CONSTITUTIONAL DIALOGUES IN ACTION: CANADIAN AND ISRAELI EXPERIENCES IN COMPARATIVE PERSPECTIVE.

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I. INTRODUCTION

Despite being over two hundred years old, the idea of separation of powers remains central to most political theories and is a subject of debate in democratic states around the world.[1] Most notably, the proper role of the judiciary in relation to the other branches of government (the executive and the legislative branches) is a prominent theme of scholarly as well as political discourse.[2] Opponents and proponents of Professor Bickel's classical statement, that "judicial review is a counter-majoritarian force in our system"[3] are engaged in a continuous debate to either sustain or circumvent the judicial counter-majoritarian difficulty—the problem of unelected and largely unaccountable judges invalidating the policy decisions of duly elected governmental representatives.[4] Indeed, the courts and their justices are frequently the pillars upon which scholars structure and focus their arguments. The judicialization or legalization of politics is perceived to be

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1. The history of separation of powers theory runs from Locke and Montesquieu to the present day. *See generally* Samuel W. Cooper, *Considering Power in Separation of Powers*, 46 STAN. L. REV. 361 (1994).

2. On the European experience see Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COM. POL. STUD. 397 (1994). On the Canadian experience see MICHAEL MANDEL, THE CHARTER OF RIGHTS AND LEGALIZATION OF POLITICS IN CANADA (3d ed. 1994).

3. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

4. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Michael P. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207 (1981); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. REV. 333 (1998); Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and the Rehnquist Courts*, 1994 DET. C.L.REV. 1 (1994); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 768 (1991); Martin H. Redish, *The Passive Virtues, the Counter Majoritarian Principle, and the Judicial-Political Model of Constitutional Adjudication*, 22 CONN. L. REV. 647 (1990); Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

the work of judges who, boldly and without qualms, exercise broad judicial-review powers.[5] The overall expanded power and centrality of judicial review is the result of Supreme Courts overstepping their proper boundaries and playing an unduly political role.

Arguments relating to these concerns have been raised in both the Canadian and Israeli public spheres, which are the focus of this paper. In Canada the proper role of judges vis-à-vis the elected officials has become a prominent issue of public debate since the introduction of the Canadian Charter of Rights and Freedoms (Charter).[6] In Israel, the same issue is the focus of a turbulent debate currently taking place in the parliament (the "Knesset") and many other forums.[7] Some scholars argue that the Israeli Supreme Court is willing to thoroughly scrutinize, intervene in and invalidate every act of any governmental agency,[8] as almost all social and political burning questions are now perceived as justiciable.[9] The Israeli debate is especially appealing, taking into account that Israel has not yet adopted a formal written constitution and that its legislature's sovereignty was, and to

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5. *See* Mauro Cappelletti, *The Expanding Role of Judicial Review in Modern Societies*, *in* THE ROLE OF COURTS IN SOCIETY 79 (Shimon Shetreet ed. 1988); Torbjorn Vallinder, *The Judicialization of Politics - A World Wide Phenomenon*, 15 INT'L POL. SCI. REV. 91 (1994).

6. Canadian Charter of Rights and Freedoms, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), sched. B. For the public debate on the performance of the Courts vis-a-vis the policy making institutions see Sheldon Alberts, *Judge Defends Decisions Affecting Social Policies*, THE NAT'L POST, Mar. 25, 1999, at A4; Luiza Chwialkowska, *Case Inflames Debate Over Judicial Activism: Are Courts Going Too Far?*, THE NAT'L POST, Apr. 17, 1999, at A7; Luiza Chwailkowska, *Legal Minds at Odds Over Whether Supremes Have Too Much Power: A Charter Review*, THE NAT'L POST, Apr. 19, 1999, at A5; Peter Russell et al., *Balancing Rights the British Way*, THE NAT'L POST, Mar. 24, 1999, at A6. *See also* IRPP Conference of the Canadian Judicial System, held at the University of Ottawa (Apr. 16-17, 1999), *available at www.irpp.org/archive.courts.html.*

7. On June 9, 1998, a religious Orthodox Member of the Knesset, Igal Bibi, while responding in the Knesset on behalf of the government to several motions, harshly criticized the Israeli High Court, claiming: "Everything is open; everything is breached; everything is justiciable". HA'ARETZ, June 10, 1998, at 5. The criticism engendered a stormy debate within the parliament and outside of it. *See* HA'ARETZ, June 11, 1998, at 3;HA'ARETZ, June 14, 1998, at 4. For an academic account on the debate see Ruth Gavison, *The Constitutional Revolution - A Depiction of Reality or a Self-fulfilling Prophecy*, 28 MISHPATIM L. REV. 21 (1997) (in Hebrew).

8. *See e.g.*, Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 613 (1994); David. Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341 (1990); Seev Segal, *Administrative Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 59 (Amos Shapira & Keren C. DeWitt-Arar, eds. 1995); Shimon Shetreet, *Standing and Justiciability*, *in* PUBLIC LAW IN ISRAEL 25 (Itzhak Zamir & Allen Zysblat eds., 1996); Itzhak Zamir, *Rule of Law and Civil Liberties in Israel*, 7 CIVIL JUST. Q. 64, 69 (1988).

9. The common view is that there is actually no legal barrier to bringing any question before the court. *See* Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1 (1993); Itzhak Zamir, *Administrative Law: Revolution or Evolution*, 24 ISR. L. REV. 357 (1990); Itzhak Zamir, *Courts and Politics in Israel*, PUB. L. 523 (1990); Itzhak Zamir, *Administrative Law*, *in* PUBLIC LAW IN ISRAEL 18, *supra* note 8.

a great extent still is, assumed to be absolute. Instead of a constitution, the Israeli Parliament has hitherto gradually enacted the eleven Basic Laws, which are supposed to be the chapters of a future constitution.[10] The first nine Basic Laws are mainly structural, defining the form of government and dividing the powers between the three branches. Only the last two Basic Laws, enacted in 1992, touch on human rights.[11]

Recently, the Israeli High Court of Justice[12] decided to annul a section of a law passed by the Knesset on the grounds that it was unconstitutional.[13] A week later, a newspaper columnist claimed that the High Court's decision was handed down "*without ruffling many feathers*".[14] Yet, one Knesset Member whose feathers were ruffled, reacted by claiming:

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10. According to the Israeli Declaration of Independence, a constitution was to be established by an elected constituent assembly no later than October 1, 1948 (an English translation of the Declaration can be found in DANIEL J. ELAZAR, CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 210 (1991)). However, Israel never adopted a Constitution. A political compromise, known as the Harrari Resolution, was embraced instead, prescribing the afore-mentioned way of gradually enacting the chapter-by-chapter future constitution. *See* Dafna Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312 (1995); Samuel Sager, *Israel's Dilatory Constitution*, 24 AM. J. COMP. L. 88 (1976). However, the status and meaning of the Basic Law vis-à-vis the regular Knesset legislation were left veiled in vagueness. *See* Eliyahu Likhovski, *Can the Knesset Adopt a Constitution Which Will Be the 'Supreme Law' of the Land?*, 4 ISR. L. REV. 61 (1969); Marina O. Lowy, *Restructuring a Democracy: An Analysis of the New Proposed Constitution for Israel*, 22 CORNELL INT'L L.J. 115, 120 (1989); Maoz, *The Institutional Organization of the Israeli Legal System, in* PUBLIC LAW IN ISRAEL, *supra* note 8, at 11. Furthermore, these Basic Laws were not entrenched in any substantive way, except for the technically entrenched section four of the Basic Law: The Knesset, which will be dealt with shortly.

11. These are Basic Law: Human Dignity and Liberty (S.H. 1992-1391, at 150) and Basic Law: Freedom of Occupation. *See infra* note 35. Both Basic Laws contain entrenched clauses. As mentioned, unlike their predecessors, which covered the institutional aspects of Israel's constitutional system, these prescribe some fundamental civil liberties and human rights. *See* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238 (1992); David Kretzmer, *The New Basic Laws of Human Rights, in* PUBLIC LAW IN ISRAEL, *supra* note 8, at 141.

12. The Israeli Supreme Court has a dual function. It is both the highest appellate court in civil and criminal matters as well as the High Court of Justice. As the High Court of Justice, it has original jurisdiction in claims against the state and its organs in matters which are outside the jurisdiction of other courts.

13. The case in question, handed down in September, 1997, involved an appeal by an investment management group which demanded the cancellation of several regulations found in the law that first established guidelines as to who is allowed to advise on investment portfolios. Specifically, the petitioners asked for the annulment of the transitional clauses, dealing with the examinations veteran investment managers were demanded to write in order to be allowed to continue in their former occupation. *See* H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24,1997, not yet reported).

14. Gidon Alon, *Who Makes the Law*, HA'ARETZ, Sept. 30, 1997, at 1A (in Hebrew).

> *Until now, there has been a status quo between the Supreme Court and the Knesset. Each of the branches tried hard not to intrude in the other's affairs.* I consider the High Court of Justice ruling a very serious matter. . . . Perhaps on this occasion an insignificant section was under discussion, but henceforth they [the judges] will be able to annul *significant* laws, and so a new reality will be created . . . . [T]his decision sets the stage for the court's intervention in the legislative activity of the Knesset. *Such intervention is unwarranted,* and the Knesset needs to state its opinion on this matter... *The Knesset is sovereign, not the Court.* The Court can recommend that the Knesset amend the law which the Court feels is a contradiction of the Basic Laws, but it can't revoke a law on its own say-so.[15]

These words focus on a presumed new reality in which the Israeli Court counteracted parliamentary sovereignty. Yet this statement ignores two additional facets of the matter. First, the Israeli Court has more than once struck down primary legislation, and the Knesset stated its opinion on those occasions. Second, the Israeli Supreme Court's docket should be checked and analyzed along with, and in light of, the legislature's actions and reactions to the decisions.

This article argues that the proper analysis of counter-majoritarian arguments against Supreme Courts and judicial activism in any constitutional system obliges one to simultaneously look into the actions and powers of the decision-making institutions (notably those of the legislature), as well as their interplay and interrelations. Specifically, this article will compare how the Israeli and Canadian policymakers addressed their responses to similar judicial features and thus substantiate the collating.[16] As shall be elaborated shortly, in both countries a court's declaration of unconstitutionality could be successfully counteracted by the legislature. Thus, the legislature's modes of retort should be considered an important component in analyzing the relevancy of the counter-majoritarian problem to any political system.

Part II briefly discusses the American-type, classic counter-majoritarian difficulty and the arguments suggested in the literature to undermine or overcome it, while elaborating on the constitutional dialogue theory as a possible solution. Part III presents the Israeli case study, focusing on the very first cases in which the Israeli Court struck down laws. Part IV works through the meaning of constitutional dialogues by suggesting a subtle distinction between two kinds of dialogues: substantive and formal. Both

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15. *Id.* (quoting the words of the Knesset Speaker, Dan Tichon)(emphasis added).

16. On the similarity between the Canadian Charter of Rights and Freedoms and the Israeli Basic Laws of 1992 see *infra* notes 25, 137 and accompanying texts. *See also* Lorraine Weinrib, *The Canadian Charter as a Model for Israel's Basic Laws*, 4:3 CONST. F. 85 (1993).

parts V and VI contextually compare some Canadian and Israeli examples by interpreting formal and substantive dialogues occurring in each system. Part VII delves into the question of the responsibility to engage in dialogues, and Part VIII examines whether there are grounds for the theory that constitutional structures affect constitutional dialogues and concludes that they are not necessarily associated, after reviewing the experiences of other countries. This article concludes with a few general comments on the nuances of counter-majoritarianism.

II. COUNTER-MAJORITARIANISM AT EASE: THE CONSTITUTIONAL DIALOGUE

In a nutshell, the counter-majoritarian (or anti-majoritarian) objection to judicial review assumes a situation in which unelected and unaccountable judges are "vested with the power to strike down the laws that were enacted by the duly elected representatives of the people".[17] According to this view, the Court exercises its power of review contrary to the will of national majorities, undermining the policy and decision making institutions.[18] Thus, counter-majoritarianism is an anomaly in a democratic society.

While the expansion of the Court's judicial review power has become a worldwide phenomenon, so has the counter-majoritarian difficulty. Supreme Courts all over the world, including those of Canada and Israel, are being charged with encroaching on the powers of elected officials.[19]

Over the course of the years, many theorists attempted to solve the difficulty, to benumb its sting or to deny it altogether. Robert Dahl, for example, has suggested that "the policy views dominant in the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[20] According to his position, the Court is usually an institution that supports the majority politics of the dominant coalition. Thus, a Court's striking down laws does not really pose any substantial threat to democracy, and the overall danger of Court's

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17. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 77 (1997).

18. Such undermining can take many forms: not only can it displace a current majoritarian decision, but it can also distort and debilitate future ones. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination for the Counter-majoritarian Difficulty*, 94 MICH. L. REV. 245, 247 (1995).

19. For the Canadian debate see F.L. MORTON & RAINER KNOPFF, CHARTER POLITICS (1992). For the Israeli debate see *supra* note 7 and accompanying text.

20. ROBERT ALLAN DAHL, DEMOCRACY AND ITS CRITICS 190 (1989); *see also* Robert Allan Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). For a slightly different account of the same argument see William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on the Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

countering majority will is empirically mitigated.[21] The same argument was recently made with respect to the Canadian Supreme Court: in a study on one-hundred constitutional rulings handed down between 1996 and 1998, it was found that the Supreme Court posed no challenge to parliamentary sovereignty.[22]

Mark Graber has proposed that the anti-majoritarian difficulty is actually a non-majoritarian one, as "justices . . . declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute . . . [and] prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would not address."[23] Accordingly, courts do not act when there is a clear and certain majority for the specific law at issue, and thus, they are not counter-majoritarian institutions.[24] Inevitably, according to this approach, the difficulty is diminished by the fact that our initial assumption about the presence of an identified majority has been proven wrong. Professor Graber posits that in most cases clashing majorities are indeed involved. Hence, the priority of governments is to avoid deciding controversial moral issues, leaving them to be decided by the courts. If courts so decide, the self-interest of government is upheld; courts deciding non-majority issues are acting according to the officials' preferences. Thus, these decisions cannot be counter-majoritarian.

In the same vein, a somewhat variant approach to tackling the difficulty has recently taken root. Containing both normative and empirical cores, the dialogue theory suggests that counter-majoritarianism might be overcome if one acknowledges that courts and legislatures are engaged in a continuous dialogue. Rather than being the final determination of a contested issue, a court's decision to annul a law or declare a governmental action invalid can be the starting point or stimulus of public debate. The legislature or the executive, the policy-making institutions, are indeed the ones to articulate the final constitutional solution in light of, and in accordance with, a court's decision.[25] In such circumstances, majority will is not circumvented, it is

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21. *See Decision-Making in a Democracy*, *supra* note 20, at 294.

22. *See* Judy Tibbetts, *Top Court Judges Shy Away from Rewriting Laws: Study*, THE NAT'L POST, Apr. 9, 1999, at A5. *See also* Patrick J. Monahan, *The Supreme Court of Canada Constitutional Cases 1998*, CANADA WATCH (1999), *at* http://www.robarts.yorku.ca/.

23. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993).

24. Graber mentions abortion as one American example of a debate in which neither side constituted a clear political majority. *See id.* The same controversy serves Hogg & Bushell as an example of the rare cases in which a legislative response to Canadian Supreme Court's annulment of a law is precluded, since the "issue is so politically explosive that it eludes democratic consensus." Hogg & Bushell, *supra* note 17, at 96. On the Canadian version of the non-majoritarian solution see F.L. Morton, *Dialogue or Monologue*, 20:3 POL'Y OPTIONS 23, 25-26 (1999).

25. The fact that legislative bodies can have the last word, even after the Court has

adjusted; the legislature, not the Court, is still the institution with decisive powers. Courts participate in shaping governmental policies in an appropriate and suitable manner, not by dictating them. The constitutional dialogue approach, instead of identifying the Court's striking down a law duly enacted by the legislature as the critical moment for analyzing the counter-majoritarian action, studies the issue in a broader context. It concentrates not only on the period following a judgment but also on the period preceding the Court's determination. It further focuses on the legislature's reaction more than on the Court's action – that is, on the ameliorated potential of subsequent legislative action. Using empirical data, this approach projects a normative response to the dilemma: if dialogues take place between courts and legislatures and if these dialogues result in the better articulation of the legislature's will the court is not counter-majoritarian but an institution upholding majoritarianism on the one hand, and civil or minority rights on the other.[26]

This seems to be the appropriate perspective to probe concerns that courts run counter to democratic principles. Any assertion with respect to counter-majoritarianism should include an assessment of the political institutions' actions and reactions, resistance or compliance, and modifications or performances. Any observation on the courts' power should emanate from a broader analysis of how the political branches used their own legitimate power to respond to courts' democratic "deviations."[27]

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spoken, has been acknowledged by many scholars in many different jurisdictions. For the American version of the argument see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 13 (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655-56 (1993). For the Canadian perspective see Allan C. Hutchinson, *Charter Litigation and Social Change: Legal Battles and Social Wars, in* CHARTER LITIGATION 370, 375 (Robert J. Sharpe ed. 1987). The Canadian example is especially intriguing since the Canadian Charter of Rights and Freedoms includes a few features that facilitate the legislature's responses to Court's decisions. *See infra* note 105 and accompanying text. *See also* Hogg & Bushell, *supra* note 17, at 82; Julie Jai, *Policy, Politics and Law: Changing relationships in Light of the Charter*, 9 N.J.C.L. 1 (1997). The Canadian example is of great importance to our study, as the Israeli (as well as the South African) constitutional structure follows that of Canada, granting the legislature the power to limit rights for a justified cause. In Israel the power to override some rights was included in one Basic Law. *See infra* note 137 and accompanying text. For the similarities and influences of the Canadian Charter on Israeli constitutional law see Zeev Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, 8 CONST. F. 53 (1997).

26. When God contemplated creating Eve, he thought to offer Adam an *Ezer Kenegdo*. *See* Gen. 1:18. *Ezer* in Hebrew means helper or assistant. *Kenegdo* has a few meanings, two of which are over and against him or challenging him. Unfortunately, the English translation of "helpmate" loses the oxymoronic nature of the biblical expression. The Court thus, can be the legislature's *Ezer Kenegdo*.

27. Indeed, Friedman, *supra* note 25, at 682, asserts: "The problem of the counter-majoritarian difficulty is that it overstates the role of courts and thus understates society's responsibility." *See also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 90 (1998).

Such a broad outlook recently found its way into the Canadian discourse.[28] However, as the next sections will suggest in a rather general manner Canadian commentators have paid little attention to the different types of dialogues that courts and legislatures engage in or to their different meanings.[29] In contrast, the Israeli scholastic critique still focuses primarily on the Court's action.[30] It is the Court's decisions, rather than the legislature's responses, that govern the debate in Israel. The next section therefore aims at filling this gap: tracing the Israeli governmental address to the first instances in which the Court struck down laws, while analyzing and interpreting the actions that both preceded and followed those judicial decisions.

Before proceeding, one remark should be made to with respect to the Israeli constitutional system. Due to the absence of a formal written constitution or bill of rights, parliamentary supremacy was accepted as the governing principle of Israel's constitutional regime, as attempts to persuade the Court to review primary legislation traditionally received a negative response.[31] Israel still does not have a full written constitution. Yet the principle of parliamentary supremacy has suffered significant encroachments with the introduction of the two 1992 Basic Laws.[32] Thus, the Israeli deviation from the classical counter-majoritarian problem should be considered: the state could have, at least prior to 1992, prevented the decision to strike down its laws or easily restored the proper order of powers once an annulling decision has been handed. A failure to act in this manner, might point to a different problem. The following sections and the previously quoted statement made by the Knesset Member should be read with this in mind.

III. THE ISRAELI EXAMPLE – RESPONDING BEFORE AND AFTER THE JUDICIAL DECISION

Since its inception the Israeli Court has struck down five pieces of legislation.[33] Four out of the five dealt with Basic Law: The Knesset and

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28. *See* Hogg & Bushell, *supra* note 17; Peter W. Hogg & Allison A. Thornton, *The Charter Dialogue Between Courts and Legislatures*, 20:3 POL'Y OPTIONS 19 (1999); Morton, *supra* note 24. *See also* Lorraine Weinrib, *infra* note 108 and accompanying text.

29. *See infra* section IV.

30. *See, e.g.*, Pnina Lahav, *Rights and Democracy: The Court's Performance*, *in* ISR. DEMOCRACY UNDER STRESS 125, 141-46 (Ehud Sprinzak & Larry Jay Diamond, eds., 1993); Martin Edelman, *Israel*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 403 (Neal C. Tate & Torbjorn Vallinder eds. 1995); Netanyahu, *supra* note 9, at 1.

31. *See* Kretzmer, *The Supreme Court and Parliamentary Supremacy*, *in* PUB. LAW IN ISR. 303, *supra* note 8.

32. *See id.* at 304. *See also* Barak-Erez, *supra* note 10, at 323.

33. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 693; H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D.

were decided before 1992,[34] while the last case revolved around Basic Law: Freedom of Occupation.[35] The study hereinafter will concentrate only on three out of the four cases touching upon the entrenched provision in section four of the Basic Law: The Knesset. [36] That entrenched clause states, "[t]he Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset."[37] The common interpretation of the ending words "save by a *majority* of the members of Knesset" was that at least 61 out of the 120 members should vote favorably for the changing of the section - this is also known as a *special majority*.[38]

In all three cases, the Court found that the challenged law infringed the entrenched clause and thus declared it void. As shall soon become evident, the Court's competence and jurisdiction to decide the cases (the justiciability issue) was not contested either before, or after, the judicial determination. Furthermore, the legislature's subsequent actions in response to the Court's decision missed some important features, resulting in a very futile - and what I will later refer to as formal - dialogue.

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(4) 1; H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141; H.C. 142/89, Tenuat Laor v. Knesset Speaker (1990), 44 P.D. (3) 529; H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24, 1997, not yet reported). The first three cases were translated in 8 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 13, 21, 60 (1992) at 13, 21 and 60 respectively [hereinafter SELECTED JUDGMENTS]. The preceding citations refer to this translation.

34. Basic Law: The Knesset, 1958, S.H 5718, at 69. An English translation of the Basic Law: The Knesset can be found in: http://www.uni-wuerzburg.de/law/is_indx.html. On the meaning of Basic Laws see *supra* note 10.

35. Basic Law: Freedom Of Occupation, 1992, S.H. 5752, at 114. An English translation of the Basic Law: Freedom of Occupation can be found in Itzhak Zamir & Allen Zysblat eds., *supra* note 8, at 157, as well as under the sub-category of Basic Law: Freedom of Occupation, 1994, S.H. 1994-1454, at 90, *at* http://www.uni-wuerzburg.de/law/is_indx.html. For an overview on the happenings of this Basic Law, which was repealed and re-enacted in 1994, see *infra* notes 134-38 and accompanying text.

36. The fourth case, *Laor*, will not be dealt with directly, for two reasons; that case was not translated in the SELECTED JUDGMENTS series, thus the English reader will be unable to access it. Furthermore, the case evolved around a relatively marginal question of whether a law's pre-reading procedure (as opposed to the three-reading process) is also subject to the absolute majority requirement found in section 4 of the Basic Law: The Knesset.

37. It is worth mentioning that section 4 was entrenched once more by section 46 of the Basic Law, which reads as follows: "The majority required by this Law for changing section 4, 44, or 45 shall be required for decisions of the Knesset plenary at every stage of law-making...In this section, "change" means both an express and an implied change." *Id.*

38. *See* Barak-Erez, *supra* note 10, at 326.

A. In-Court Reluctance: The State Representatives' Arguments

The afore-mentioned entrenched clause was at the center of a 1969 petition submitted by a Tel-Aviv lawyer named Bergman.[39] The petitioner challenged the validity of a new law passed by the Knesset that dealt with the endowment of public funding to support the election campaigns of political parties.[40] The law provided that public funding would be granted only to those parties represented in the outgoing Knesset. The petitioner claimed the law discriminated against new parties running and campaigning for the Knesset for the very first time, thus infringing the principle of equal election laid down in the entrenched clause. Since the required majority did not pass the law, Bergman argued that it should be struck down.

The petition raised a number of fundamental structural constitutional issues for the very first time. First, the status of Basic Laws, vis-à-vis other laws, had never before been determined. The issue of whether an entrenched section in a Basic Law could invalidate later legislation remained an open question.[41] Second, the Knesset's authority to bind itself by entrenched clauses had yet to be settled.[42] Third, the petitioner's standing to challenge the legislation was questionable.[43] Finally, and most importantly, the Court's competence to decide on the validity of primary legislation, even if entrenched, was at stake. Recall that such competence is not grounded in a written constitution or any other legal document and has never before been exercised.[44]

Notwithstanding the potentially fatal flaws of the petition, the Attorney General asked the Court for a ruling on the merits, and consequently the

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39. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 69.

40. *See* Knesset and Local Authorities Elections (Financing, Limitation of Expenses and Audit) Law, 1969, S. H. 53.

41. *See supra* note 10 and accompanying text.

42. Recall that the constituent assembly's sole task was to prepare a constitution. However, that did not happen: the Constituent Assembly became the First Knesset. When the First Knesset dissolved, it adopted the Harrari Resolution and the Transition law, which delegated its constituent power to future Knesset. Was the first Knesset authorized to delegate its power to adopt a constitution? This has been a crucial academic question ever since. On this point see Haim Deutch, *The "Legal Duty" Argument in the Israeli Debate Over the Constitution*, 4 TEMP. INT'L & COMP. L.J. 239 (1990); Claude Klein, *A New Era in Israel's Constitutional Law*, 6 ISR. L. REV. 376, 380 (1971).

43. *See* Klein, *supra* note 42, at 386.

44. *See* Kretzmer, *supra* note 31, at 307. It is worth mentioning that the Court's competence to declare Parliament's legislation inoperative is a weighty question in a system lacking explicit authority. In Canada, before the enactment of the Charter, the Canadian Courts' authority to refuse to apply any law that infringed the 1960 Canadian Bill of Rights was questionable as well. However, the Canadian Supreme Court dealt lengthy with this specific issue in the famous Drybones case (R. v. Drybones, [1970] S.C.R. 282). On this decision and the Court's dealing with its own competence to declare a law as inoperative see WALTER SURMA TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 132-43 (2d ed. 1975).

Court's decision left most of these issues open for further deliberation.[45] The Attorney General's arguments were confined to rebutting the petitioner's material arguments and to sustaining the validity of the new law. The Court unanimously rejected the Attorney General's arguments and held that the new legislation violated the equality principle to an unjustifiable degree and thus should not be enforced.[46] Notably, the Court suggested two paths that were open to the legislature if it wished to fix the defect of the void law. First, the Knesset could leave the law intact, provided that it reenacted it by a special majority.[47] Alternatively, the Knesset could amend the law by replacing the discriminatory provision with a provision that would balance the Knesset's interest with the equality principle prescribed in the Basic Law.[48]

In 1981, a second petition, in the *Agudat Derekh Eretz* case, challenging a law that allegedly infringed the entrenched provision, was brought before the Court.[49] In this petition, the Elections (Mode of Propaganda) Law-a law regulating the free radio and television broadcasting

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45. *See* H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 69, at 15-16. The court stated:

> This petition raises potentially weighty preliminary questions of a constitutional nature, relating to the status of the Basic Laws, and to the justiciability before this court of the issue of the Knesset's actual compliance with a self-imposed limitation in the form of an "entrenched" statutory provision. . . . *However, the Attorney-General relieved us of the need to deliberate on the matter by stating on behalf of the Respondents that they "do not take a position on the question whether the legal validity of a legislative enactment is a justiciable matter before this court, since they are of the opinion that the petition must fail on the merits"* . . . . We therefore leave the question of justiciability open for further consideration and, clearly, nothing in this judgment should be taken as an expression of opinion on that matter.

Id. (emphasis added).

46. *Id.* at 19.

47. *See id.* at 20. "The Knesset accordingly has two courses from which to choose: it can reenact the financing provisions in the new law, despite their inherent inequality, if the majority required under section 4 and 46 of the Basic Law is mustered." *Id.*

48. In the Court's words:

> In the Knesset debates on the Financing Law, the merits of a method of finance based on the balance of party power in the outgoing (sixth) Knesset was contrasted with a method based on the new party balance in the incoming (seventh) Knesset. The Knesset preferred the first method and one of its main reasons for so doing was the danger that short-lived lists would be formed because of the temptation to receive an advance on the funding allocation. *This danger can be countered without causing the inequality that we have found to be unlawful, by promising a new list funding without an advance payment and only retrospectively after it stood the test of the elections and gained at least one seat.*

Id. at 20 (emphasis added).

49. H.C. 98/69, Agudat Derekh Eretz v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1.

time for parties participating in the elections-was challenged.[50] The amendment decreased the time allocated to new parties, while simultaneously considerably increasing the time allocated to those parties who participated in the outgoing Knesset. Two associations that intended to introduce a new party argued the amendment infringed the equality principle of the entrenched provision, and, since the required majority did not pass it, it should be struck down.

The petitioners' right to standing in this case was rather obvious, yet the question of the case's justiciability remained challengeable. The then state attorney, following his predecessor in the *Bergman* case, asked for a ruling on the merits, stating explicitly he would not dispute the case's justiciability, nor the Court's competence to review the legislation.[51] All five justices held that the law in question infringed the equality principle and, as it was not enacted in accordance with the entrenched clause's requirements, was invalid.[52]

Within less than a year, the third petition, *Rubinstein, et al. v. Chairman of the Knesset, et al.*, concerning the same entrenched clause was brought before the Court for review.[53] The petitioners in this case were Knesset members of a relatively small party, who claimed to be harmed by a retroactive amendment to the election campaign spending law that was supported by the biggest parties. A third state representative preferred not to raise a plea of non-justiciability and again asked the Court for a ruling on the merits.[54]

These were the three cases in which fundamental constitutional issues could have been but were not directly considered by the Israeli High Court or the legislature (via its legal representatives).[55] One point should be kept

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50. Elections (Modes of Propaganda) Law, 1981, am. 6, S.H. 198.

51. *See* H.C. 98/69, Agudat Derekh Eretz v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1, at 24.

52. *Id.* at 25. The Attorney General chose to argue other preliminary issues such as the need to join additional respondents to the petition. Not arguing the justiciability issue cannot be viewed as mere forgetfulness.

53. H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141. While preparing for the tenth Knesset elections, several parties exceeded the campaign spending limits set forth in the Elections Financing Law which compensated the parties from the public funding budget. After the elections, the Knesset amended the Elections Financing Law retroactively, raising the spending limits and reducing the sanctions imposed on any party that exceeded its budget. An ordinary majority passed the amendment. The petitioners, leaders of a party which adhered to the original spending limits, argued that the retroactive amendment violated the principle of equality in the elections, and as the majority requirement was not sustained, the amendment was invalid. The five justices were unanimous in accepting the petition. *See id.*

54. *See id.* at 66.

55. The Israeli Attorneys General, as well as state attorneys, have the exclusive power to represent the State in all courts, and they are defending the State, the Government and Government organs when they are being sued in the courts. It is their role to represent and give

in mind: it was not the Court that marked the boundaries of the discourse. The Israeli High Court itself did not define the scope or the content of the in-court dialogue.

Three different state representatives have followed the same path: they have all avoided contesting the justiciability of the constitutional question at issue, while asking the Court to dismiss the petitions on their merits. It should be noted that this approach was also taken with respect to another fundamental issue: the Israeli High Court's jurisdiction to decide petitions submitted by the inhabitants of the Gaza and the West Bank territories administered by Israel since 1967. For more than ten years, Israeli Councils of State abstained from arguing that the Israeli Court did not have the jurisdiction to hear those petitions, limiting themselves to arguing that the petitions should be dismissed on their merits.[56] They have acted in that manner even though there are international legal precedents that support the position that the Israeli Court did not have jurisdiction.[57] This is but another example of State representatives narrowing the scope of the dialogue, which engages themselves and the Court.

The motivations behind these litigation strategies are not well known. It has been speculated that time constraints led the state representatives to follow this strategy.[58] One might further speculate that, by taking that position, state representatives signal their preferences, perhaps even their desire, for a Court's decision. Maybe there was something politically satisfying in submitting to the Court's jurisdiction. Was this submission an attempt to foist a controversial, clashing issue on the Court?

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voice to the government's stance on the issue brought before the Court. *See* Itzhal Zamir, *The Role of the Attorney General in Times of Crisis: The Shin-Bet Affair, in* THE ROLE OF COURTS IN SOCIETY, *supra* note 5 at 271. On the role of the Attorney General in the dialogue see *infra* note 72 and accompanying text.

56. The first petition to the High Court was submitted on June 20, 1967. In that petition, the counsel for the State declared he would not challenge the competence of the Court to review the acts of the military authorities in the territories. *See* Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government, in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTRATED BY ISRAEL, 1967-1980 114 (Meir Shamgar ed. 1982). Consequently, the right of Palestinians to petition the Court for relief, as well as the Court's jurisdiction over these matters, were not thoroughly discussed by the Court. This strategy became the standard. *See, e.g.* H.C. 337/71, Algamaia Almakasda v. Minister of Defense (1972), 26 P.D. (1) 574; H.C. 69/81, Abu Ita v. Military Commendor et al. (1981), 37 P.D. (2) 197. Only years later the Court clearly declared its jurisdiction to hear and decide these petitions, regardless of governmental concession. H.C. 393/82, Gamayat v. The Military Commander (1983), 37 P.D. (4) 785, at 809 (translated in PUBLIC LAW IN ISRAEL, *supra* note 8, at 396). *See also* Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2013, 2032 (1988).

57. *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. YRBK. HUM. RTS. 262, 273 (1971).

58. Both the *Bergman* and *Agudat Derekh Eretz* petitions were submitted just a few weeks before Election Day, forcing prompt court sessions and decisions. *See* Claude Klein, *Judicial Review of Statute*, 4 ISR. L. REV. 569 (1969).

First, even if time limitations enforced prompt and pointed decisions in both the *Bergman* and the *Agudat Derekh Eretz* cases, they were not relevant in the *Rubinstein* case because it was submitted and decided long after the elections took place; thus, thoroughly delving into the questions of justiciability and jurisdiction was indeed possible. Second, it is highly unlikely that the issue of how to allocate financial aid between parties' electoral campaigns, once it was agreed that it would come from the public purse, was controversial. The issues decided in these three cases do not go to the essence of human rights; they are not the conventional "hot potatoes" like abortion, freedom of expression, or gay rights thrown to the Courts by reluctant and indecisive politicians. They touch on more formal, technical, and structural aspects concerning the structure of government, and only indirectly on the essence of equal opportunity to be elected.[59] Third and most importantly, these were not cases in which a political majority could not have been obtained. Quite the contrary, a special majority reenacted the disputed laws in all three of the cases.

It may have been a mistake for the state representatives to limit the issues to be decided in these petitions by narrowing the scope of their legal arguments. They might have inadequately represented the interests of their clients.[60] However, the legislative body could have mended the situation by taking measures to ameliorate the Courts' decisions. More specifically, it could have taken action to negate the Court's declaration that the law was of no force and to restate parliamentary supremacy.[61] As shall be illustrated presently, that is not quite what the Knesset has chosen to do.

B. In-House Reluctance: The Parliament Response

Recall that after declaring for the very first time that a law was of no effect in *Bergman*, the Court suggested two alternative ways to amend the

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59. *See* Ariel L. Bendor, *Are There Any Limits To Justiciability?*, 7 IND. INT'L & COMP. L. REV. 311, 340 (1997). Bendor states:

> It is noteworthy that in Israel, where it is still contended that judicial review of interference with human rights is unacceptable because it causes the courts to slip into the determination of value-laden political questions, the judicial adjudication of questions related to the structure of government and to the relationships between its various branches arouses less opposition because of the more technical/legal appearance of those issues.

Id.

60. It has been suggested that if the American Solicitor General undermines a sound argument, the government may think she is misusing her office, and that such sound arguments may very well include issues of justiciability or standing. *See* David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 167-68 (1998).

61. It is worth emphasizing again that at the time it was not obvious that the Israeli Court had the competence to declare that a law was of no effect. The recent statement by the Knesset Speaker that even now, the Israeli High Court lacks the authority to annul legislation and that the Knesset is sovereign, plainly attests to that point. *See supra* Part I.

defective law, one procedural and one substantive.[62] Yet, the Knesset, in response, "did not choose between the alternatives but adopted them both."[63] Not only did following the Court's suggestion outright change the law, but it was also re-enacted by a special majority.[64] Simultaneously, the Knesset passed an additional law, again by a special majority, retrospectively confirming the validity of all legislation concerning election procedures that had been previously enacted.[65]

After the Court spoke for a second time in the *Agudat Derekh Eretz* decision, the legislature responded in a similar fashion, only slightly modifying the inequality provision before swiftly re-enacting the law with the required majority.[66] Following the decision in the *Rubinstein* case, those parties that exceeded the permitted spending ceiling returned the surplus amounts to the Treasury, and the law was re-enacted by a majority of Knesset members.[67] However, after the elections for the Twelfth Knesset, it was once again retroactively amended to increase the permitted spending limits, and, by a series of acts, the Knesset confirmed the validity of this change by a special majority.[68]

Thus, in each of the cases, the legislature reacted by re-enacting the statutes and by implementing the Court's advice. The legislature did not reverse the judicial decision; it also did not avoid future decisions of the kind by restructuring the Basic Laws, reshaping the entrenched provision, or challenging the Court's authority to strike down laws in the first place. Yet, the Knesset, in its retroactive ratification following the *Bergman* case, did signal its protest and its desire to avoid Court challenges to its legislation in the future. By so doing, I suggest, the Knesset flagged its reluctance to participate in nascent dialogues. It also indicated that it was not totally persuaded that it had erred in other legislation.

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62. *See supra* notes 47-48 and the accompanying text. There could have been no mistake that one of these two alternatives was sufficient. Indeed, the Knesset was well aware of that. *See also* The Knesset Protocols, Jul. 14, 1969. Knesset Member Avraham Vardiger mentions, "(t)he Supreme Court showed us in its decision two ways of which we should choose." *Id.* at 2 (in Hebrew).

63. Hans Klinghoffer, *Legislative Reaction to Judicial Decisions in Public Law*, 18 ISR. L. REV. 30, 31 (1983).

64. *See* Burt, *supra* note 56, at 2045; Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 413-14 (1983). The significance of this mode of action will be discussed further in Section V.

65. Election (Ratification of Validity of Laws) Law, 1969, 568 S.H. 269. *See also* Klinghoffer, *supra* note 63. The meaning of this action will also be discussed in Section V.

66. *See* Klinghoffer *supra* note 65, at 34. The new legislation was enacted by the required absolute majority (during three readings) in a single day. *See* Editor's Synopsis, H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1, at 22.

67. *See* AMNON RUBINSTEIN, ISRAELI CONSTITUTIONAL LAW 377 (4th ed. 1991) (in Hebrew).

68. *See id.*

IV. WHAT CONSTITUTES A CONSTITUTIONAL DIALOGUE?

A constitutional dialogue starts with a governmental action being taken, for example, by the legislature. An individual balks, asserting a violation of a structural guarantee. The Court issues its decision. The public notices the decision, and articles are written commenting on the Court's decision. More lawsuits are brought before the courts. Legislatures act.[69]

Constitutional dialogues can take many forms. They can be limited or broad in scope with respect to both time and participants. A dialogue can start with a legislative committee debating a possible challenge to a suggested law, or it can start with the judicial decision striking down that law. It can end with the implementation of the Court's decision, or it may end with a newly enacted law articulated by the competent legislative body.[70] The participants can include some or all of the following: courts, legislatures, Attorneys General or Solicitors General, opinion-makers, individuals, interest groups, and the general public.

The Court's contributions to the dialogue are relatively easy to identify; they are found in the Court's decision to strike down a law. This is the case even if the implications of the decision on future cases are hard to determine, if the reasoning is contestable or vague, if it was decided unanimously or even if it was decided in dissent. Regardless of the context, the Court's input into the dialogue is quite clear: it is found in the decision itself. However, the contributions of the other participants, especially those of the political branches, are a little more elusive and difficult to recognize. Do these contributions include the first legislative initiative that triggered the constitutional challenge (*i.e.* the challenged law) and the debates that may or may not have revolved around that law at different legislative stages?[71] Furthermore, do they include the state Attorney General's position and litigation strategies in such cases?[72] Finally, which kind of legislative acts

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69. This description is Barry Friedman's. *See supra* note 25, at 655-56. Friedman's format deals with laws concerning constitutional rights. Our former discussion deals more with the Israeli laws governing the constitutional structure. Nevertheless, that format can be easily applied to our case studies.

70. *See* Hogg & Bushell, *supra* note 17, at 81.

71. Shapiro and Stone, for example, describe the constitutional dialogue as circular. When Courts declare laws to be unconstitutional, legislatures may be more inclined to take constitutional arguments seriously while pondering future legislation. The executive participates as well, by considering a Court's potential interference prior to the subjected action. *See* Shapiro & Stone, *supra* note 2, at 416-18; *see also* Jai, *supra* note 25, at 12.

72. Jai, *supra* note 25, at 17, gives an example from the Canadian context. Indeed, many litigation strategies are decided solely by the Attorney General. Yet, in a few cases, the constitutional dialogue starts when the Attorney General takes a case to the Cabinet, to discuss the appropriate approach to be taken by her at Court. One litigation issue taken to the Ontario Cabinet between 1990 and 1994 was whether to concede a Section 15 (equality) violation where

are to be counted as constituting or participating in a dialogue—those that reverse a Court's decision, those that leave it intact, those that repeal the violated provision by articulating new legislation, or those that merely acquiesce in the Court's legal "prescription"? [73]

This last quandary is not merely semantic. The legislature's response to a Court's striking down a law can take many different forms. Yet the different modes of action suggest different degrees of commitment and participation in the constitutional dialogue. Indeed, the general usage of the concept of dialogue obscures important differences between types of legislative responses that should be analyzed.[74] These different kinds of responses vary in their meaning and essence. The ensuing discussion delineates a distinction between two different sorts of possible constitutional dialogues: substantive and formal.

A. The Substantive Dialogue

Webster's Dictionary defines "dialogue" as "an open and frank interchange, exchange and discussion of ideas and opinions in the seeking of mutual harmony."[75] Based on this definition, it is my position that a substantive constitutional dialogue should be defined as one in which the parties participating are themselves committed to and engaged in a search for a harmonious solution that will contain both the Court's interpretation of a constitutional question and the legislature's interest. A substantive dialogue is realized only when the *input* of both the dialogists leads to the final state of the law. When a substantive dialogue develops, the Court's decision articulates the flaws of particular legislation which results in its being struck down, whereas the legislature on its own initiative includes in its response solutions for achieving its goal in light of the Court's decision. It may very well be that the Court's decision and the legislature's action will coalesce. For example, sometimes the legislature overreached or undermined democracy or the very rules it formerly set for itself. The Court then declares such encroachments as unconstitutional. The legislature restricts its action to conform to the Court's declaration. After all, legislatures can be

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definitions of 'spouse' in legislation excluded same-sex couples, and to argue only that the exclusion was in accordance with section 1 of the Charter. On the same point see Ian G. Scott, *Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s*, 39 U.T.L.J. 109, 125 (1989).

73. Counting the number of cases in which a constitutional dialogue has developed between the Canadian legislature and the Court, Hogg & Bushell were puzzled as to whether to include in their count the cases in which the legislature acquiesces in the Court's decisions. *See supra* note 17, at 98 and *infra* note 95 and accompanying text.

74. See Morton's critique on the "lax operationalization" of Hogg & Busshell's concept of dialogue. *Supra* note 24, at 23.

75. WEBSTER'S NEW WORLD DICTIONARY (on Power CD, Version 2.5, Zane Publishing Inc., 1994-1996).

persuaded that they have wronged. Yet, if a substantive dialogue has taken place, such a response is the fruit of the legislature's deliberations on the Court's declaration and of its acknowledgment that it has exceeded its powers. In substantive dialoguing, the correspondence of the Court's declaration and the legislature's response is achieved after these two committed public agencies have deliberated the matter in question, each in its own turn, and reached the preferred alternative.

B. The Formal Dialogue

Dialogue is also defined simply as a conversation between two or more participants.[76] This somewhat narrow definition is quite different from the afore-mentioned one. A conversation between two parties can take the form of one participant formulating a solution and the other utterly agreeing. It can also take the form of one party enforcing its own interpretation over the other participant's. Finally, it can also take the form of one party expressing its opinion, and the other participant refusing to listen altogether.

A formal dialogue, I propose, takes place when the legislative action adds nothing to the final articulation of the constitutional solution; it does not add any content to the court's decision, except for "rubber-stamping" it with the relevant legislative process.[77] A formal dialogue occurs when the final formal act is that of the legislature, but the final words are those of the Court. This type of response is characterized by the reluctance of the one or more participants to acknowledge their overreaching or to thoroughly ponder the others' objections in considering alternatives.

A formal dialogue also occurs when a legislature uses its power to hamper future dialogues or limit current ones. Presumably, this type of dialogue is not available in every legal system. Yet it is possible in countries without a constitution, where the principle of parliamentary supremacy reigns, or in those systems where a Court's decision could be overcome by a legislature's explicit reaction, like a legislative override, found in both the Canadian and Israeli constitutional systems.[78]

The determination of whether a dialogue is formal or substantive results from an empirical and contextual examination of every case in question. The differentiation between the two kinds is more a matter of degree than of dichotomous qualifications. A few indications can help determine which of the two possible dialogues came into being in a specific context, although

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76. Search term 'dialogue' at MERRIAM WEBSTER on-line dictionary, *available at http://www.m-w.com/dictionary.htm.*

77. Indeed, WEBSTER'S DICTIONARY defines "formal" as: "of external form or structure, rather than nature or content...." *Supra* note 75. The legislature's "rubber stamping" can be manifested by repealing the annulled law from the books or by fully implementing the changes the reviewing court has suggested. *See infra* note 95.

78. *See infra* Section V(B).

they are by no means decisive. For instance, the length of time that the legislature has taken to reach its response is one such indication: if a thorough debate followed the Court's decision, it is likely that considerable time will elapse before the legislature will provide its solution. Balancing the Court's decision and the legislature's will and reaching an appropriate formula can be a difficult task and involves the interaction of many participants.[79] Hence, a relatively prompt legislative response may suggest a more cursory debate.[80] Furthermore, the *mise-en-scene* surrounding the legislative response is an additional factor to consider: was the response contained in a single piece of legislation or was it a combination of legislative or administrative measures? If so, what were these measures, and why were they taken? Last, the content of the final legislative response should be weighed: if it is identical to the Court's declaration, it should draw our attention. While it is plausible that the legislature will reach the same conclusion as the Court, such an outcome may also indicate a reluctant and uninvolved decision-making process.

The Canadian governmental response to the Court's decision in the famous *Morgentaler v. Borowski*[81] case illustrates how the analysis can be exercised in determining which of the two dialogues applies. In *Morgentaler*, the Canadian Supreme Court struck down those sections of the Criminal Code dealing with abortion. The parliament did not enact a modified abortion provision. The Court's words were final, in that no legislation followed the Court's declaration. Seemingly, such a response implies the occurrence of a formal dialogue. Yet, a closer look into the parliament's workings after the *Morgentaler* decision suggests that a substantive dialogue had taken place.

Many commentators acknowledged that the *Morgentaler* decision left Parliament with a relatively free hand to craft a new abortion law.[82] Naturally, the Mulroney government introduced a compromise measure.[83] The bill incited lengthy and forceful debates in the House of Commons, the

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79. The participants may include: interest groups, the Attorney General's office, and Parliament members.

80. The overall time span in which one examines the dialogue between these institutions could be divided into short-term and long-term interactions. A court's decision to strike down a law can, in the short run, result in the legislature's acquiescence in the Court's definitive answer and yet, in the long run, will result in the legislatures' retaliation, calling to limit the Court's power or to politically control Supreme Court Judges' nominations. *See* ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 27-43 (1994). For the purpose of this paper, only the short-run interactions and reactions will be examined.

81. R. v. Morgentaler, [1988] 1 S.C.R. 30; 44 DLR (4th) 385.

82. *See* F.L. MORTON, MORGENTALER V. BOROWSKI: ABORTION, THE CHARTER, AND THE COURTS 290 (1992).

83. The Bill C-43 proposal was introduced to the House of Commons on November 3, 1989. *See id.*

cabinet, the Senate, and the media, as well as among various interest groups and academia.[84] Eventually, the bill was defeated, and no further attempts to revive the legislation were made. Since Parliament did not respond to the Supreme Court's decision with new legislation, Canada was left with no abortion law, although the Canadian legislature, polarized over the issue, debated at length the alternative legislation the government did initiate. The public dedicated time and energy to discuss and express their opinions on abortions, women's rights, and fetuses' rights. The constitutional dialogue, engendered by the Court's decision, encouraged various participants to engage themselves in the discourse. The final outcome, notwithstanding *Morgentaler*, resulted in substantial dialogue. While this case represents one sort of substantive dialogue, the next section poses some Israeli and Canadian examples of formal dialogues.

V. FORMAL DIALOGUES IN ACTION

A. The Israeli Example

The aforementioned Israeli case studies exemplify the workings of a formal dialogue, both in the courtroom and in the parliament. This dialogue is most clearly manifested in the events surrounding the *Bergman* case. [85]

In this matter, the Knesset's discussions before the enactment of the impugned law revolved around the system of public financing of election campaigns, examining both its advantages and drawbacks.[86] Neither the constitutionality of the new law nor the possibility of a judicial review were discussed by the legislature.[87]

Furthermore, the litigation strategy of the Attorney General, which included avoiding points that could have prevented the Court's decision to strike down the law,[88] impeded the constitutional dialogue and substantially narrowed it.[89] For example, had the Attorney General disputed the

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84. A "free vote" over the proposal took place in the House of Commons six months afterwards, on May 22, 1990. *See id.* at 292; *see also* Allan C. Hutchinson, *Challenging the Abortion Law*, THE [TORONTO] GLOBE AND MAIL, Nov. 13, 1989, at A7; Sheilah L. Martin, *The New Abortion Legislation*, 1:2 CONST.L.F. 5 (1990).

85. H.C. 98/69, Bergman v. Minister of Finance and Others (1969), 23 P.D (1) 693.

86. *See* Peter Elman, *Judicial Review of Statute*, 4 ISR. L. REV. 559, 565 (1969).

87. This is clear from transcripts of the Knesset debates before the enactment of the relevant law and from the fact that the decision in *Bergman* produced general surprise. *See* Klein, *supra* note 58, at 569. See also Justice Zamir's words, (C.A. 6821/93, Mizrahi Bank et al. v. Migdal Kfar Shitufi et al. (1995), 49 P.D. 4 221, at 468-69), claiming the *Bergman* case was "a legally big surprise." Furthermore, A. Vardinger, Member of the Knesset, talking about the Court's decision in *Bergman*, mentioned the decision brought embarrassment on the House of Parliament. *See* The Knesset Protocols, July 14, 1969, at 2 (in Hebrew).

88. *See supra* Section III(A).

89. Although the Court can raise these issues by itself, "there is nothing in the common

justiciability of the petition or the petitioner's standing, the judicial decision would have been enriched.[90] The Court's decision on these issues could have engendered a principled public debate on the scope of the Court's authority.[91] After all, justiciability and standing are substantive issues, cutting to the heart of the proper role of the Court vis-à-vis the other branches of government.[92] The decision to bypass these issues suggests that the governmental agencies were reluctant to enter a comprehensive dialogue on the scope of judicial review that underlies the Israeli Court.[93]

More importantly, the legislature's response to the Israeli Supreme Court's decision also indicates that this dialogue was formal in nature. Recall that the Knesset responded to the *Bergman* decision in two ways. It first remedied the equality infringement, amending the law by fully adopting the Court's suggestions. In addition, the law was reenacted with a special majority. Together, these actions demonstrate the legislature's lack of interest in participating in a meaningful dialogue.

The legislature should have chosen one out of the two possible alternatives. Either one of the alternatives was legally sufficient.[94] However, by using both of them at the same time, two contradictory positions were implemented. Had the legislature wished to accomplish its original goal of financing only the incumbent parties, it simply could have reenacted the law with the special majority. Once the procedural steps were taken, the law's validity would have been regained. On the other hand, had the legislature wished to remove the inequality, the law could have been amended with a regular majority. Amending the law and at the same time reenacting it with the required majority implies that the legislature was

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law approach that *compels* a court to consider justiciability of an issue and the doubts concerning its own jurisdiction when neither party has raised these points." Benjamin Akzin, *Judicial Review of Statute*, 4 ISR. L. REV. 576, 577 (1969).

90. In an earlier case in 1955, the Court was asked to issue an order of mandamus against the Israeli President, directing him as to the method of carrying out his duties. *See* H.C. 65/51, Jabotinsky v. Weizmann (1951), 5 P.D. 801 *in* SELECTED JUDGMENTS, *supra* note 33, Vol. I. at 75. The then Attorney General claimed that the Court had no jurisdiction to hear the petition. The unanimous decision of the five Justices upheld the Attorney General's arguments finding the case non-justiciable (the issue at stake was not whether the Court has jurisdiction, but rather whether the case was justiciable). The Court's rather lengthy decision revolved entirely around the justiciability of the case. Thus, when the Israeli Court was firmly challenged with the justiciability issue, it addressed the question thoroughly. *See id.*

91. On the Court's decision being the beginning point of a societal dialogue see Friedman, *supra* note 25, at 660-68; Friedman & Smith, *supra* note 27, at 89.

92. On this specific point see Bendor, *supra* note 59, at 319.

93. This view is supported by the fact that this strategy prevailed in subsequent cases, even after the government realized that defense policy could result in the decision to strike down laws. While the Attorney General's position in *Bergman* could be explained by the fact that he positively expected the Court to deny the petition, thereafter such an expectation could not hold; the Attorney General's position remains puzzling.

94. *See supra* note 62.

unsure whether it was ready to infringe the equality right to achieve its goal or wished to refrain from violating the equality right altogether. The linking of these somewhat contradictory actions suggests that the Israeli legislature did not thoroughly and deliberately partake in a substantive dialogue. Its response to the Israeli Supreme Court's decision constituted a formal mode of dialogue in which its own genuine voice was not clearly heard. [95]

However, the government's response contained an additional component. The amended legislation was introduced simultaneously with another short piece of legislation: the Election (Ratification of Validity of Laws) Law,[96] which provided as follows: "(f)or the purpose of removing doubt it is hereby laid down that the provisions contained in the Knesset Election Laws are from the date of their coming into effect valid for every legal proceeding and for every matter and purpose."[97] This law was also enacted within two days, and by a special majority, less than two weeks after the *Bergman* decision was delivered.[98]

This last action has been interpreted as a political-legislative reaction against the Court's intervention[99] as well as a proactive removal and prevention of any future possibility of judicial review of Knesset legislation.[100] While it is a legislative action towards a dialogue that follows a judicial decision to strike down a law,[101] such an action nevertheless entails a very confined dialogue and hampers the very possibility of future dialogues on the same matters. Taken together, the legislature's threefold response, amending the law, reenacting it with the required majority, and enacting the

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95. It should be mentioned that Hogg & Bushell deliberated whether the cases in which the remedial legislation merely implemented the changes the reviewing Court has suggested should be counted as well as examples of dialogues. *See supra* note 17, at 98.

96. *See* Election (Ratification of Validity of Laws) Law, 1969, 568 S.H. 269.

97. *Id. See also* Shapira, *supra* note 64, at 414. In the explanatory notes appended to the draft of the law it was stated that "since the decision of the Supreme Court clears the way for argument against the lawfulness of various election laws, it is proposed to confirm the validity of the laws related to electoral matters and to do this by the majority required." *Id.*

98. The first reading took place on July 14, 1969 and the second and third readings, on July 15, 1969. *See* The Knesset Protocols, July 14-15, 1969 (in Hebrew).

99. *See* Elman, *supra* note 86, at 569.

100. In the Knessets Protocols, the government's representative mentioned:

> This *Ratification Law* is needed not because we believe there is something else [other laws that might infringe the principles provided in section 4 – g.d.], but because we know what the Supreme Court is. Once a petition was successful, we can expect a flood of unsuccessful petitions that will disturb the Elections.

The Knesset Protocols, July 14-15, 1969, at 2 (quoting Knesset Member Yohanan Bader)(in Hebrew, translated by the author).

One Knesset Member, Shmuel Tamir, reacted by stating: "This is a law against the Supreme Court, against the Court's supremacy and out of the fear from the rule of law." The Knesset Protocols, July 14, 1969, at 2 (In Hebrew). *See also* Klinghoffer, *supra* note 63, at 32 and Editor's synopsis to the *Bergman* case, *in* SELECTED JUDGMENTS, *supra* note 33, at 14.

101. For Hogg & Bushell's definition of a dialogue, see *supra* note 17, at 82.

Ratification Law, clearly reveals its reluctance and limited commitment to partaking in a meaningful dialogue.

The circumstances surrounding both the *Agudat Derekh Eretz*[102] and the *Rubinstein*[103] cases are very similar. In both cases, state representatives persisted in bypassing the justiciability question.[104] In both cases, the Court struck down the laws that were found to infringe the election equality prescribed in section 4 of the Basic Law: The Knesset. In both cases, the legislature reenacted the laws with the required majority, in haste, and without delving into the substantive constitutional issues raised by the Israeli Supreme Court's decision.

In all these cases, the potential for a substantive dialogue, in which the legislature engages itself in finding an appropriate resolution that balances both the Court's declaration on rights and its own policy-making interests, never materialized.

B. The Canadian Example

Some scholars suggest that the Canadian constitutional model, entrenched in The Charter, is better adapted to deal with counter-majoritarianism because it contains a few features that facilitate the possibility of legislative action to overcome a judicial decision striking down a law.[105] Most prominently, section 33 has been perceived to accommodate and reconcile the competing ideals of entrenched rights and parliamentary supremacy.[106]

Indeed, section 33 (the "Notwithstanding Clause") has the potential for inducing a substantive dialogue. A legislative response to override a Court's decision would evoke a more focused and informed public political debate, thus leading to the better articulation of majority will and values.[107] The

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102. H.C. 246, 260/81, Agudat Derekh Eretz et al. v. Broadcasting Authority et al. (1981), 35 P.D. (4) 1.

103. H.C. 141/82, Rubinstein et al. v. Chairman of the Knesset et al. (1982), 37 P.D. (3) 141.

104. In a much later case, where the Israeli Supreme Court upheld the constitutionality of a law that was challenged to infringe the property right prescribed in Basic Law: Human Dignity and Liberty, the then Attorney General, Michael Ben-Yair, again did not dispute the justiciability issue. *See* C.A. 6821/93 Mizrahi Bank et al. v. Migdal Kfar Shitufi et al. (1995), 49 P.D. 4 221, at 468-69.

105. These features are contained in sections 1, 7-9, 12, 15(1), and 33. *See* Hogg & Bushell, *supra* note 17, at 82; Weinrib, *supra* note 16, at 85.

106. *See* Tushnet, *supra* note 18, at 279 as well as at pages 282-83: "On this account, section 33 allows judicial review to coexist with majoritarian decision-making in a way that contributes to enhancing the public's understanding of democratic values and constitutional norms." *See also* Roger Tasse, *Application of the Canadian Charter of Rights and Freedoms, in* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A COMMENTARY 65, 103 (Gerald A. Beaudoin & Ed Ratushny eds. 1989).

107. *See* Peter H. Russell, *Standing Up For Notwithstanding*, 29 ALTA. L. REV. 293

Notwithstanding Clause could theoretically play a positive role in the Canadian constitutional system by promoting "a complex partnership through institutional dialogue between supercourts and superlegislatures."[108] It might also foster a substantive dialogue, as it "actually invigorate(s) majoritarian politics by providing the people and their representatives with a way *of engaging in direct discussion of constitutional values* in the ordinary course of legislation."[109] However, hitherto the practice of section 33 has drawn it closer to the formal type of constitutional dialogue, the forces drawing it in that direction being both those of the legislature and the Canadian Supreme Court.

The Quebec provincial legislature, the first to make use of the Notwithstanding Clause,[110] used it in a very formal manner. Furious over the enactment of the Charter by the other provinces, Quebec reacted by a blanket override: all existing Quebec legislation was repealed and re-enacted with a standard override clause.[111] This protest-oriented government was surely not interested in engaging itself in any future dialogues with the Canadian Supreme Court. Similar to the Israeli Ratification Law after the *Bergman* decision, the Canadian legislature sought to shield its legislation from judicial review and eradicate future interaction and intercommunication between the judicial and legislative institutions.

After the Canadian Supreme Court's decision in *Ford v. Quebec (A.G.)*,[112] in which Quebec's Bill 101 (requiring that all public signs and commercial advertising in the province be only in French) was struck down, Quebec invoked section 33 once again. This time section 33 was used to protect a revised version of the law, in which exterior signs in the province had to be only in French, while interior signs could be bilingual. Some legal scholars argue that Premier Bourassa believed the revised law was a constitutionally acceptable compromise.[113] If this was indeed the case, why was the usage of the Notwithstanding Clause necessary? Revising the law

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(1991); Tushnet, *supra* note 18, at 280; Paul Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51, 81-82 (1984).

108. Lorraine Eisenstat Weinrib, *Learning to Live With the Override*, 35 MCGILL L.J. 541, 564-65 (1990). This complex partnership is very close to my notion of the substantive dialogue.

109. Tushnet, *supra* note 18, at 284 (emphasis added).

110. The Quebec provincial legislature was also the only one to use it so far, except for the Saskatchewan government in a back-to-work law. In that latter case, section 33 was used after the Saskatchewan Court of Appeal had declared a back-to-work law to violate section 2(d) of the Charter. However, the Supreme Court of Canada overturned the Saskatchewan Court's decision and upheld the original law, thus negating the effect of using the section. *See* Tushnet, *supra* note 18, at 287.

111. *See* Weinrib, *supra* note 108, at 544-45.

112. [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

113. *See* Tushnet, *supra* note 18, at 289. Tushnet based this assumption on Stephane Dion's proposition. *See* Stephane Dion, *Explaining Quebec Nationalism*, *in* THE COLLAPSE OF CANADA? 93-94 (Kent R. Weaver ed. 1992).

while simultaneously invoking the Notwithstanding Clause signals the Quebec government's disinterest in dialoguing. The parallel to the Israeli situation is once again striking.

The aftermath of these affairs was the development of a political climate of resistance and antagonism toward the use of section 33.[114] In light of Quebec's rather prodigal use of section 33, the rest of Canada apparently considers the use of section 33 inconceivable.[115] As a consequence, an important component of the Canadian constitution has been eviscerated. The Federal and Provincial legislatures of Canada have chosen to seal off one possible avenue of legitimate, legal legislative response.

The Canadian Supreme Court has also contributed to turning section 33 into a formal mode of dialoguing. In the *Ford* case,[116] the Court found that an omnibus act containing override clauses could be added to pre-existing legislation, and that there is no need for the legislature to specify which of the Charter provisions it is exempting its legislation from.[117] The Court's interpretation of the purpose of the clause has entailed an unfocused and formal employment of the legislative decision-making power.[118] Hence, Quebec, the federal government, the provincial legislatures, and the Supreme Court — all impaired the potential for substantive dialoguing found in section 33.

VI. SUBSTANTIVE DIALOGUING

Nonetheless, the overall Canadian experience affords us with ample examples for understanding how substantive dialogues work. The above-mentioned *Morgentaler* example is such a one.[119] Moreover, in their study, Hogg & Bushell found that in a significant majority of cases the legislature responded to the Court's decision by changing the law in a *substantive* way.[120] This majority is made up of those cases in which the Court's decision led the political institutions to re-debate the proposed law

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114. *See* Hogg & Bushell, *supra* note 17, at 83.

115. The reluctance of the other Canadian provinces to invoke section 33 was demonstrated during the aftermath of the Supreme Court's decision in the *Vriend* case. Vriend et al. v. Alberta et al., [1998] 156 D.L.R. (4th) 385. For details see Hogg & Thornton, *supra* note 28, at 20-21.

116. *Supra* note 112.

117. Geoffrey Marshall, *Taking Rights for An Override: Free Speech and Commercial Expression*, PUB. L. 4, 6 (1989). The Court in fact suggested that requiring specificity from the legislature would be unreasonable. *See* Tushnet, *supra* note 18, at 288.

118. Tushnet, *supra* note 18, at 289. "The Court's key analytic tool is its characterization of the override as 'formal.'" Weinrib, *supra* note 108, at 555.

119. *Supra* notes 81-84, and accompanying texts.

120. Indeed, Hogg and Bushell themselves used the word 'substantive' to describe this majority. *See supra* note 17, at 98. The majority of cases are reached after excluding the cases in which legislature simply repealed the provision that was found to violate the Charter, or in which the remedial legislation merely implemented the changes the Court has suggested.

and come up with a new initiative in the shape of a modified law - one which honored both the Court's words (the interpreted rights) and the legislature's will.

Canada is not alone in its substantive dialoguing experience. Other legal systems, not possessing the Canadian *Charter* features, have developed their own dialogues' modes and patterns. In the constitutional history of the United States, the striking down of a law by the Court has occasionally spawned proposals for constitutional amendments.[121] At times, it has also brought about deliberation on alternative proposals for new statutes that will restate the legislature's will in a different way.[122] Courts' decisions to strike down laws have also evoked responses that result in the curtailment of their importance or consequences,[123] or they have resulted in futile attempts to override Court's decisions.[124] Whether these responses were formal or substantive is a matter of empirical analysis, yet at least in some of these cases continuous and profound dialogues developed.[125]

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121. After the famous decision of *Roe v. Wade*, 410 U.S. 113 (1973), numerous attempts were made to overturn the decision by constitutional amendment. *See* Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J. L. & PUB. POL'Y 427, 446-55 (1985).

122. Tushnet gives the example of the anti-flag-burning episode of 1989. *See* Tushnet, *supra* note 18, at 293.

123. Friedman, *supra* note 25, at 663; Pearson & Kurtz, *supra* note 121, at 460-63. Sometimes it is the Court itself that invites the Congress to reverse or override its decisions; Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT. REV. LAW & ECON. 503 (1996). *See also* William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, YALE L. J. 331 (1991).

124. *See, e.g.*, City of Boerne v. Flores, 117 U.S. 2157 (1999). In this case, the Court struck down the Religious Freedom Restoration Act (42 U.S.C. 2000bb to 2000bb-4) (1994), also known as the RFRA. The RFRA was passed in reaction to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), by using Congress' enforcement authority under section 5 of the fourteenth amendment. The Smith decision distinguished the Court's previous decisions relating to federal laws burdening religious practice. The Congress' RFRA was aimed at reapplying the Court's former balancing text. For a discussion concerning the meaning of the *City of Boerne v. Flores* decision, as well as notes on judicial versus legislative supremacy, see the Symposium: *Reflections on City of Boerne v. Flores*, WM. & MARY L. REV. 39:3 597-1003 (1998).

125. See, for example, Friedman's analysis of the abortion issue and the consequences of the *Roe v. Wade* decision, which concludes with the following:

> Throughout the [abortion] debate, the Court has been a vital, but by no means dispositive, participant. What seems apparent, however, is that the story of abortion rights debate does not support the premises of the counter-majoritarian difficulty. Rather, that story demonstrates a vibrant public dialogue over the issue. Courts have had an important voice in this dialogue, particularly in facilitating it, but theirs is not the final or only voice.

Friedman, *supra* note 25, at 667-68.

VII. THE RESPONSIBILITY TO ENGAGE IN DIALOGUE

The responsibility to enter a substantive dialogue should be equally shared by the Court and society at large, its representatives, and its decision-makers.[126] For it takes two to tango, it takes at least two to dance to the tune of a valuable dialogue for the benefit of all. If one of the participants refuses to take an active part in the evolving exchange, it will inevitably result in the development of a very restricted dialogue, which is less capable of adequately counteracting counter-majoritarianism. It is within the terrain of a substantive dialogue that the majority's will is reshaped and re-expressed in light of a Court's decision. It is when substantive dialogue takes place that the role of the Court as a facilitator and catalyst of the dialogue comes to life.[127] It is therewith that the Court performs its role not at the expense of, but along with, the elected and representative bodies. However, when the legislature and society are not catalyzed and their participation is not facilitated, the dialogue sought dies and with it the prospect of counteracting the difficulty. If "courts can hamper or chill dialogue,"[128] so can legislatures. The lack of a dialogue can be the outgrowth of either legislatures' or Courts' constraints.

Take the Israeli example; the absence of constitutional dialogue until the late 1970s has been attributed mainly to the Court's self-restraint.[129] However, as the preceding discussion suggests, this absence could be explained just as easily as the result of a legislature that avoided materially partaking in a nascent dialogue. Even now the willingness of the Knesset to deliberate constitutional issues in the context of such a dialogue is questionable, as the following account indicates.[130]

As mentioned, in 1992, a change in the constitutional regime took place in Israel, with the introduction of the two new Basic Laws: Basic Law:

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126. At the very end of his discussion, Friedman once again states the problem with the counter-majoritarian difficulty: "it overstates the role of Courts and thus understates society's responsibility." He suggests that it does not "accurately account for the critical role of the rest of society, the people." *See id.* at 682. *See also* Russell, *supra* note 107, at 299: "A legislative override... can subject these questions [of political and social justice raised by the *Charter*] to a process of wide public discussion so that *the politically active citizenry participate in and share responsibility for the* outcome."

127. On the role of courts in the constitutional dialogue see Friedman, *supra* note 25, at 668-71.

128. *Id.* at 671.

129. *See* MARTIN EDELMAN, COURTS, POLITICS AND CULTURE IN ISRAEL 31 (1994); Burt, *supra* note 56, at 2015; Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COM. L. 585, 590 (1996).

130. Gavison, *supra* note 7, at 86. Gavison argues that the political bodies usually conceive constitutional issues to be secondary in importance to the substantive, important security issues. She further claims that the Knesset constitutional discussions frequently reveal extreme apathy, indifference, and ignorance. *See id.*

Human Dignity and Liberty and Basic Law: Freedom of Occupation.[131] The rights conferred by these two Basic Laws were circumscribed in a way that imitated the Canadian Charter's structure.[132]

About a year and a half after its enactment, the Basic Law: Freedom of Occupation was at the center of a petition submitted to the High Court.[133] Accepting the petition, the Court declared that the government's refusal to grant an importation license to a private company which dealt, *inter alia*, with the importation of non-Kosher meat was grounded on illegitimate considerations, and thus infringed the guaranteed right of freedom of occupation. As a remedy, the Court ordered the Ministry of Trade to grant the requested license to the petitioners.[134] Note that the Court reversed a discretionary administrative decision rather than a legislative act; no law was struck down. However, in an obiter dictum, one of the Justices mentioned that should the Knesset enact a law which would condition the granting of licenses to those companies which would import only Kosher meat, such a law would *probably* be found to infringe the freedom of occupation to an unjustified degree.[135]

Both the decision and its obiter evoked the resentment of religious parties in Knesset. Under their pressure, the Legislature repealed the Basic Law: Freedom of Occupation and replaced it with a new law, enacted in March 1994.[136] The new version amended a few original clauses and added a whole new Notwithstanding clause.[137] The enactment of legislation

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131. *See supra* note 10 and accompanying text. On the constitutional change resulting from the introduction of these Basic Laws see Aaron Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4:3 CONSTITUTIONAL FORUM 83 (1993).

132. *See* Weinrib, *supra* note 16, at 85.

133. H.C. 3872/93, Mitral v. Prime Minister et al. (1993) 47 P.D. 5 485.

134. Although the details of this petition are beyond the scope of this paper, a few notes are in order. In 1992 the Israeli Government decided on a new policy which would privatize the importation of meat to the Israeli market. The Government appointed a committee to recommend the necessary steps for the implementation of that policy, yet these recommendations were not executed. In 1993 the Government decided to change its policy once more. Instead of privatization, it sought regulation of the meat market by enacting laws concerning its importation. In the time between these two policy changes, the petitioner's application for a license was refused. The reason behind the second policy change (as well as the license refusal) was the pressure exercised by the religious coalition partners, who feared the total privatization of the market would result in the abundant importation of non-Kosher meat. The private company petitioned the Court against both the policy change and the refusal of its license application. For more on this issue see Hofnung, *supra* note 129, at 596. *See also* Tzvi Kahana, Notwithstanding the Constitution: The Israeli Deviating Law and the Canadian Override, (LL.M. Thesis, Tel Aviv University, 1995) [unpublished] [in Hebrew] at 101-07.

135. These were Justice Or's words in the *Mitral* case. H.C. 3872/93, Mitral v. Prime Minister et al. (1993) 47 P.D. 5 485.

136. For an English translation of the new version see *supra* note 35.

137. Section 8 of the 1994 Basic Law: Freedom of Occupation, states as follows:

> The provisions of any law which are inconsistent exceptionally with the freedom of occupation shall remain in effect, even if it does not conform with section 4,

explicitly using the notwithstanding clause and forbidding the importing of non-Kosher meat immediately followed.[138] By so doing, the Israeli legislature once again engaged in nothing more than a formal dialogue. Just like the Quebec legislature, it signaled lack of interest in future dialogues with the Court on the matter.[139] It used the notwithstanding clause to foreclose any substantive and focused dialogue over the meat issue.

A later petition challenging the constitutionality of the Import of Frozen Meat Law was dismissed. Following the footsteps of the Canadian Supreme Court decision in *Ford* while explicitly referring to it, the Israeli Court ruled that a law which included a notwithstanding clause was immune from judicial review.[140] Once again, the legislature forsook its responsibility to commit itself to a meaningful dialogue.

Fortunately, prospects for a new era of Israeli constitutional dialogue are finally emerging. As mentioned in the introduction, the Supreme Court recently struck down a piece of legislation in the *Investment Managers* case, finding the impugned provision to impair the freedom of occupation rights of investment managers more than necessary.[141] A few months ago, the Knesset responded by amending the law and choosing a less restrictive alternative. That alternative was the product of its own reasoned

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> if it is included in a law adopted by a majority of the Knesset with the explicit comment that it is valid despite the provisions of this Basic Law; such a law shall remain in effect for four years from the date of its commencement, unless an earlier date is fixed.

On that occasion, the Basic Law: Human Dignity and Liberty was also amended. *See* Barak-Erez, *supra* note 10, at 324. After thoroughly examining the happenings that led to the enactment of the 1994 Basic Law: Freedom of Occupation, Kahana concludes:

> the political level desired a law that will forbid the importation of non-Kosher meat. The Supreme Court clarified that in light of *Basic Law: Freedom of Occupation* (1992), the enactment of such a law was not possible. The political level decided to lift the obstacle and amend the Basic Law. The professional level (*i.e.*, the Ministry of Justice) recommended that will be done by including a notwithstanding clause to the Basic Law... The political motive behind the inclusion of a notwithstanding clause was therefore the desire to bypass the *Mitral* ruling.

Kahana, *supra* note 134, at 105 (translated by the author).

138. The Import of Frozen Meat Law, 1994 (S.H. 47-1994 at 104), was enacted on the very same night the Basic Law was amended.

139. While the Quebec government shielded all its legislation and protested against the enactment of the Charter, the Israeli government shielded its Kosher-meat legislation and protested against the Court's administrative decision in Mitral and against possible future constitutional decisions.

140. H.C. 4676/94, Mitral Ltd. et al. v. The Israeli Knesset at all. 50 P.D. (5) 15 at 28.

141. *See supra* note 14. Hogg & Bushell found that the minimal impairment requirement (or the least restrictive means) is the reason behind striking down most of the laws, and that indeed, in most of these cases, alternative legislation using less restrictive means was upheld by the Court. *See supra* note 17, at 85.

deliberations, initiative, and balancing process.[142] Hopefully, this latest development will symbolize the beginning of a new type in the Israeli Court-Legislature dialogue.

VIII. DOES STRUCTURE PROMOTE CONTENT?

The Israeli and Canadian examples raise more profoundly the question of the connection between structure and substance. Does the fact that institutional frameworks are structured in a specific manner have any effect on the substance of the interaction to be developed between courts and legislatures? I extrapolate to the negative.

Substantive dialogues took place in Canada even though a significant institutional framework that was supposed to encourage them - that is, the notwithstanding clause - was almost never used.[143] Yet, one may challenge that substantive dialogues took place in Canada altogether; the same overall institutional framework that was supposed to enhance dialogue achieved quite the opposite. It was suggested that the mere power given to the Canadian legislatures to reasonably limit rights (section 1) or override them to a specific period of time (section 33), discouraged the Court's input to the dialogue.[144] Recent interpretations slant toward this direction: Canadian judges, it was found, defer to rather than challenge the Canadian parliament.[145] Thus, the Canadian model can just as well discourage meaningful dialogue.

The French Constitutional Council's experience produces a puzzling counter-proposition. Taking as a point of departure that the French Constitutional Council was impressively successful in its contribution to the dialogue,[146] Professor Shapiro suggested that its success is the result of the limited powers vested in the Council. Since its judicial review is restricted to only a one-shot abstract review of future legislation, the Council is

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142. On June 29, 1998 the Parliament reenacted the Investment Portfolio Managers' Law, by amending the transitional clauses. In the explanatory notes appended to the bill, it was stated that the amendment follows the Supreme Court's decision. *See* H.H. 2652, at 82 (1998) [in Hebrew]. The Court's decision declared the unconstitutionality of the transitional clauses, yet left it open for the legislature to decide the required changes. *See* H.C. 1715/97, The Investment Portfolios Managers' Association et. al v. Minister of Finance et al. (Sept. 24,1997, not yet reported).

143. *See supra* Section VI.

144. *See* William G. Buss, *A Comparative Study of the Constitutional Protection of Hate Speech in Canada and the United States: A Search for Explanations, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 89, 106 (Sally J. Kenney, et al., eds. 1999).

145. Professor Monahan's proposition, *supra* note 22.

146. Alec Stone, *Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144 at 8, 25.

determined in taking the fierce and full advantage of that "one time at bat."[147] Putting aside the differences between the Canadian and the French Courts' scope of review, both frameworks were constructed in the midst of a long tradition of parliamentary sovereignty,[148] and in both the marks of this tradition are forever visible.[149] Hence, if frameworks induce dialogues, one might expect both courts to arrive at more of the same end-point. As mentioned hereinabove, that is not quite what some inferences submit; while the French Council was crowned "fierce", the Canadian Court was said to only rarely challenge parliamentary sovereignty.

The Hungarian Constitutional dialogue can also be referred to in rebuffing the "institutional-influencing-outcome" conjecture. Professor Seitzer posits that the Hungarian Parliament was relatively assertive while ". . . not quite as readily raise the white flag in conflicts with the Constitutional Court . . . [but instead] crafts legislation that pushes the envelope of its permissible discretion."[150] Yet, as Professor Seitzer himself points out, the Hungarian Constitutional features, with their far greater potential intervention upon policy-making, should have entailed a more formal dialogue, in which the legislature is more prone to acquiesce to the Court's authoritarian decision.[151] Without structural clauses similar to the Canadian's, the Hungarian Parliament was successful in reshaping its will, twice or even three times, until it was found constitutional by the Court.[152] Deprived from "notwithstanding" or "reasonable limitation" clauses, the Hungarian legislature managed to instate itself as a full participant in substantive dialogues that have produced constitutional statutes, accepted by both the Court and the political branches.

The Israeli case study is more complex. First, Israel has not yet adopted an encompassing, written constitution. This fact alone should exclude it from being put in the constitutional dialogue category altogether. However, as the British example contends, dialogues occur, even if to a lesser extent, in non-constitutional polities in the form of administrative discretion review.[153] Furthermore, dialogues in Israel did occur and were not

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147. Martin Shapiro, *The Success of Judicial Review, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE , *supra* note 144 at 193, 199. In passing, Professor Shapiro has himself admitted that "the French indeed have achieved a flourishing judicial constitutional review, peculiarly limited by its abstract only character but still roughly comparable to constitutional judicial review elsewhere." *Id.*

148. *Id. See also* Buss, *supra* note 144, at 105-06.

149. In the Canadian framework, section 1 and 33 of the Charter and in the French framework, the exclusively abstract review model.

150. Jeffrey Seitzer, *Experimental Constitutionalism: A Comparative Analysis of the Institutional Bases of Rights Enforcement in Post-Communist Hungary, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144 at, 42, 48.

151. *Id.* at 45-47.

152. *Id.* at 49.

153. *See* Susan Sterett, *Intercultural Citizenship: Statutory Interpretation and Belonging*

restricted to quasi-constitutional (that is, administrative in nature) issues, but included direct political (electoral) rights. Second, Israel's court-political branches dialogue in other areas of constitutional law of rights was far more impressive, like noted by Professor Shapiro:

> Only in Israel might it be fairly said that constitutional rights have generated judicial review. Indeed, in Israel the Supreme Court has generated a constitutional law of rights and judicial review to enforce those rights in the face of a dramatic failure even to promulgate a constitution. Israel can join Italy in our anomalies bag.[154]

Thus, the absence of a constitution could not account, at least not alone, for the lack of the development of substantive dialogues.

In an attempt to systematically explain the emergence and institutionalization of constitutional dialogues and judicial review, Professor Shapiro raises, and somewhat disqualifies, three possible hypotheses: the Federalism-English hypothesis, the division of powers hypothesis and the rights hypothesis.[155] What is intriguing in his attempt is the number of countries that were put, for a time being or for life, in the "anomalies bag": Italy, France, Spain, Israel, and the ECHR.[156] For a moment or two, it felt as if the United States was the only one to be found in the "anomaly bag", making the possible generalization of the structure and outcome connection almost impossible. If "so many parts of the world entrust so much of their governance to judges,"[157] the importance of different frameworks, adopted by different constitutional structures, is withered.

At the end of the day, what matters is the legal and political culture, held by the country's leaders and people. These are the factors influencing the institutional design of one's constitution and the features that were adopted from the various possibilities. They are the ones to effect the political branches' dialogues and responses, and they are the ones to be embedded in judicial decisions.[158]

Why then, have substantive constitutional dialogues emerged in Canada and formal ones reigned the Israeli landscape? One important element is the elite's attitude and political culture towards the rule of law.[159] Canada, as

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in Britain, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144, at 119; Susan Sterett, *Judicial Review in Britain*, 26 COM. POL. STUD. 421 (1994).

154. Shapiro, *supra* note 147, at 200.

155. *Supra* note 147.

156. *Id.* at 196, 197, 199, 200 and 203 respectively.

157. *Id.* at 218.

158. On the importance of cultural traditions and themes on the Court's performance see Buss, *supra* note 144.

159. *See* William M. Reisinger, *Legal Orientations and the Rule of Law in Post-Soviet Russia, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 144, at 172.

part of the Commonwealth, shares a deep allegiance to the rule of law. The English political tradition, committing itself to respect and follow judicially independent and neutral decisions, resonated well in Canada.[160] In Israel, on the other hand, ambivalence towards the rule of law and the role of the judiciary in the governmental scheme was prevalent at the early days of the state.[161] The government had occasionally defied or ignored the Court's decisions, disapproving the very notion of judicial review.[162] Hence, its readiness to enter a substantive dialogue with the Court was circumscribed. Once it was forced to engage in dialogue, it demonstrated a deep reluctance to generously partake. The Israeli legislature had also introduced an override clause to one of its Basic Laws in an exertion to cut off a constitutional dialogue prematurely.

Furthermore, an additional important element to give attention to is the country's political structure, such as the number of legislative houses, the rules governing the internal works of the legislatures, and the right to veto. While comparing Germany and Hungary, Professor Seitzer claims that the unitary system, the one-house legislature, and the relatively low institutional threshold for expressing reservations to the Court's decisions encouraged the Hungarian legislature to respond to constitutional adjudication and fully partake in the shaping of a final constitutional solution.[163] The more houses to approve legislation or the more veto powers,[164] the harder it is for the legislature to substantially respond and contribute to the constitutional dialogue.

Hence, many factors, other than the Constitution's scheme itself, should be taken in account in calculating the probabilities for the evolution of different kinds of constitutional dialogues. The political and legal cultures and traditions, the overall political system, and the constitutional model - together they all effect these dialogues.

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160. On the English allegiance to the rule of law see Shapiro, *supra* note 147, at 195; Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Time of Change*, 45 U.N.B.L.J. 3 (1996).

161. *See* Ehud Sprinzak, *Elite Illegalism in Israel and the Question of Democracy*, *in* ISRAELI DEMOCRACY UNDER STRESS, *supra* note 30 at 173; Lahav, *supra* note 30 at 125; Pnina Lahav, *The Supreme Court of Israel: Formative Years, 1948-1955*, 11 STUD. IN ZIONISM 45 (1990); Shimon Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L & COMP. L. Q. 979, 981 (1984).

162. Klinghoffer, *supra* note 63 at 36-43; Burt, *supra* note 56, at 2075-79; Shapira, *supra* note 64, at 425.

163. Seitzer, *supra* note 150, at 50-51.

164. The President could use the veto to block laws precipitously enacted in the heat of factionalism. The people would be protected against abuse of this power because the President would rarely hazard a test of power with Congress if not backed by the popular will. This was especially so when the veto could be overridden by the Congress.

Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 SAN DIEGO L. REV. 791, 797 (1986).

IX. CONCLUSION

All participants in constitutional dialogues should contribute their share into the development of a meaningful and responsible exchange. Courts, legislatures, cabinets, governments, attorneys general, and the general public are all, and should be, part of an ongoing endeavor to make a constitution a living document.

The chain of a dialogue is endless, and each link is essential. A petition is triggered by legislation. In order for a court to consider a constitutional issue, a petition must be brought before it. It uses the state representatives' legal arguments in order to articulate the constitutional problem and to suggest a solution (either upholding or striking down the law). In turn, the legislature needs a court's decision striking down a law to set its majoritarian wheels in motion again. Using the Court's interpretation and constitutional guidelines, the legislature acts to rephrase its will. A new law is enacted.

The exact features of the links might vary from one constitutional order to another. Canada and Israel's models contain some means that may foster a system of checks-and-balances between the political branches and the judiciary. Both embraced similar override provisions and limitation clauses, yet these features resulted in somewhat different forms of dialogues in the two countries. They are not alone. South Africa's recently adopted constitution also includes the reasonable limitation clause.[165] Its overall constitutional mechanism yields an even far richer dialogue.[166]

However, as this article demonstrates, the mere existence of constitutional features and institutions that may amplify a meaningful and accountable dialogue between Courts and other State institutions does not mean that such a dialogue will inevitably materialize. The dialogues also depend upon the political and legal cultures relating the rule of law, the role of the Court and parliamentary sovereignty, and the political structure.[167]

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165. Section 36(1) of the Constitution of the Republic of South Africa, 1996, prescribes: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...." Section 1 of the Canadian Charter reads: "The *Canadian Charter of Rights and Freedoms* 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."

166. This is the result of the existence of State institutions as the South African Human Rights Commission and the Commission for Gender Equality. *See* Craig Scott, *Social Rights: Towards a Principled, Pragmatic Judicial Role*, 1:4 ESR REV. 4 (1999).

167. Another example of a formal dialogue can be found in a recent South African constitutional case. In *The National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice and Others*, 1998 (12) BCLR 1458 (CC), the petitioners applied to the Court, asking it to declare the unconstitutionality of the inclusion of sodomy as a felony in the South African Criminal Procedure Act. The Attorney General did not lodge any written

Just as there are different types of constitutional dialogues, there are also variants of the counter-majoritarian difficulty. Rather than perceiving it as a homogenous dilemma that undermines all democracies in a similar fashion, one should acknowledge its nuances and, indeed, seek its relevance in different political systems. As counter-majoritarianism rests upon a number of assumptions, the applicability of these very assumptions should be questioned. A full discussion of these variations is beyond the scope of this paper. However, a few concluding remarks on the possible directions in pursuing alternative answers to these questions are in order.

Counter-majoritarianism assumes that laws, enacted by the duly elected legislative body, express the majority's will. Yet it overlooks the workings of politics in coalition governments, especially in parliamentary systems, where various parties, sometimes utterly alien to each other's agenda, constitute a government founded on political compromises and exchanges. It also ignores the well-established practice of party discipline, which might force voting patterns contrary to any free and representative will. In addition, it disregards the effect of the lapse of time between election day, the enactment of the law, and the striking down of that law, thus the very possibility that the majority will has meanwhile changed.

The counter-majoritarian argument also assumes that a judicial decision to strike down a law is final, leaving elected governments speechless and helpless. This supposition fails to acknowledge the possibility of an evolution of substantive constitutional dialogues.

Finally, the theory also suggests that the court's decision runs counter to the majority's will, as represented by its elected delegates. This suggests that the court's actions and the government's reactions inherently stand counter to one another. That, in turn, fails to consider situations in which the legislature chooses not to engage in dialogue of any kind. Where a formal dialogue took place, and it was the legislature that hampered the development of a substantive dialogue, no clash between unaccountable judges and accountable elected officials occurred. Perhaps it was merely the meeting point of two unaccountable institutions. Where, however, a substantive dialogue took place, perhaps it was the meeting point of two equal and

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argument to support the challenged legislation. The Court found the sodomy criminal provision to be unconstitutional. I will argue that this is but another example of a formal dialogue, one in which an administrative body (the Attorney General office) preferred not to contribute from its own part any substance to the Court's interpretation and declaration. Furthermore, in a few South African cases, the Attorney General preferred to concede that the law limited the application of a guaranteed right. However, the concession was not followed by an attempt to justify the limitation as "reasonable and justified in an open and democratic society" (*supra* note 137), or to present evidence that supports the limitation's reasonableness or justification. *See, e.g.*, S v. Williams and Others, 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paras. 61-92; Mello and Another v. the State, 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at paras. 7-10.

responsible partners that together deepen the understanding and reach of democracy.

> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The courts review the work of the legislature and the work of the courts in its decisions can be reacted to by the legislature in the passing of new legislation. . . . This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[168]

Each branch of government plays a crucial role, and each should strive to work in harmony with the other branches in order to promote the needs of society.

168. Justices Cory and Iacobucci wrote for a unanimous court in *Vriend et al. v. Alberta et al.*, [1998] 156 D.L.R. (4th) 385 at 439.