enlistment of the largest possible portion of Israeli society in awareness of the unifying function of the army,²⁶ and the Kosher Food for Soldiers Ordinance, 1948 was intended to guarantee better integration of religious soldiers in military service. Similar things can be said regarding the education legislation during those years. It was intended to ensure basic education for all, but in fact purported to go beyond this purpose. The State Education Law, 1953, which was enacted as a supplement to the Compulsory Education Law, 1949, aspired to standard, non-party education, which would inculcate universal shared values.²⁷ In the same manner, the State Service (Appointments) Law, 1959 was intended to lay the foundation for a public service that would be open for all, as opposed to a system based on political criteria.

Indeed, the implementation of these laws has not always mirrored the statutory ideal they embodied. The public service has never been entirely non-factional; general state education was established alongside a statutory recognition of the autonomous and independent ultra-Orthodox educational streams, and the partially autonomous state-religious educational stream; the Arab citizens and

²⁴ See Nir Kedar, 'Ben-Gurion and the Struggle to Appoint a Sepharadi Justice to the Israeli Supreme Court' (2003) 19 *Bar-Ilan Law Studies* 515, 534 ('Law, as a normative system and as a social and cultural institution, plays an important role in Ben-Gurion's conception of republican statehood. Law is important for Ben-Gurion because like the modern state, it is general, and its purpose is not only to regulate the mutual relations in the mass modern society, but also to serve as an agent for the liberation of man and society').

²⁵ Dan Horowitz and Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (trans by Charles Hoffman, Albany, 1989), 155: 'the adoption of a universalistic legal system, a legacy of the British Mandate, worked to reduce the occurrence of particularistic arrangements between the political center and groups and individuals that were common under the ambiguous rules of the game of the Organized *Yishuv*'.

²⁶ In the Knesset deliberations devoted to the enactment of this law, Ben-Gurion stated that: 'We must not ignore the destructive and divisive forces that still operate amongst us. Our factional and ideological fragmentation is no less than that which characterizes the most inferior and depraved nations . . . apart from the school which is also partially tainted by factionalism, only the Army can and must serve as a merging and elevating force in forging the new character of the nation, and its proper integration into the new culture and society that has been created in the State of Israel' (1949) 2 *Knesset Protocols* 1338.

²⁷ See also Eyal Kafkafy, *A Country Searching for its People* (Tel-Aviv, 1991) (Hebrew).

ultra-Orthodox Jews are usually granted de-facto exemptions from the military draft.²⁸ Even so, it is important to note that legislation was an important tool in the promotion of Ben-Gurion's conception of 'statehood' during the 1950s. It also defined the targets to be aspired to even when their materialization was less than total. The conception of statehood was also consistent with the establishment of a professional and autonomous judiciary, one of the features of the Israeli legal system from its early beginning.²⁹

Legislation in the Symbolic Realm

The 1950s were also the years of legislation intended to decorate the State with national symbols considered crucial for identification with the collective. The choice of the State flag and emblem were anchored in the Flag and Emblem Law 1949. The national memorial days were similarly anchored in laws that dealt with the memory of fallen soldiers and the victims of the Holocaust (Heroes' Remembrance Day (War of Independence and Israel Defense Army) Law 1963 and Martyrs and Heroes' Remembrance Day Law, 1953).³⁰ The Labour Hours and Rest Law, 1951 instituted the Sabbath (Saturday), the traditional Jewish day of rest, as the State of Israel's principal day of rest. Similarly, the legislation prohibiting pig-raising³¹ and limiting commerce in pork,³² followed the traditional Jewish prohibitions on pig-raising and pork consumption.³³ Notably, the importance of these symbols as unifying factors was limited to the Israeli Jewish public and did not extend to the Arab minority.

Welfare Legislation

The broad welfare legislation of the 1950s also played an important role in the consolidation of Israeli society. In this context, particular importance should be attached to the comprehensive protective legislation dealing with workers' rights,

²⁸ At the same time, Ben-Gurion totally rejected the demand to establish separate units for religious soldiers. Relating to this demand he wrote in his diary: 'I told them: "A. Our army will be unified without any factions; B. To Keep it unified we shall make it kosher throughout"'. See Tom Segev, *1949: The First Israelis* (Arlen Neal Weinstein (ed.), New York, 1986), 252. The separate frameworks for religious soldiers in the format of *Yeshivot Hesder* (special army programs, combining religious studies and army service), and *Nachal Haredi* (separate army service for ultra-orthodox Jews) are far later developments.

²⁹ At the same time, the tradition of professional appointments of judges conflicted with Ben-Gurion's concept of statehood when he aspired to appoint a *Sephardi* (non-European Jewish) judge to the Supreme Court as a means of promoting social solidarity and social inclusion of Jewish immigrants from the Arab countries. See: Kedar, n.24, above.

³⁰ Regarding symbolic legislation see further Yifat Holzman Gazit, 'Law as a Symbol of Status: The Jewish National Fund Law of 1953 and the Struggle of the Fund to Maintain its Status after Israel's Independence' (2002) 26 *Tel-Aviv University Law Review* 601.

³¹ Pig Raising Prohibition Law, 1962.

³² Local Authorities (Special Enablement) Law, 1956.

³³ For a more extensive treatment of this issue, see: Daphne Barak-Erez, 'The Transformation of the Pig Laws: From a National Symbol to a Religious Interest?' (2003) 33 *Mishpatim* 403 (Hebrew); Daphne Barak-Erez, *Outlawed Pigs: Law, Religion and Culture in Israel* (forthcoming).

such as the Labor Hours and Rest Law 1951, already mentioned above, and the establishment of the National Insurance system by the National Insurance Law 1953. This legislation was inspired by the socialist ideology of the first Israeli governments, but in a broader perspective, it is important to recognize its seminal contribution to social cohesion in terms of establishing a society predicated on mutual help. It is a prime example of values of social solidarity poured into legal vessels, which further fortified the status of these values. At the same time, it is important to note that the welfare legislation of that time did not create social solidarity, but rather expressed it. It helped to enhance that which was in existence even without it. Furthermore, in view of the accepted norms in the employment market during those years and the powerful status of the *Histadrut*, the main workers' union, it was possible to guarantee workers' rights even without legislation.

The Declaration of Independence and the Missing Constitution

The most obvious omission in the Israeli project of unity and solidarity through law was the failure of the initiative to establish a national constitution. As mentioned above, constitutions are tools for the inculcation and propagation of a society's most cherished values. In Israel, this important document is still missing. To a limited extent, Israel's Declaration of Independence fulfilled the unifying role normally designated for a national constitution. The Declaration was considered an expression of national consensus at a rare historical moment. Indeed, in deciding hard cases, the Israeli Supreme Court repeatedly invoked the spirit of the Declaration of Independence as a document that expressed the 'national vision', and the national 'I believe' (*credo*).³⁴

Legislation and the Price of Unity through Law

The aspiration to achieve unity by enacting laws of consensus also had its price. The realm of Israeli family law provides an example. In this area, religious law was applied to matters of marriage and divorce, primarily due to unity-based considerations. This compromise achieved with the Jewish religious sector was understood as necessary to prevent division in the Jewish nation. The compromise led to the enactment of the Rabbinical Courts' Jurisdiction (Marriage and Divorce) Law 1953. The price of this compromise is paid by all those who are aggrieved by the application of religious law in this area as the sole alternative for marriage and divorce—women (who are often discriminated against by religious law), atheists (who have to take part in a religious ceremony for the purpose of getting married) and people interested in marrying a partner of a different religion or sex (and are barred from doing so, because their religion does not recognize these possibilities). As a result, despite its enactment as a harbinger of unity, this law has become an ongoing source of foment and division in Israeli society.

³⁴ The source of this expression is in the Supreme Court decision HCJ 10/48 *Ziv v. Gubernik* 1 PD 85, 89.

Judicial Decision-Making in a Search for Unity

Judicial Perceptions Regarding Shared Values

The Israeli judiciary has always tried to function alongside the Israeli legislature as an agent of social consensus. Since its foundation, the Supreme Court has regarded itself a national institution which echoes the voice of Israeli society. On numerous occasions it noted that it dwells amongst its people,³⁵ and that it both recognizes and expresses the values of society.³⁶ In the context of public law, the court cites social values as guiding principles for the exercise of judicial review. The question of whether an administrative decision is tainted by irrelevant considerations is examined in view of these values,³⁷ and in the same vein, the process of assessing whether an administrative decision followed the dictates of equality (and abstained from irrelevant distinctions) also relies on the 'fundamental values of law'.³⁸ The Court assumes the existence of a network of shared values that its decisions should reflect and benefit,³⁹ echoing Dworkin's writings.⁴⁰ In addition, as already indicated, the Israeli Supreme Court has always regarded the Israeli Declaration of Independence as reflecting the national credo of the Israeli polity. Its assumption has been that a national credo of this nature exists, and that the Court is its trumpet.⁴¹

The inclination of the Israeli Supreme Court to act as the agent of social norms has increased since the 1980s, and in this respect there has been a 'role reversal' between the legislative-political branch and the judiciary. On the one hand, the political system's ability to determine the national agenda (including its legislative

³⁵ See, e.g. SSA 1928/00 *State of Israel v. Beruchin* 54(3) PD 694, 704 ('The court dwells amongst its people, and it reads, hears and knows that the phenomenon of sexual harassment is still rife').

³⁶ See, e.g. HCJ 7074/93 *Swissa v. Attorney General* 48(2) PD 749, 784–5.

³⁷ Justice Aharon Barak, later to be the President of the Supreme Court of Israel, dealt at length with the function of the basic values of society in this context. He explained that: 'The assumption is that the purpose of any legislative act is to realize the fundamental values of the system and not to contravene them'. See: HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* 42(2) PD 311, 329–30. As for the sources of these fundamental values, he added that: 'The judge deduces these fundamental values from the "fabric of national life" of the people . . . the judge finds expressions of these in its fundamental documents, such as the Declaration of Independence, which is a legal norm that expresses the nation's proclamation of its values . . . another expression of the basic values may be found in the various laws giving them normative expression. But beyond all these, the fundamental values have an extra-legislative, extra-documentary existence, and are not a closed list. They change in accordance with changes in the "fabric of the national life" of the people'. *Ibid.*, 330.

³⁸ Judge Zamir addressed this issue in one of his judgments: 'How does one determine the parameters of the equality group in a particular case . . . since the law does not provide an answer to this question, we must extrapolate the answer in this case, as in all other cases, from the purpose of the law, the nature of the case, the fundamental values of the Israeli legal system and the particular circumstances of the case in question. Based on all the above, we can determine, with reference to a particular case, whether a specific characteristic or other is a pertinent consideration or not'. See: HCJ 6086, 6051/95 *Rekanat v. National Labour Court* 51(3) PD 289, 347.

³⁹ See also: Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 86–8.

⁴⁰ See n.14, above.

⁴¹ See n. 34, above. See also: HCJ 73/53 *Kol Ha'am v. Minister of the Interior* 7 PD 871, 884.

expression) has steadily declined. On the other hand, the judicial system, led by the Supreme Court, has become increasingly involved in normative decisions which claim to express shared basic values, and as a result, it is frequently criticized as too 'activist'.⁴²

Problems of Resorting to the Judiciary

The growing centrality of the courts in Israeli public life has been accompanied by increasing opposition to the legitimacy of its rulings and—by extension—to the values it proclaims. In fact, the controversy around precedents of the Israeli Supreme Court is not new, but its scope and level have broadened over the years. Even in the 1950s, the Supreme Court gave expression to values that were not subject to consensus. It served as a bastion of individualistic, liberal ethos (in contrast to the collectivist spirit that dominated the political realm) and thus established an unwritten bill of rights. Occasionally, it delivered decisions that were at the centre of political and value-oriented controversies, for example, the recognition of the status of non-married cohabitants.⁴³ Even so, until the 1980s the Court itself (as opposed to specific issues it adjudicated) was not the focus of dispute in Israeli society, for several reasons. First, the Court underplayed the value-based dimension of its rulings, which were presented in formalistic rhetoric,⁴⁴ and wherever possible eschewed the adjudication (and resolution) of questions that were regarded as political, by invoking preliminary doctrines such as standing and justiciability.⁴⁵ Secondly, the subordination of the judiciary to the decisions of the political system was clear and undisputed in the sense that the legislature was considered sovereign and its laws were not subject to judicial review (in contrast to administrative actions). Therefore, any controversial judgment from the perspective of the political system could be overturned by legislation. A representative example for this was the controversy around the definition of the word 'Jew' for purposes of the Law of Return 1951 and the Population Registration Law 1963.⁴⁶ Thirdly, until the end of the 1970s, the hegemony of the Labour Party in the political system effectively stifled any significant controversy over the constitutive values of Israeli society.

The 1980s witnessed changes both in the format of judicial decisions and in the social-political circumstances surrounding them. It was during this period that

⁴² See (1993) 17(3) *Tel-Aviv University Law Review* ('Special Issue: Judicial Activism in Israel').

⁴³ See: HCJ 563/65 *Yegerv. Palevitz* 20(3) PD 244.

⁴⁴ See: Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel-Aviv, 1993) (Hebrew).

⁴⁵ For example, the Court refused to adjudicate the question of establishing diplomatic relations with Germany. See HCJ 186/65 *Reiner v. Prime Minister* 19(2) PD 485.

⁴⁶ In a very disputed decision the Israeli Supreme Court allowed the registration of children born to a Jewish father and a non-Jewish mother as 'Jews' based on their parents' declaration, and against the religious doctrine, which recognizes as Jews only children born to a Jewish mother. See: HCJ 58/68 *Shalit v. Minister of the Interior* 23(2) PD 477. This decision was soon after followed by an amendment to the relevant legislation that defined the word 'Jew' in a way that followed the ancient Jewish tradition: 'a person who was born of a Jewish mother or has become converted to Judaism'.

the Israeli Supreme Court opened its gates to petitions that previously would have been dismissed out of hand due to lack of standing or non-justiciability. The Court was now prepared to recognize the status of public petitioners who represent a matter of concern to the public as a whole, especially if the petition raises questions with ramifications for the rule of law. In addition, only rarely would such cases now be considered non-justiciable.⁴⁷ The Court has also begun using value-laden terms such as 'good faith' and 'reasonableness'.⁴⁸ The result was that the ideological-evaluative component of judicial decisions became increasingly prominent, exposing them to criticism regarding both the values that should be endorsed by the court and the legitimacy of its value-laden decisions. In addition, judicial resort to terms such as 'the enlightened public' was considered as alienating social groups that not only opposed the new precedents of the Israeli Supreme Court, but also felt that in the Court's eyes they were the epitome of 'darkness' and archaism.⁴⁹ Another background factor that influenced these developments was the termination of the Labour Party's political hegemony following the 1977 elections.⁵⁰

Criticism of the Israeli Supreme Court intensified due to changes that occurred during the 1990s, following the enactment of two new Basic Laws regarding the protection of human rights—Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty. These Basic Laws specified a list of human rights which were granted constitutional protection against infringing legislation, and therefore threatened the omnipotence of the legislature. The Basic Laws did not include a specific provision on judicial review of legislation, but the Court has interpreted them as implying this result. The President of the Supreme Court, Aharon Barak, described the enactment of these Basic Laws as a 'constitutional revolution',⁵¹ terminology which attracted both attention and criticism. Soon after, this interpretation also had practical results, when the courts started to review legislation which was understood as infringing on rights protected by the new Basic

⁴⁷ A landmark judgment in terms of this new approach regarding standing and justiciability concerned a public petition against the policy of non-enlisting *Yeshiva* students to the military service. See: HCJ 810/86 *Ressler v. Minister of Defense* 42(2) PD 441. The petition was rejected, but the Court's judgment recognized the petitioners' standing and the justiciability of the subject matter, and therefore paved the way for the petitions that were to follow.

⁴⁸ The concept of 'good faith' was adopted by the Contract Law legislation (primarily in sections 12 and 39 of the Contracts (General Part) Law, 1973), as opposed to the requirement of administrative 'reasonableness', which was the product of case law. Even so, it was case law that bestowed the principle of 'good faith' with its elevated status as a 'majestic principle', applicable to all fields of law.

⁴⁹ Ronen Shamir, 'Society, Judaism and Democratic Fundamentalism—on the Social Roots of Judicial Interpretation' (1995) 19 *Tel-Aviv University Law Review* 699, 715 (Hebrew).

⁵⁰ For a detailed description of society and politics during the 1980s, see: Menachem Mautner, 'The 1980s—Years of Anxiety' (2002) 26 *Tel-Aviv University Law Review* 645 (Hebrew).

⁵¹ This term was ingrained in the consciousness of the legal community primarily due to the writings of the President of the Israeli Supreme Court, Aharon Barak. See: Aharon Barak, 'The Constitutional Revolution: Protected Human Rights' (1992–93) 1 *Mishpat Umimshal* 9 (Hebrew); Aharon Barak, 'The Constitutional Revolution: Scope and Limitations' (1992–93) 1 *Mishpat Umimshal* 253 (Hebrew).

Laws.⁵² Another controversy aroused by the new Basic Laws was associated with the provision which declared that their purpose is to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.⁵³ This provision had the effect of emphasizing the ideological dimension of Court decisions.

The developments around the enactment of the Basic Laws on human rights provided further impetus for the voices of criticism on the Israeli Supreme Court. In matters pertaining to the interpretation of the 'Jewish and democratic' formula, the Court is often perceived as expressing the values of a relatively limited segment of Israeli society—elitist, Western and liberal.⁵⁴ The potential of judicial review of legislation further sharpened the criticism against the Supreme Court. The result of all these developments seems to be that despite the official view of the Court that it embodies and reflects the values of the entire Israeli society, in fact it does not function any more as the exclusive mouthpiece for commonly shared values. There are numerous communities that regard it as being the mouthpiece of one particular community in Israeli society: one of many.

The intensified controversy over the role played by the Israeli Supreme Court results also from the defective functioning of the other branches of the Israeli Government. Questions left unresolved by the political system invariably find their way to the courts. Ultimately, the result is that the court system finds itself in the eye of the storm even when the criticism should properly be directed at other authorities. There are many examples of this phenomenon. One of the Supreme Court's important and controversial decisions in the area of law and religion—regarding an administrative decision to prohibit the use of cars in a central road in Jerusalem during prayer times on Sabbath—was given only after the failure of many attempts to reach an acceptable compromise.⁵⁵ In the same manner, the question of the draft exemption granted to *Yeshiva* students (who pursue full-time traditional Jewish studies) was repeatedly brought to the Supreme Court because the political system was unable to provide a satisfactory solution, which would assuage the hostility generated by the existing arrangement among the general population. Only after the Court declared that this exemption is *ultra vires*⁵⁶ has the Knesset started to address the matter in its legislation, and even then only partially.⁵⁷ The dysfunctionality of the political system also contributes to the

⁵² See: CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* 49(4) PD 221.

⁵³ Section 2 of Basic Law: Freedom of Occupation, and section 1A of Basic Law: Human Dignity and Liberty.

⁵⁴ In fact, the Basic Law's reference to the phrase 'Jewish and democratic' places the Court in a trap, in view of the deep division in Israeli society regarding its meaning. Accordingly, while judges are commanded by the legislature to base their rulings on these values, any decision in this matter inevitably generates controversy.

⁵⁵ HCJ 5016/96 *Horev v. Minister of Transport* 51(4) PD 1.

⁵⁶ HCJ 3267/97, 715/98 *Rubinstein v. Minister of Defense* 52(5) PD 481. In this case, the Court ruled that a general exemption on a group basis requires specific authorization in primary Knesset legislation and therefore necessitates an amendment to the Defense Service Law [Consolidated Version], 1986.

⁵⁷ The Court's decision that the exemption given to *Yeshiva* students is *ultra vires* led to the enactment of the Law on Service Deferrals for Full-Time *Yeshiva* Students, 2002, which officially

criticism of the judiciary in another way. Many petitions which lead to value-based judicial decisions begin as public petitions of players in the political arena, like Knesset members, usually those who do not succeed in gaining a majority for their views.⁵⁸ In these circumstances, the judicial decisions are sometimes understood as siding with the political agenda of the petitioners. In the same manner, groups who regard themselves permanent losers in the Court are motivated to attack it in the political arena.

The Contribution to the Public Debate

The tentative conclusion so far is that in Israel, judicial enunciation of consensual values did not enhance social unity and perhaps even led to the reverse. Sometimes, it merely aggravated existing feelings of alienation felt by certain groups. Nonetheless, as indicated above, the process of litigation can contribute to social cohesion by supplying a discursive framework that would not otherwise exist. The adjudication of passionately disputed questions such as 'Who is a Jew?'⁵⁹ or 'enlistment of *Yeshiva* students'⁶⁰ is invariably accompanied by heated debates in the public arena and by attempts to 'win' the public relations battle. In other words, the judicial proceedings also catalyze public discussion of the issues outside the walls of the courts. The recurrent litigation over the question of 'Who is a Jew?' forced Israeli society to confront repressed questions regarding its understanding of Judaism and the concept of Jewish identity in our time, although the Court's decision in this matter was formalistic.⁶¹ In the same vein, when the Supreme Court was asked to review the practice of establishing settlements for 'Jews only',⁶² Israeli society was compelled to address the tension between the Zionist ethos of settlement and the democratic ethos of equality.⁶³ A similar social process developed following the proceedings of the Commission of Inquiry headed by Justice Orr, which investigated the events of October 2000 in the Arab sector, where thirteen Israeli Arabs were killed by the police in the course of heated demonstrations. The commission's deliberations stimulated public discussion of questions relating to the status and rights of Israel's Arab citizens. In addition, quite often judicial decisions serve as catalysts for the instigation of political decision-making. For example, following the 'Who is a Jew' decision which ordered the registration of the children of the petitioners as Jews, the Israeli Knesset passed

sanctioned the current situation, but created a mechanism enabling the students to leave their studies for a 'year of decision', during which they can examine the possibility of integration into the work market without exposing themselves to the 'danger' of enlistment.

⁵⁸ Mautner, n.50, above, 671–72.

⁵⁹ For the purposes of the Law of Return. See: n.46, above.

⁶⁰ See the text accompanying n.56, above.

⁶¹ According to the judicial precedent in this matter, the Ministry of Interior is obligated to register as a Jew every person who presents documents which *prima facie* prove it.

⁶² HCJ 6698/95 *Qa'adan v. Israel Land Authority* 54(1) PD 258.

⁶³ As an example for the discussions generated by these proceedings, see: (2001) 6(1) *Mishpat Umimshal* 212.

an amending law which defined the word 'Jew' for the purposes of registration and the Law of Return. Many years later, in the context of the military service of *Yeshiva* students, although the Court refrained from specifically enunciating its own preferred view, its declaration that the administrative exemption granted to them was *ultra vires* compelled the Knesset to act and pass a new law on this matter, after years of abstention.

Once again, it is important to stress the shortcomings of the dialogue triggered by legal proceedings. It is usually a dialogue influenced by the legal environment, and limited to a discourse of rights. Hence, when several organizations filed petitions against the decisions of the Israel Lands Council to grant broad rights to agricultural lessees, the litigation focused almost exclusively on questions of contractual rights. This dictated total disregard of the ethnic rift underlying the entire case (the petitioners opposing the decisions claimed to represent mainly Jews who immigrated to Israel from Arab countries and the lessees benefiting from it were identified mainly as Jews from European origins). Admittedly, the Supreme Court's judgment was based on the principle of 'distributive justice',⁶⁴ and this rhetoric only expressed the class-status-related aspect of the case and not its ethnic background.

Developing a Judicially-inspired Value System?

Is there a possibility that court rulings will also help to develop a value system with a unifying effect on Israeli society? So far, I have expressed serious reservations regarding the viability of such an enterprise. I did so with reference to two main categories of litigation relating to the 'classic' political schisms dividing Israeli society: the religious-secular split and the Arab-Jewish conflict. The powerful ideologies fuelling these conflicts appear to preclude any possibility that judicial decisions in these areas would lead to a new social consensus (although they may contribute to a social dialogue over the issues debated in court). At the same time, from time to time it is possible to point to judicial precedents which serve as catalysts for the forging of consensual values. In the United States, the *Brown* decision which abolished racial segregation in the public schools system⁶⁵ was the pillar of fire that blazed the way to the consolidation of broad social rejection of segregation, despite the controversy that ensued when this judgment was first given. In the Israeli context, a famous decision of the Supreme Court ruled that a group of youngsters who forced themselves on a young girl, without the use of physical force, had committed the offence of rape. This judgment was a consensus-rallying decision with respect to the autonomy of women.⁶⁶ When the Court defined rape as non-consensual sexual intercourse even absent physical resistance, it ushered in a new social consensus regarding women's autonomy and their rights

⁶⁴ HCJ 244/00 *New Deliberation Association for Democratic Deliberation v. Minister of National Infrastructure* 56(6) PD 25.

⁶⁵ See n.9, above.

⁶⁶ CrA 5612/92 *State of Israel v. Be'eri* 48(1) PD 302.

over their bodies. A possible conclusion is that courts have a better chance to influence social perceptions in ordinary 'civil' areas than in matters directly touching the sensitive roots of ethnic and religious disputes which Israeli society is struggling with.

Another example of a civil area in which law traditionally had a unifying role in Israel concerns the realm of social justice. At the dawn of the twenty-first century, Israeli society is a torn and ruptured society—divided not only according to the classical rifts already mentioned, but also by socio-economic gaps. Recent years have witnessed the gradual broadening of socio-economic gaps, as a result of the inability of the traditional welfare legislation of the 1950s to withstand the pressures of globalization on the one hand, and the tremendous burden imposed by Israel's grave security situation on the other. Entire sectors of the Israeli population currently lead lives of degradation and atrophy, unable to extricate themselves from the debilitating cycle of poverty; with the welfare system powerless to help, crippled by manpower and budgetary shortages. Against this background, an interesting question is whether judicial recognition and enforcement of social rights can assist in bridging the socio-economic gap and ameliorating its evils, and thus contribute to the enhancement of social cohesion. There is some ground for hope that judicial decisions in this area will create a social consensus on the protection of the dignity of the poor. It is based on the understanding that while disputes concerning matters of social justice are severe and sometimes intractable, they are unrelated to conflicts with long and bloodstained histories. At the same time, controversies over issues of globalization and privatization prove to be more bitter than in the past, and therefore scepticism should not be neglected in this context as well.

To date, judicial decisions in Israel have had an important, though restricted, contribution to the development of a public culture of social justice. In its seminal decision on the matter of the agricultural lands, the Israeli Supreme Court ruled that administrative authorities are obliged to act in accordance with the value of 'distributive justice'.⁶⁷ The Court has also progressed towards recognizing the constitutional status of social rights, such as the right to education, bestowing on them the status of basic rights.⁶⁸ Still, the courts can and must go further. Admittedly, the Supreme Court cannot 'create' budgets out of thin air, but it can ensure just allocation of resources,⁶⁹ and it can impose sanctions on administrative authorities that attempt to 'save' their budgets by the systematic harassment of

⁶⁷ See the text accompanying n.64, above.

⁶⁸ HCJ 2599/00 *Yated, Association of Parents of Children with Down's Syndrome v. Minister of Education* 56(5) PD 856.

⁶⁹ See: HCJ 2814/97 *Supreme Follow-up Committee for Education of Arabs in Israel v. Minister of Education, Culture and Sport* 54(3) PD 233 (petition against the failure to include the Arab sector in education and welfare programmes initiated by Ministry of Education); HCJ 727/00 *Committee of Heads of Arab Local Authorities v. Minister of Construction and Residence* 56(2) PD 79 (petition against the discrimination of the Arab sector in the framework of suburban renewal project).

welfare recipients in the form of impenetrable bureaucracy.⁷⁰ In other words, the law should play an amalgamative role in the creation of a civil society predicated on communal solidarity. The aspiration to social justice is shared by most of the segments of Israeli society and may provide a basis for a renewed social contract between populations that lack any other common denominator—Jews and Arabs, religious and secular.

Intermediate Summary: Dialogue and Civil Values

This chapter has argued that the recourse to law as a unifying force in society is not a wonder solution, particularly not when deeply rooted disputes are in the background. As long as the values underlying conflicts brought to legal resolutions are disputed, the law pertaining to them will also be disputed. However, law can still make some contribution to social reconciliation and reconstruction. First and foremost, the legislative arena can be utilized for initiating laws aimed at nation-building and reconciliation between groups. In addition, although legal proceedings cannot fulfil the same role, they can serve a stimulus to the revival of a vigorous social dialogue.

Is there any chance that the content of judicial decisions will serve as a source of inspiration for the crystallization of social consensus? The discussion so far has expressed serious reservations regarding this possibility. These reservations were based primarily on examples taken from areas shaded by historical group rivalries. The discussion pointed, however, at the possibility for such a development in the context of judicial decisions centred on matters of individual autonomy and dignity.

It is important to add that even when judicial precedents express values which have the potential for being accepted by relatively broad sectors of society, they will not contribute to the creation of social consensus unless their content is delivered to the public in an effective manner. If the law is to make a significant contribution, measures must be adopted to improve the information flow from the legal professional community to the public at large. The problem is not one of exposure per se; indeed, courts are permanently exposed to the public eye, and are probably among the most extensively covered public institutions. Media exposure as such is not sufficient, however. In fact, public exposure to current affairs is more limited than in the past, due to the 'explosion' of information and the 'clip'- or 'sound bite'-oriented nature of the news reports on court proceedings. This is not a criticism of the media, but rather recognition of the new reality of the public discourse. In addition, even when the relevant information is forthcoming, quite

⁷⁰ The erosion of welfare rights by bureaucratic methods is also dealt with in Daphne Barak-Erez, 'The Israeli Welfare State: Growing Expectations and Diminishing Returns' *The Welfare State, Globalization and International Law* (Eyal Benvenisti and Georg Nolte (eds), Berlin, 2004), 103.

often the public lacks any real understanding of the precise question that was resolved by the court and the reasons for its ruling, including the constraints surrounding it.⁷¹ Accordingly, the potential of the judiciary to contribute to the evolution of consensual values is contingent also on the civic education given by the school system, which should provide better tools for understanding the content of court decisions and their limitations.

⁷¹ Media coverage is usually limited to a presentation of the question being resolved by the Court and the result of its decision.