

Human Rights between Non-governability and Political Culture – A New Approach in Human Rights Analysis

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This article calls for a new approach in human rights analysis. It points out on a new definition of human rights as a collection of practices in the policy areas of a given specific human right. The article analyzes the politics and strategies of defending human rights. To do so, it integrates the tools of social choice theory with a unique institutionalist perspective that looks at both formal and informal factors. The analysis is novel in two important aspects. Based on institutional theory and social choice, we develop a theory that explains the political aspect of human rights policies in general as well as the functions of several players in the political arena, particularly politicians, bureaucrats, interest groups and the public. These political players operate amid three structural variables. The first is non-governability, that is the inability of the political system to formulate and implement systematic policy plans. Non-governability arises in an environment with a sectarian electoral system that is restricted to a particular group and a traditional public management system that is not oriented towards outcomes and efficiency. The second characteristic is a political culture that promotes short-term calculations over long-term goals. In its extreme form, this culture gives rise to alternative politics, a semi-legal pattern of do-it-yourself behavior that favors outcomes over process. The third characteristic is the judicialization of politics, the situation in which the legal system partially replaces the other authorities in a state. A case study in this paper attempts to examine the factors explaining the Mehadrin' buses policy making on public transportation in Israel. The separation between men and women on these buses harms the constitutional principles of equality, human honor and dignity and freedom of religion and conscience.

Introduction

Philosophers and political theorists tend to regard human rights as political rather than universal ideals grounded in comprehensive moral doctrines. Human rights theory has taken to following human rights practice, which has always been non-committal on the issue of justification (Cranston, 1983; Sened, 1997; Forst, 1999; Ignatieff, 2001; Rawls, 2001; Simmons, 2001; Cohen, 2004; Williams, 2005; Raz, 2007; Ackerly, 2008; Cohen, 2008; Baynes, 2009; Madsen and Verschraegen, 2013). This global process has caused many researchers to focus on intra-state research, in the understanding that the promotion of human rights cannot be achieved by international means only, and that political pressure on leaders as well as the creation of a local culture that respects human rights are

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essential as supplemental and perhaps even preliminary measures. Furthermore, human rights require the state to act positively to remove barriers and facilitate the exercise of these freedoms (see for example: Risse, Ropp and Sikkink, 1999; Falk, 2000; Freeman, 2002; Halliday and Schmidt, 2004; Fredman, 2008; Oomen, 2011).

Most of the current studies dealing with the domestic arena emphasize the normative evolution of the promotion and protection of human rights (see for example Donnelly, 1998; Alston and Crawford, 2000; Twining, 2009a), the notion that human rights are grounded in human needs (Miller, 2007; Papanikos, 2025) and the concept of human rights as rooted in the understanding of the social function of such norms (Galligan and Sandler, 2004; Twining, 2009b). By highlighting the institutional and socio-cultural context of human rights (Madsen and Verschraegen, 2013), these studies also underscore the link between democracy and human rights (Fredman, 2008), yet, some would argue that human rights can exist without democracy, since Human rights are considered to be inherent to all individuals by virtue of their humanity, although democratic governance can provide a framework for their protection through the rule of law, independent judiciaries, and systems of checks and balances. Other studies have used a detailed anthropological perspective (Slyomovics, 2005), focusing on the attempts to rebuild human rights through public accountability, compensation, educational policy, constitutional reform, and debates about national history and collective memory (Roniger and Sznajder, 1999). They have also established the connection between the denial of human rights and violent conflict (Azar, 1990; Bunch, 2000), the impact of bureaucracy (Barak-Erez, 2002), and the limitations of concepts about human rights in a complex domestic context (Harvey, 2005; McCrudden, 2007; Sikka, 2023). Finally, these studies have focused on the activities of non-governmental organizations (henceforth: NGOs), their effect on the political culture and on the legal arrangements in the state, their strategies and identities (for example: McCann, 1994; Camiel, 1999; Risse, Ropp and Sikkink, 1999; Freeman, 2002; Keith, 2002; Maimon, 2004; Morris, 2006; Pinto-Duschinsky, 2011; Vanhala, 2011).

This article calls for a new approach in human rights analysis focusing on a new definition of human rights as a collection of practices in the policy areas of these rights by analyzing the politics and strategies of defending human rights (see also Gready 2023). To do so, it integrates the tools of social choice theory with a unique institutionalist perspective that looks at both formal and informal factors (Landmann, 2006; Meydani, 2016). A case study in this paper attempts to examine the factors explaining the Mehadrin' buses policy making on public transportation in Israel. The separation on these buses harms the constitutional principles of equality, human honor and dignity and freedom of religion and conscience. Buses on which Orthodox rules are customary are called "Mehadrin" (Kosher) buses, where men and women are separated. The men sit in the front and the women in the back. Usually, the women enter and exit the bus through the back door; the men, through the front. Additional rules include modest clothing, listening to Hasidic music or none at all. On January 2011, the Israeli Supreme Court has established that gender segregation is allowed only if it is carried out willingly.

A New Approach in Human Rights Analysis: Human Rights as a Collection of Practices in the Policy Areas of a specific Human Right

Human rights stand at the core of the social and political debate as well as the academic research in these fields because they have significant educational value, they impose limitations on government authorities (Rosenthal, 1990; Finer, Bogdanor and Bernard, 1995; Kretzmer and Hazan, 2000) and on private institutions (Donnelly, 1998), and they are very important for individual self-fulfillment, social stability and democratic regimes (Kremnitzer, 1991; 1999). The understanding that human rights will be guaranteed is related to the social and governmental structure in a given society, led researchers to understanding that the strategies that will enable better protection of human rights must be studied. This centrality creates the need to develop effective strategies for defending human rights. Ruth Gavison (1991) discusses two such strategies: the legal strategy and the political strategy. While the literature emphasizes the dual struggle on both the legal and political fronts in the international arena as well as the domestic arena, Gavison draws an important distinction between narrow and broader defenders of human rights who act via the legal or the political channel respectively. The narrow strategy of defending human rights via the legal channel may prove ineffective in cases where there is no public consensus regarding the importance of human rights (Gavison, 1991; McCann and Silverstein, 1998; Gavison, Kremnitzer and Dotan, 2000).

The analysis in the article defines human rights as the collection of policy practices in the areas of the specific right. For example, the right to women's equality is the collection of policy decisions that have been made that enable the advancement of women's equality, such as the Convention on the Equality of Women's Rights, the laws on the equality of women's rights passed in Parliament, as well as precedent rulings that protect women's equality. This view leads to the analysis of these policy processes, which include the activity of policy actors in the political and social sphere operating against the background of structural and social conditions.

The analysis suggested in this article is novel in two important aspects. Based on institutional theory and social choice, we develop a theory that explains the political aspect of human rights policies in general as well as the functions of several players in the political arena, particularly politicians, bureaucrats, interest groups and the public (Robins, 2009). These political players operate amid three structural variables.

The first is *non-governability*, the inability of the political system to formulate and implement systematic policy plans. Non-governability arises in an environment with a sectarian electoral system that is restricted to a particular group and a traditional public management system that is not oriented towards outcomes and efficiency (Dror, 2001; Arian, Nachmias and Amir, 2002; Doron, 2006; Vigoda-Gadot and Mizrahi, 2010). Under these conditions of constant instability and uncertainty, players adopt strategies that will maximize their self-interests (Manuel Castillo Lopez, 2022). One result is the harm done to human rights, even though, ironically, the main strategy utilized is intense litigation with the expectation that the High Court of Justice will provide policy decisions about human rights. Non-

governmental organizations that fails to receive their demands from the government, turn to the Court because it has traditionally enjoyed high levels of trust and legitimacy due to its image as a stable and objective entity. This process positions the Israeli Supreme Court as a central player in the political scene with significant influence on policy making processes as well as on the way Israel chooses to state its human rights policy (Meydani, 2011; Ben-Porat, 2012). The dual issues of security and nationality inhibit the creation of an atmosphere that makes human rights a priority (Barak-Erez, 1999). The activity of non-governmental organizations in Israel is not an isolated case. Rather, it is part of a global process that has been at work since the 1970s in which non-governmental organizations have been shaping human rights as a legal, political and social product (Steinberg, Herzberg and Berman, 2012).

Non-governability arises from a sectarian electoral system that is restricted to a particular group and results in the inability to design and implement quality public policies, goods and services (Doron and Harris, 2000; Arian, Nachmias, and Amir, 2002; Rosenthal, 2012). It also leads to the entrenchment of traditional public management systems that are not oriented towards outcomes and efficiency through improved management of the public budget and do not focus on the role of public agencies in working with citizens (Galnoor, 2011).

The second characteristic is a *political culture* that promotes short-term calculations over long-term goals. In its extreme form, this culture gives rise to alternative politics, a semi-legal pattern of do-it-yourself behavior that favors outcomes over process. Israel is plagued by a *non-liberal political culture*, which prompts people to find ways around bureaucratic obstacles. Such a situation results in an alternative political cultural characterized by semi-legal, do-it-yourself behavior. The goal of such behavior is on achieving outcomes, rather than on the process of achieving these goals.

The third factor is the *judicialization of politics* - the situation in which the legal system partially replaces the other authorities in a state (Holland, 1991; Shamir, 1991; Barzilai, 1999; Hofnung, 1999). These variables help explain the processes through which Israel is struggling to promote human rights within a specific institutional environment in general, thus determining the scope of human rights in particular. From this twofold analysis we draw conclusions about the future of Israeli democracy and its attitude towards human rights.

Thus, we suggest various insights on the theoretical level. We elaborate on the processes of social learning and their impact on the institutional setting. We also discuss the place and role of policy makers in defending human rights in light of cultural and structural variables.

In the next section we examine the politics of implementing and defending human rights as part of the process of policy making. We present a theoretical framework using a public choice theorem for analyzing the political process of policy making in which we emphasize the politics of defending human rights. First, we discuss the phenomena of collective action and free riding in mobilizing NGOs. Then, we elaborate on the role that NGOs play as part of the process that includes politicians, bureaucrats and interest groups. Finally, we investigate the role of the court as a central player. This analytical framework will subsequently

lead us to the next part of this chapter in which we will analyze the reality for human rights amid a particular socio-legal environment.

The Relationship Between the Public and Politicians

Public choice theory has undergone significant development since the seventies, primarily concerning the use of economic tools in the study of society and politics. The theory integrates structural and individual aspects in the sense that the social reality is determined by the acts of individuals who are acting rationally under the influence of structural factors (Von Neumann and Morgenstern, 1947; Taylor, 1987; Mueller, 1989; Hargreaves Heap and Varoufakis, 1995). The politics of defending human rights is a complex area that includes the numerous decisions of several actors under a certain set of structural and cultural circumstances. For this reason, in order to provide an empirical explanation of the politics of human rights, we must break the politics down into specific actions and decisions and analyze the process that gave rise to the pertinent legislation and regulations.

The models proposed by public choice theory work on the assumption that any policy decision made by a politician in connection with human rights is underpinned by the reciprocal relations between the politician and the electorate (Downs, 1957). In other words, the public make demands for a certain policy on human rights, and politicians respond positively solely to those demands that are beneficial to them. Thus, the politicians supply the products that match the position of the median voter most closely (Weimer and Vining, 2010). Consequently, politicians in office need information about the distribution of public preferences regarding the various policy alternatives in a specific case as well as information regarding credible measures that will bring themselves in line with the position of the average voter.

Interestingly enough, in many cases, the public does not make demands to change the situation until a catastrophe occurs. This problem is known in the literature as the problem of collective action (Weimer and Vining, 2010). It means that most of the public will tend not to be involved in defending human rights. However, in a related action, the public will engage in free riding, meaning it will benefit as many of these rights as it can without paying for it (Andersen and Lindsnaes, 2007; Felice, 2010). The centrality of self-interest and the fact that Not all people benefit the same from a given public policy, create the motivation to become a free rider who remains uninvolved in the efforts to advance and promote human rights (Olson, 1965; Axelrod, 1984; Taylor, 1987). In the absence of demand by the general public, those groups that do manage to overcome the problem of collective action and form interest groups increase their power substantially. However, these NGOs are not the only players (Howlett, Ramesh, and Perl, 2009).

Non-Governmental Organizations Advocating for Human Rights

Researchers into political economics have engaged in extensive study of the actions and influence of interest groups in the field of public policy. They have determined that there is a reciprocal relationship through which the interest groups

provide financial or electoral support to the politicians. In return, the latter supply preferential policies and privileges to the interest groups in the form of rules and regulations such as price controls and monopolies (Stigler and Friedland, 1962; Olson, 1965; Posner, 1971; Peltzman, 1976; Buchanan, Tollison and Tullock, 1980; Mitchell and Munger, 1991).

As noted above, politicians attempt to shape policies that benefit them. To do so, they need to be well acquainted with the distribution of preferences in society. In many cases, however, due to the problem of collective action, the public is passive with respect to most issues, as long as they have not yet reached catastrophic proportions. For this reason, the politicians' main source of information is the activity of interest groups (Ainsworth and Sened, 1993; Lohmann, 1993; 1995; Austen-Smith, 1998; Saba, 2014).

Thus, from a practical point of view, examining the role of non-governmental organizations in advancing and promoting human rights provides insight into the relationship between the public and politicians. These groups, such as the Association for Civil Rights in Israel (ACRI), B'tselem and the Public Commission against Torture in Israel manage to overcome the problem of collective action and advocate for human rights. However, this advocacy may conflict with the activities of other interest groups that are seeking to limit the scope of human rights to safeguard their own interests. Thus, paradoxically, the promotion of human rights is explained by the dominance of interest groups, where their interests are undermined by the implementation of policies aimed at increasing the provision of human rights.

The Involvement of Bureaucrats in Human Rights Policies

Thus far, our analysis has been concerned with the way in which problems requiring government intervention are created, and the way in which politicians identify the problems and the public's preferences with respect to the possible solutions. These details enable the politicians to take a stand concerning the policy alternative that will serve their own interests. However, there is another political actor who could influence their preferred policy. These are the bureaucrats, who are motivated by interests different from those of the politicians. By virtue of their position, these administrators allocate budgets to various activities and thus determine, in practice, whether certain activities will take place. The relationship between these bureaucrats and the politicians affects the determination of specific policies (Peters, 2010).

Public choice theory proposes an extensive range of models demonstrating that the reciprocal relationships between politicians and the bureaucrats subordinate to them are characterized by a built-in conflict (Niskanen, 1971; Bendor, 1990). Politicians adopt various strategies in order to control the bureaucrats (Miller and Moe, 1983; Bendor, Taylor and van Gaalen, 1987a, b). Therefore, this built-in conflict usually results in the swinging of public policy in the direction of the interests of one of the parties, in accordance with that party's relative power. This process illustrates the power of bureaucratic players to undermine initiatives put forward by politicians, as well as the changing of political objectives as a function of political interests.

There is one other key bureaucratic player in the determination of human rights policies--- the Supreme Court. Here there is a complex process at work that both influences and is influenced by the political culture in Israel. Its influence is particularly strong at the stage of making decisions, rather than at the stage of understanding the problem and formulating a position. The Justices of the Supreme Court cannot initiate a hearing. They are dependent on whatever petitions are filed in the Court. Given that the Justices of the Supreme Court are not elected to their position by the general public, but are appointed by a political entity, we may consider the Supreme Court to be a bureaucratic player striving to maximize its powers and its authority over the politicians, who act within the executive and legislative authority. The method of appointment and the appointing entity affect the degree of politicization of the Supreme Court. However, according to public choice theory, from the moment they have been chosen, the Justices of the Supreme Court act in order to maximize their power and influence, within the limits of the rules of the game. In the US, for example, broad constitutional powers are vested in the Supreme Court, allowing it to influence legislation and public policy. In contrast, in Israel (and in Britain), the rules of the game are not well defined in this context. Therefore, by virtue of its actions and decisions, the Supreme Court takes part in shaping these rules. This is particularly true with respect to petitions of a moral, social or political nature on which the law remains silent, so the Court is required to intervene.

Notwithstanding its definition as a bureaucratic player, the relations of power between the Supreme Court and the politicians in the executive and legislative authority differ from those in the models analyzing the public administration. Public choice theory therefore proposes a separate discussion of these reciprocal relations according to a separation-of-powers model (Marks, 1988; Segal, 1997; Epstein and Knight, 1998). According to this model, while it is true that the Supreme Court has the ability and power to interpret the decisions of the legislative authority, and thus to change a decision, to a certain extent, the legislative authority has the ability and power to annul that interpretation by enacting new legislation. It follows that there is a built-in conflict in these reciprocal relations, similar to the reciprocal relations between the politicians and the bureaucrats subordinate to them. The difference is that not all of the politicians' means of control over the bureaucrats, such as political appointments, are available to the politicians in their relationship with the Supreme Court. To conclude, the politics of defending human rights is a complex realm consisting of several actors who are motivated by different means and interests. Thus, policy makers must consider the input of these actors if they want to determine a suitable policy.

An important branch of public choice theory is the study of institutions and constitutional arrangements within the discipline of new institutionalism. Understanding institutions as the rules of the game, this field studies the ways in which institutions evolve and their impact on political and economic outcomes. In Israel, many of the processes are informal in the sense that special behavioral conduct becomes part of the reality without being formally institutionalized in the rules of the game.

Most human rights violations are perpetrated by the state through the exercise of its administrative power or the failure to exercise its power to implement the law (Galligan and Sandler, 2004: 51). Furthermore, the expression of human rights in the constitution of a country is part of a wider issue concerning their relationship to other features of constitutionalism. Galligan and Sandler refer to constitutionalism as the recognition of and respect for the values of respect for persons, democracy, the rule of law, and related ideas within a country, and the existence of institutions and mechanisms for upholding them. Such a situation implies an institutional structure that reflects these values in a general way and provides mechanisms for their protection in particular cases (Galligan and Sandler, 2004: 50).

The Mehadrin' Buses Policy Making: Rhetoric versus Practice – Case Study

During the 1990s the Orthodox public had used private and local transportation without a public transportation license called “Mehadrin buses” on which gender segregation was customary¹. In order to encourage Orthodox Jews’ use of public transportation, the Langental committee was established. In 2007, it recommended experimenting with two buses labeled “Mehadrin” in Bnei-Brak. The buses may be entered from both the front and the back doors; gender segregation will be voluntary; drivers will not take part in the segregation. Eventually, the experiment wasn’t implemented; Mehadrin buses were used for inter-city and inner-city transport in Jerusalem, the only city where they have been used². Between 2003 and 2006, Egged had introduced new buses (most of which were Mehadrin buses) in accordance with the needs of the Orthodox public. In order to attract this population, bus fares were reduced³. In 2009, there was a Mehadrin bus in Beit Shemesh, run by Superbus company.

Bus number 140 is an inner-city bus run by Dan Company, running between Bat-Yam, Holon, Tel-Aviv, Ramat Gan and Bnei-Brak. A young woman who took the bus says “I had asked to sit on the last available seat left on it, next to an Orthodox man. The man wouldn’t let me sit next to him. He said he wouldn’t stand so I could sit, started cursing me and accused me of being promiscuous and insolent, and the reason for all the trouble Jews ever had, only because I had asked to sit in a vacant seat for which I paid a full bus fare (Suruzo, a Blog, room 404, 29.1.2010)⁴. This is just one example of what has been happening. It led to a public discussion regarding the legality of the segregation buses. The opponents claim that:

¹Final Report, Committee to examine public transit arrangements for Orthodox sector, page 14. for further study on competition in public transport see Shifan Yoram & Sharabi Nir, competition in bus public transport, *the Ministry of Transportation*, Jerusalem, 2007, p.5.

²Final Report, *Committee to examine public transit arrangements for Orthodox sector*, Jerusalem, pp. 31-32.

³Final Report, *Committee to examine public transit arrangements for Orthodox sector*, Jerusalem, p. 33.

⁴Suruzo Eti, from a Blog, room 404, <http://room404.net> 29 January 2010 (accessed 14/5/13)

1. The “Egged” company running the buses, receives public funding. It prefers that a certain sector of the population would use these buses, since the bus fare in some of them is significantly lower than buses with similar routes (Cohen, nrg Maariv site 31.3. 2010).⁵
2. These buses are public transportation. Therefore, there is no place for Orthodox rules on them.
3. Orthodox Jews use regular buses as well and they are not harmed by that. Therefore, there is no genuine need for ‘Mehadrin’ buses.

The proponents of the ‘Mehadrin’ lines respond:

1. These buses are profitable, since the Orthodox population is a major user of public transportation. ‘Mehadrin’ buses and reduced prices aim to encourage the use of public transportation.
2. Services such as public transportation should match the customer’s culture and lifestyle.
3. Rabbis of the Orthodox sector had appointed a transportation committee which had decided that ‘Mehadrin’ transport Orthodox population in accordance with the demands of modesty (Gelhar, Mynet site, 24.8.2008).⁶
4. The ministry of transportation prevents the Orthodox sector from operating its own buses. Therefore, public transportation companies should provide specific buses for it (Stern, ynet site, 19.8.2009).⁷

The debate took place not only on the public level, but also inside the ‘Mehadrin’ buses and sometimes led to violence. As a result, the ministry of transportation has opened a “hot line” where people can report irregularities occurring on these buses as well as cases of physical or verbal assault Hezelcorn, ynet site 25.8.2010).⁸

In 2007, 5 women petitioned the HCJ against the Ministry of Transportation and the transit companies Egged and Dan claiming that the segregation buses damage the principle of equality, the right for human dignity and freedom of conscience and religion – since they are operated on a lawless basis. The Center for Jewish Pluralism - the Movement for Progressive Judaism in Israel had joined the petition as the sixth petitioner. The HCJ enabled five other parties to join the petition as ‘friends of the court’ – public petitioners, in order to enable them to participate in the decision making, on the basis of the need for representation of relevant positions in the matter: Zedek Association – the American-Israeli center

⁵Sagi Cohen, Mehadrin’ buses – The same bus at half the price, nrg Maariv site <http://www.nrg.co.il/online/16/ART2/085/635.html>, 31 March, 2010 (accessed 21.6.14)

⁶Gelhar Ari, Rabbis: “The Train is a Disaster to Orthodox Jews”, Mynet site <http://www.mynet.co.il/articles/0,7340,L-3585879,00.html>, 24 August 2008, (accessed 21.6.14).

⁷Stern Shimon, Separation on a bus? Respect the Women, ynet site <http://www.ynet.co.il/articles/0,7340,L-3764027,00.html>, 19 August 2009, (accessed 21.6.14).

⁸Hezelcorn Shahar, “Hot line” for victims of ‘Mehadrin’ buses separation, ynet site <http://www.ynet.co.il/articles/0,7340,L-3943662,00.html>, 25 August 2010, (accessed 21.6.14).

for the promotion of Justice in Israel, Kolech – Religious Women Forum, Torah and Work Trustees Movement, Yaacov Herzog Center and Yerushalimim Movement.

This is how the petitioners described the customary behavior on ‘Mehadrin’ buses:

“It is nine years since the public transportation companies – especially respondent number 2 - are operating ‘Mehadrin’ buses. On those buses...the women are asked to enter through the back door and sit in the back of the bus while the men enter it through the front door and sit in the front. The women are also asked to dress modestly... women who do not comply with these restrictions or rebel against them - such as petitioners 1-5 – are humiliated and suffer verbal violence, expulsion from the bus or threats of physical violence”⁹.

The ruling was given 4 years later, on January the 5th, 2011. It said that gender segregation on buses should depend on passengers’ wish. We shall analyze the interactions between the different players based on the structural and cultural conditions. Such analysis would enable us to comprehend the different factors that reveal the complex political reality which results in the policy of gender based separation on public buses in Israel; it means an operative definition of the principle of equality, the right for human dignity and freedom of conscience and religion.

The court is very clear about the principle of equality and the right for human dignity and freedom of conscience and religion in Israel allowing personal liberty to be the supreme ideal. However, the structural condition of non-governability of arrangements in Israel, i.e. a clear enforcement of the Supreme Court will interfere with the actual practice of ‘Mehadrin’ buses. Without clear enforcement or teaching of essential democracy culture, the result would be erosion of the principle of equality and freedom of conscience and religion (see also Papanikos, 2022).

Israeli Non-governability and determining Facts Policy – “We don’t want any Favours from this State”

The ruling stated it was the ministry of transportation’s responsibility to oversee bus companies’ activities. This represents the non-governability of the political system. When there is no enforcement, it enables Orthodox Jews to determine facts in the form of ‘Mehadrin’ buses. This behavior reflects a disengagement of the Orthodox public from democratic norms (Israel-Vleeschhouwer, 2023). Knesset member, Israel Eichler from Yahadut HaTorah had said a year after the ruling: “what are we asking? Let us have our own transportation company It is the most profitable thing. We don’t want any favours from the state”¹⁰

⁹HCI 746/07 Naomi Ragen and others versus the ministry of transportation and others, given on January 5th, 2011. <http://elyon1.court.gov.il/files/07/460/007/t38/07007460.t38.htm>

¹⁰Knesset Protocol, meeting number 129, Jerusalem, 19 December 2011, page 6.

Non-governability exists not only on the level of supervision, but on a deeper level, due to the nature of the state of Israel. It has already been set in the scroll of independence read at the declaration of independence ceremony on May 14th, 1948.

In this document the state of Israel is defined as a Jewish state in the land of Israel. The word “democracy” is absent, yet there is commitment to bestow equal rights upon all, regardless of race, gender or religion; due representation to non-Jewish citizens in temporary and permanent state institutions. The debate on the Jewish/democratic nature of the state hasn’t yet been settled. In 1992, the state of Israel had been officially defined as a Jewish, democratic state in the freedom of employment basic law and human dignity and liberty basic law. Nevertheless, the meaning of “Jewish, democratic state” remains debatable.

Given the circumstances, the policy makers, i.e. publicly elected politicians choose to preserve the status quo in order to maximize their chances of being elected. A well-known practice is transferring the responsibility to government officials, the knowledgeable professional bureaucrats. Controversial issues are usually handled with short-term crisis solutions in a way which preserves the status quo whereas public policy is managed in an additive fashion, as mentioned by Aharon Wildavsky (1979).

The Position of the Bureaucrats – Status Quo

In 1997 the minister of transportation, Itzhak Levi from Mafdal (a religious party) had appointed a committee led by the head of the ministry of transportation Langental (hereafter the Langental Committee). Its role was to formulate ‘recommendations for increased use of public transportation by the Orthodox population’. Its name reflects the interest of preserving the status quo or finding a way to embed gender-based separation in buses. The committee included 12 men and one woman, 4 from the Orthodox sector, 5 representatives of the bus companies Dan and Egged and 4 workers of the ministry of transportation. It was clear from the panel of the committee what its recommendations would be. In May, 1997, the committee offered to allow special transit arrangements for intra-city buses where gender-based segregation exists for Orthodox people. The report of the committee read:

“In the buses included in the arrangement, passengers may enter and exit the bus from all doors. The Orthodox public will voluntarily persuade the users to implement a gender-based separation, so that the men enter the bus in the front and the women in the back. Moreover, the men and the women will implement voluntary separation inside the bus. The driver or any other worker from the bus company will not enforce the separation between the men and the women. Also, they will not refuse to serve any passenger who decides to enter the bus through any door. In order to ease the orientation in entering and exiting the bus, it will be especially marked”.

Later, as a result of the committee recommendation, it had been decided in a meeting in the minister of transportation’s chamber on 9/7/1997 to start an experimental program (pilot) - two buses in completely Orthodox neighborhoods

in Bnei Brak. This will be a voluntary program, without coercion, upholding the women's right to sit in the front of the bus. If the pilot is a success, it will be implemented in Jerusalem as well.

In fact, the pilot program, turned into a much broader phenomenon, including dozens of public buses. This happened despite the fact that the arrangement wasn't reevaluated; no authorized personnel reached a formal decision; therefore no lessons were learnt from the experimental program.

Non-governmental Organizations as Interest Groups over Human Rights-The Israeli Supreme Court as an Alternative Governor

The nineties mark a rise in civil interest groups involvement in the HCJ. Towards the year 2000 they have become major public petitioners, although they are also a part of an informal arrangement –expansion of the standing right by the HCJ. In 2007, due to the recurring instances of harassment on 'Mehadrin' buses and secularization of the public agenda in matters concerning state and religion, a group of petitioners together with the Center of Jewish Pluralism petitioned the HCJ claiming that 'Mehadrin' buses damage the equality principle, the right for human dignity and freedom of conscience and religion, since they operate on a lawless basis. They also claimed that the Ministry of Transportation renounces its duty to supervise the operation of transit companies.

Among the petitioners is the Orthodox writer Naomi Ragen who experienced verbal and physical harassment on number 40 'Mehadrin' bus in Jerusalem, after she had refused to sit in the back; Another victim is Mor Lidor, who took a bus from Jerusalem to Ofakim (a town in the south of Israel) on 5.9.2006. She had been verbally attacked by the passengers and was ordered to get off the bus by the bus driver. Tali Goldring lives in Petah Tikva and studies in Jerusalem. On 25.10.2006 when she took bus number 426 to Jerusalem, she had been asked to sit in the back contrary to her beliefs. Eliana Avitzur has taken bus number 40 on 25.12.2006 in Jerusalem to go to her workplace at Har Chotzvim. However, the driver refused to open the front door and made her enter the bus through the back door against her will. Efrat Ofir wanted to take bus number 999 from Kiryat Tivon to Jerusalem. However, the bus driver wouldn't let her in, since he thought she wasn't dressed modestly enough. Therefore, she had had to take two buses and pay a double bus fare in order to arrive at her destination. The 5 petitioners were joined by a sixth one, the Center of Jewish Pluralism – the judicial, public branch of the Israel Progressive (Reform) Judaism Movement. It aims to promote pluralism, tolerance, equality and justice in Israel based on liberal democratic Judaism.

It is noteworthy that both the petitioners and the managers of the aforementioned organization are all women. This defines the struggle as feminist in nature. Could the public opinion have been different if the struggle was led by men as well? Has its definition as feminist evoked antagonism? In the Center for Jewish Pluralism's report concerning gender segregation, it says that "the center

had received requests from both men and women”¹¹. The petitioners were joined by other organizations – “friends of the court” – public petitioners seeking to formalize rules for the ‘Mehadrin’ buses: Betzedek non-profit organization – the American-Israeli Center for the Promotion of Justice in Israel, Kolech – Religious Women Forum, Torah and Avoda Trustees Movement, Yaacov Hertzog Center and the Yerushalmim Movement. Note that when human rights organizations petition the HCJ, its decision might not be well accepted by general population or the political system. There had been cases in which the HCJ was criticized for its decisions, such as recruiting Yeshiva students in 2009. As a result of this decision the political system stormed and laws were suggested to limit the HCJ’s power. The public trust in the HCJ has dropped from 80% to 60% (which is still higher than the trust in the Knesset or the political parties which is 15-20%). These laws didn’t pass the legislation barrier. Yet they reflect the political system’s limits. Indeed, since the 2000s, the HCJ has been limiting its rulings and searching for legitimacy for the ones it issues (Meydani, 2011).

One characteristic of the aforementioned organizations is expressing different positions as well as attempting to find an arrangement which would increase HCJ legitimacy. For instance, Betzedek non-profit organization – the American-Israeli Center for the Promotion of Justice in Israel works with the government, Orthodox Knesset members and the legal system, to protect the unique Jewish style of Israel. Kolech – Religious Women Forum, was established in order to promote gender equality among the religious community in Israel. Torah and Avoda Trustees Movement, is a Zionist movement which aims to restore religious Zionism and attempts to integrate Torah with science and modernity. Yaacov Hertzog Center is an Orthodox Pluralist Center that aims to foster a dialogue between different groups in the Jewish community; the Yerushalmim movement includes secular and religious people who desire to turn Jerusalem into a pluralist city.

While mentioning different groups and their influence on the ‘Mehadrin’ buses policy, it is also worth mentioning ‘Dan’ and ‘Egged’ bus companies who have got economic interest. ‘Dan’ company had ceased operating the ‘Mehadrin’ lines and the ruling is mostly aimed at ‘Egged’ and its economic interest in operating those buses:

“We wouldn’t like to assume that the desire to earn money operating those buses – answers everything”. It seems that it indicates Egged’s enterprises to develop transit for the Orthodox sector during the nineties, since it could turn a profit.

The first discussion of the petition took place on 14/01/08 in which the petitioners maintained that the arrangement itself “might be legitimate. However, the [existing] arrangement isn’t”. The ruling (on 21/1/08) indicated – in due course – that “we assume that there is nothing wrong with separation on buses that attempts to supply what the Orthodox public needs”, but the difficulty of the current situation was stated:

¹¹Shapira – Rosenberg Riki, ‘Mehadrin’ report, Center for Jewish Pluralism, Jerusalem, 2010, p. 11.

“Separation which isn’t agreed on, on a normative level, is problematic...we shall recount some of the problems and claims mentioned in this court. For instance, the need for a normative basis for these buses...where will separate buses be; a reasonable transit alternative for those who aren’t interested in taking these buses; the question of appropriate signs... the driver’s duties...the price; effective supervision and complaint managing; the approach of the Orthodox leadership regarding the behavior...”

Justice Rubinstein recounts the petitioners’ words:

“Relying on Langental report isn’t enough, as time had passed and changes occurred since 1997. Also, the operating rules are different than the ones Langental committee had approved. Under these circumstances we claim that there is a place for a new forum to assess the actual situation and learn lessons from the years that had passed, recommending (among the rest) tolerance and common sense with respect to the issues at hand”.

The Bureaucrats again – Langer Committee and the HCJ: Rhetoric of Rights or Practice of the Status Quo?

The suggestion of the Supreme Court was adopted by the minister of transportation who appointed a committee led by his office manager Alex Langer (May 11th 2008) “to check the transit arrangements on Orthodox sector buses“. The committee asked for public opinion. It has received about 6000 letters for the ‘Mehadrin’ buses and only dozens against them¹². On October 26th, the committee submitted its conclusions¹³ and recommendations:

- According to the committee, each passenger may sit in any vacant seat, except for seats reserved for disabled people; also, each passenger is to be permitted to enter and exit the bus from any passenger door, regardless of gender.
- No arrangement will be made with the public transportation companies on whose buses gender segregation is being practiced, or any other arrangement which makes them different than other buses in Israel.
- On the other hand, the committee doesn’t attempt to prevent a situation where men and women desire to enter or sit in the bus in a certain way as long as they are interested in separation. This is their right as long as they follow the law and avoid any signs of physical or verbal violence toward people who disagree with their way”.

¹²Stern Shimon, Separation on a bus? Respect the Women, ynet site <http://www.ynet.co.il/articles/0,7340,L-3764027,00.html>, 19 August 2009, (accessed 21.6.14).

¹³Final Report, committee to examine public transportation transit arrangements on buses serving the Orthodox sector, <http://www.news1.co.il/uploadFiles/441250026226044.pdf>, Jerusalem, 26 October 2009, p.5. (accessed 21.6.14).

On October 20th, 2010 the minister of transportation announced that he “decided to adopt all of the recommendations of the committee, based on a detailed status report of the period and the recommendations of the transportation supervisor”. The petitioners weren’t satisfied claiming the HCJ should “ban entering the bus through the back door” altogether.

On January, 2001, the HCJ has made its decision: “Since the minister decided to adopt the recommendations of the committee, we will not intervene with his decisions on a level of principle. These recommendations (appearing on the ministry’s site), will become the obliging arrangement – including increasing supervision”. In accordance with this the HCJ ruled that forced separation between men and women on ‘Mehadrin’ buses is illegal and any harassment of passengers on the matter, for instance clothing, may constitute a criminal offence. The HCJ allowed passengers to enter the bus through the back door to allow separation based on free will. Moreover, it ruled that the drivers are to enforce the decision; Egged will have to publish the cancellation of the ‘Mehadrin’ arrangement both in secular newspapers as well as Orthodox ones and put up signs in buses that were used in ‘Mehadrin’ arrangement saying that: “Each passenger is entitled to sit wherever he or she chooses (except for seats marked for disabled people); harassing a passenger in the matter, may constitute a criminal offence”.¹⁴

The Supreme Court does recount the limitations of Langental committee and relates to the fiction of the voluntary dimension which characterized its recommendations. It offers the Langer committee to maintain a more balanced representation of positions. However, it seems that the difference between the recommendations of these committees is semantic in principle, since what has been started as a pilot by the former, became a fixed arrangement by the means of the latter. One should inquire how deeply was the ministry of transportation affected by the clear economic interest of the “Egged” company which aims to please the go-getter Rabbis to increase its circle of customers. Note that since the eighties, Israel has been adopting an economic approach similar to the free market approach. One result of this approach, is promoting the status of private companies in the market and the Ministry of Finance. Since 1997 the latter has chosen to lead a free market policy more than once using the arrangement law – a legal instrument essential for the design and implementation of social-economic policy as well as the promotion and implementation of structural reforms on the Israeli market. One of those reforms, is the transportation reform – opening the public transportation field to competition. According to Nachmias and Klein (1999) the Ministry of Finance is greatly affected by public policy, due to the professional and public status of its members as well as their experience working with the political system (Nachmias, and Klein, 1999). In fact, senior government officials oppose the arrangement law. However, the rise of the free market agenda in matters concerning the supply of economic and social products that Israel lacks, has turned finance officials - with the support of the various Prime Ministers,

¹⁴Ibid HCJ 746/07 Naomi Ragen and others versus the ministry of transportation and others.

Ministers of Finance and leaders of the economy- to leading proponents of this position (Meydani and Uriely, 2006).

Another noteworthy matter in this regard, relates to the position of the public in Israel. The Supreme Court does not function in an empty space, but is “living inside its people” despite the fact that it often rules on issues that the public has no clear position about. For instance, in Din Shalit ruling in 1968 regarding “who is Jewish”, the HCJ ruled that whoever subjectively feels he is Jewish is to be considered a Jew. Then in 1970 the Knesset had legislated a law that bypasses the HCJ for the first time – ha Shvut law (the law of return) which stipulates that whoever was born to a Jewish mother or converted to Judaism is to be considered Jewish (Meydani, 2011). It seems that when the public position is clear on a given issue the HCJ doesn't attempt to top down value decisions. This was the case with the issue of religious beliefs of religious groups versus liberal values. The HCJ tried to arrive at a compromise to enable religious groups: Jewish Orthodox, Muslim or Christian groups to behave according to their desires as long as it does not harm the population. The limits describing what is considered doing harm, are controversial and are in the process of being determined. Israel is unusual since a large proportion of its values are based on Jewish, Muslim or Christian religions. Historically speaking, since the Ottoman Muslims were against other groups being subject to 'Sharia' law, the Turkish Millet system was created. This is a legal system established in the Ottoman Empire since the 19th century as a part of the Tanzimat reforms. It maintains that a person is to be subject – in family laws – to the laws of his religion, or even subject solely to the jurisdiction of his or her own religious court. The Millet was adopted in Israel as well - in matter concerning family laws - by the British Mandate authorities. Later on, the law was embedded in the Israeli law system as well. This system allows Jewish, Muslim, Christian or Druze religions to have their own religious courts where they enforce their own family laws, without state involvement. For instance, the Jewish court rules on the basis of the Hebrew law and the Muslim one, on the basis of 'Sharia' law.

The public Mentalite (set of values; world-view) affects the Supreme Court position of the compromise of values, when core issues related to religious beliefs of groups in the Israeli society, are at stake. The Mentalite isn't adopted only by the justices, but by all of the citizens as well as politicians interested in maximizing their chances of being elected. This is part of the explanation why politicians prefer to transfer the decision to government officials when controversial issues are on the table. To this one might add the security dimension in Israel that affects policy in different areas as well as in the area of human rights. A detailed account follows.

The Public – A Decline in the Belief in Human Rights

In the period between 1999 and 2003, Arian and others (Arian *et al.* 2003) have noted distinct erosion in the support of the Jewish public for democratic values in various matters such as political and civil rights, social and economic rights, gender equality and minority rights. The erosion occurred largely in the wake of various security-related events including the eruption of The Al-Aqsa Intifada in September 2000 and the outbreak of the "October Riots" later that year

in which thirteen Arabs were killed. The latter event led to the establishment of the Or Commission, a state commission of inquiry chaired by Supreme Court Judge Theodore Or. The years 2001-2003 saw a wave of terrorism aimed at civilians which included the March 27, 2002 bombing at the Park Hotel in Netanya on the eve of the Passover holiday. Two days after the attack the IDF launched "Operation Defensive Shield", and later on April 3, 2002, Israel commenced fighting in Jenin. UN commissions of inquiry and reports of human rights organizations, including Amnesty International, criticized this action. Arian (Arian *et al.* 2003) indicated that only 81 percent of the Jewish population supported the claim that every person should have the same rights under the law regardless of their political viewpoint, in contrast to 95 percent who supported this claim in 2001. With regard to three other values – respect for human rights, the rule of law and freedom of speech – the percentage of the general population who believe that these values are being practiced in Israel declined by 4 percent between 1999 and 2003. Needless to say, such a decline in the belief in human rights is an obstacle for rights activists advocating a policy which deals with the protection of human rights.

The HCJ ruling was based on the Langer committee report. We shall analyze the guiding politics of bureaucrat policy makers in the case of 'Mehadrin' buses. The Langer report stated that most of the letters that the committee received, as a result of their publication of the issue, were written by Orthodox public supporting the separation arrangement. Most of those who wrote the letters were women and not men. We ask whether the secular population thought the issue irrelevant. Have 'Mehadrin' buses been perceived as an inter-community issue? The researcher, Menachem Friedman claims that due to the radicalization phenomenon, the struggle is led by the minority, while the majority doesn't take part in it. He adds that most of the Orthodox community doesn't actively oppose the decision, since it might be interpreted as shaking off religious values. That is why, the moment the struggle for 'Mehadrin' buses began, the Orthodox community chose not to interfere with what is being presented as a religious obligation (Friedman, 2006).

As to the secular population, the public choice theory provides an explanation based on the 'public good' concept. Freedom of conscience and religion in relation to 'Mehadrin' buses isn't perceived by the secular population as a private good. Therefore, most of the population is quite indifferent viewing the HCJ petitioners' actions as a free-rider (Olson, 1965; Taylor, 1987; Axelrod, 1984).

In contemporary economics, goods are usually defined as public goods if and only if they are *both* non-rivalrous and non-excludable (Varian 1992: 414). Rivalrous and excludable goods are called private goods. National defence is a paradigmatic example of a public good. Not only does Sally's consumption of national defence not reduce Bob's consumption; she could not prevent him from consumption if she tried. Food, clothes and flats are paradigmatic examples of private goods. Political economist regard public good as a product whose use, from the very moment it has been supplied, may not be prevented, and as a consequence, it is not possible to collect the real payment due in respect of its supply (Weimer and Vining, 1998).

In actual fact, we may consider public policy, as a whole, and public policy on human rights, in particular, to be a public good, since from the very moment the decision is made concerning the product, even people who were not involved in the decision both benefit and suffer from it. The decision concerning the National Health Law, for example, is applied to all citizens, even those who were not involved in this decision, and the same is true with respect to the decision regarding the interrogation methods used by the General Security Service, which is basically applied to all citizens.

If we apply this rationale to the area of public policy on human rights, we may say that the fact that human rights are a public good from which anyone can benefit without being involved in its production creates motivation to become a free rider, and as a consequence, none of the players gets involved with the others in efforts to advance and promote specific human rights.

The latter, which wield significant influence over public policy on human rights, are the non-governmental organizations which act to advance and promote human rights (Benvenisti, 1999).

The petitioners as an interest group took the side of freedom from religion, while the Orthodox group opposed it. The responses of politicians are predictable in cases a liberal decision could harm their chances of reelection; especially since the religious parties are a deciding force in the formation of a coalition in the Knesset. Indeed, through all the milestones of the policy making process of 'Mehadrin' buses – from 2007 with the Langental committee, the Langer committee in 2008, to the ruling in 2011 – the religious parties had been part of the coalition. It is well-known that any harm that comes to the religious status quo, means that these parties would drop out of the coalition which would, in turn, lead to the dispersion of the Knesset.

Note that there were several occasions when coalitions didn't include religious parties. However, policies related to state and religions, haven't changed. Thus, as long as the common beliefs haven't changed, policies will continue to reflect them.

Politicians –The Motivation of Re-election

As in the market model, the interactions between politicians and the electorate are based upon the mechanism of supply and demand. The public recognizes a need and demands a certain policy, while the politician will respond only to those demands that in his mind would maximize his chances of being elected (Downs 1957). David Mayew compares politicians' motivations in democracies to the profit motive of businesses. Just as businesses engage in behaviours designed to maximize their profits, so too do politicians engage in activities designed to get them re-elected (Mayew 1974; Bueno De Mesquita 2003). On the basis of this assumption, we can understand the behavior of the politicians with regard to the legal issue outlined above.

The minister of transportation in 1997 was Rabbi Itzhak Levi from the Mafdal (religious party). He chose to appoint the Langental committee, which initiated the 'Mehadrin' buses experiment. This step maximizes the chances of the

minister's reelection. On the one hand, he doesn't harm religious values thereby appeasing religious population. On the other hand, he appeases the secular population, since this is only a matter of several buses. During his term, the committee chose the additive system, recommending an experimental pilot that moderated the disagreement around this value conflict.

In 2007, the year the petition against the ministry of transportation and 'Mehadrin' buses was submitted to the HCJ, the minister of transportation was Israel Katz from the Likud party. In both the 27th and 32nd governments, Orthodox parties were part of the coalition. Minister Katz's behavior represents a strategy of blurring or sending a double message as a strategy meant to ensure his political survival. On January, 2010, in a Knesset committee discussing the issue, he had said, "a reality of separating men and women which is against the state's basic laws and its democratic character, will not be allowed...I will not take part in issuing instructions and regulations embedding such separation, or prevent women from sitting wherever they please". Nevertheless, he said, in the same place and at the same time, that the separation between men and women on 'Mehadrin' lines is to become a permanent arrangement¹⁵.

An analysis of Minister Katz's words, reflects several characteristics of the Israeli voters. First, Likud is a big party aiming at the central position; therefore it cannot allow itself to adopt any marginal position risking losing the bond with the religious parties; on the other hand, as a party of the masses, interested in putting together a government, it signals the secular population that it upholds the state's democratic character. The lack of a clear definition of what constitutes a Jewish, democratic state, serves it in such cases. Minister Katz, one of Likud's seniors, chooses expressions which portray him as a strong leader. He says, "I will not let" the separation to take place addressing women as the biggest voters sector and declares: "each woman shall sit wherever she pleases; I will not let anything else happen".

The Guttman Center survey showed that young people want to have a strong leader who would be "above the law". These findings are part of the Democracy Measurement project that the Israel Democracy Institute holds each year. The survey included 1,200 adults and 600 teenagers. Its findings were submitted to the president.

The inclination of teenagers is for "a strong leader" who would rule the state instead of "having discussions and laws". According to scholars, such a widespread opinion reflects strong anti-democratic tendencies. Sixty percent of teenagers shared this opinion, while 58% of adults felt the need for a strong ruler. The fact that this attitude is so prevalent among young people is quite disconcerting.

Paradoxically, however, teenagers were more optimistic than adults in their assessment of Israeli democracy. They agreed less than adults with statements such as: "politicians do not take public opinions into account", "one needs to be corrupt in order to reach the political top", "it does not matter who you vote for,

¹⁵Hezelcorn Shahar, Thus separation on buses has been turned into a norm, ynet site <http://www.ynet.co.il/articles/0,7340,L-3988164,00.html>, 22 November 2010, (accessed 15.5.2013).

since it changes nothing" and "spokesmen are not allowed to criticize the state". Arab teenagers perceive the political system as less corrupt and also express less desire for "a strong leadership". Perhaps these opinions reflect a lower level of interest in politics among teenagers compared to adults.¹⁶

Analysis of the Knesset protocol from 19.11.2011¹⁷ discussing mistrust proposition regarding 'Mehadrin' buses, reflects the behavioral patterns of politicians in controversial issues in the Israeli society. The mistrust proposition was issued by Kadima, Meretz, Avoda, Hadash, Raam, Balad and Taal parties (the last 4 being Arab parties) due to the ineffectiveness of the Likud government's treatment of the rising violence and radicalization in the Israeli society. These parties were identified as leftist, liberal secular parties. It is interesting to observe the Knesset members' confession in the non-governability of the political system; the minister's of the environment faulty reference to the 'Mehadrin' lines as a legal arrangement, as well as the mutual accusations of hypocrisy and utilization of the gender-based segregation issue for political profit maximization.

Knesset member Nachman Shai (Kadima) says: "We are so proud of our democracy until we discover we cannot enforce its laws; for instance, basic law: human freedom and dignity ... our government had to set up a committee, and we all knew it wasn't to promote a given matter, but to end it... and there is another, new one in this family, Tania Rozenblit, 28 years old, a hero for one day or maybe more. She got on the bus to Jerusalem on a Friday. She was dressed modestly, since she was on her way to a meeting in an Orthodox neighborhood. She sat behind the driver. Maybe she didn't know or maybe she did, thinking a woman can sit in the front of a bus. Unfortunately, in Israel 2011, women are not in the front but at the back...her sitting in the front, angered the Orthodox passengers, two of whom stopped the bus and then many of them gathered round and yelled at her. The policeman, who came, attempted to persuade her to move to the back of the bus. It went on for half an hour, a scene from another world, until the bus resumed its route... Tania Rozenblit received many compliments yesterday. The prime minister mentioned her in a meeting, the minister of transportation invited her in, Tzipi Livni, the minister of law and Limot Livnat, the minister of culture, have spoken to her as well. She is just like most of us, doesn't understand what she did; all she wanted was to get to Jerusalem in peace... Under this government and the leadership of Binyamin Netanyahu, things we couldn't imagine happen in Israel. The prime minister shakes off his responsibility, which is to ensure that in this good state democracy exists not only in the declaration of independence or laws, but also in daily life"¹⁸.

Ilan Glion, a Knesset member from Meretz (a secular) party, adds to Knesset member Nachman Shai's words: the prime minister – yesterday I heard him say

¹⁶Yoaz, Yuval, A Strong Leader instead of Laws, *Walla News* <http://news.walla.co.il/?w=/90/546825>, 13 May 2004 (accessed 21/6/14); see also Arian Asher, Atmor Nir & Hadar Yael, *Israeli Democracy Measurement -2006*, Guttman Center, Israel Democracy Institute, Jerusalem, 2006, p. 73.

¹⁷Knesset protocol 19.12.2011, meeting number 297 of the 18th Knesset, Jerusalem

¹⁸Knesset protocol 19.12.2011, meeting number 297 of the 18th Knesset, Jerusalem.

that he had heard about a young woman who was removed from her seat in a bus and that he opposes such behavior. Well, hello. This has been going on for 10 years already. Minister of transportation Katz, who expressed his objection to this, was the one who gave permission to segregation buses.

This kind of talk reflects the duality in Israel. On the one hand, there are laws which bestow equality upon women – liberal basic laws such as human freedom and dignity; and human rights agreements are being signed. On the other hand, everyday practice enables behavior of certain groups, which contradicts these rights. The average citizen then starts wondering – if these groups are permitted by law to behave in a way that harms human rights, due to their tradition, why shouldn't I adopt behaviors which reflect my position even though it contradicts Israeli laws.

Minister of the environment from the Likud, Gilead Ardan, responds to the criticism of the leftist parties: “attack is probably the best defense strategy... you are right, this is all wrong, Knesset member Gilon... if you look up ‘Mehadrin’ buses on Google or Wikipedia you’ll see - ‘Mehadrin’ buses are officially embedded in law since 2003...so with all due respect, neither you, nor Knesset member Tzipi Livni (Kadima) has never asked the minister of transportation, Shaul Mofaz, who was from your own party to battle against ‘Mehadrin’ phenomenon... it actually grew under your government with Shaul Mofaz as minister of transportation... and Mrs. Tzipi Livni has never talked about it...”. Gilead Ardan’s strategy is to lay fault on the opposition, maintaining “I am not to blame, you are”. No practical discussion is held, no understanding of the problematic nature of the issue from the point of view of human rights. This constitutes a conscious decision not to choose.

Nisim Zeev from the religious party Shas in the coalition, comprised of Sephardic Jews, was the one who rushed to defend Minister Arden: “Mr. chairman, respectable Knesset members, each night we listen to such Arabian Nights stories. Women’s singing, segregation of women, ‘Mehadrin’ buses. Are these the issues of the state of Israel? Where the woman entered the bus, where she got off, where she sat, and suddenly we have a hero who has won the respect of the minister of transportation ... all this issue, the segregation of women is incitement, a provocation aimed at the Orthodox population”.

Hearing this, Knesset member Itzhak Hertzog from the Avoda party (opposition) interrupted saying: “this is where the failure of the government lies, since it in fact allows such things in public transportation. Israel Aichler from the Ashkenazi ‘Siat HaTorah’ party (in the coalition) responded by citing a survey conducted by Tel-Aviv municipality: “It is a survey by the Unit for the Promotion of Women’s Status from the prime minister’s office. It reveals that half of the women come across instances of sexual harassment in public transportation. Instead of fighting these harassments or give the women an opportunity to have defined space in the back of the bus, and as far as I’m concerned, in the front, and thereby to protect them; some people choose to attack the Orthodox community for its disrespect of women. Is there a greater way to honor women than have men and women crowd together on one bus? Where are the men’s rights? Men don’t want to be crowded...What do we ask? Let us start a public transportation

company of our own. It is the most profitable. We don't want any favors from this state¹⁹.

Analyzing the Reality for Human Rights – Summary and Conclusions

We maintain that the protection of human rights is the product of the activity of several players: politicians, bureaucrats, non-governmental organizations and the general public. In Israel, these groups act within the structural conditions of non-governability, the judicialization of politics and an outcome-directed, participatory political culture that advocates a do-it-yourself approach to solving problems. Regarding future research, this hypothesis allows us to make comparisons between countries. In countries where the structural and cultural conditions are not outcome-directed, i.e more governability as well as fundamental liberal democratic culture, the viewpoint of the players will be long-term. Thus, it would be easier to create a human rights commission, for example, and the effectiveness of such a commission would be greater.

In the Israeli context, given its outcome-directed structural and cultural conditions, it is apparent that in spite of the fundamental differences between NGOs and state institutions, they both use similar tools. For example, human rights NGOs adopted legal tools to handle social issues. This factor, which expresses the social and cultural characteristics of Israeli society, is accepted as a component in political considerations and in the struggle between the political players. Thus, in societies in which structural and cultural conditions emphasize outcomes, there is a greater tendency to adopt legal strategies. Even though they were seemingly interested in changing the political culture, the NGOs still adopted the same methods because they had to function in that particular political culture.

Regarding the issue of promoting human rights, it is apparent that the meeting point between the state, which often represents the body that violates human rights, and the non-governmental organizations is not as contentious or challenging as one might expect. This identity between human rights NGOs and the state institutions is evident in the cooperation between the organizations and certain politicians with liberal agendas. For these politicians, the promotion of human rights could be translated into electoral capital, maximizing these politicians' chances of re-election. In this context, results are emphasized over process. Actions adopted by the non-governmental organizations reflect the reality of the political culture in Israel where short-term goals that are outcome-directed are supreme. Indeed, in an environment of non-governability characterized by the quick turnover of politicians in ministerial positions and the agendas they promote, organizations must move swiftly to realize their goals. The small window of opportunity works against the promotion of thoughtful, long-term goals. Such an environment also favors lobbying over more lengthy procedures that involve pilot projects, public hearings and education. Furthermore, non-governability and judicialization result

¹⁹Knesset protocol 19.12.2011, meeting number 297 of the 18th Knesset, Jerusalem.

in the struggle's being transferred to the organizations and the courts. Therefore, lawyers at both the NGO level and the political and bureaucratic level spearhead initiatives. Even though representatives of human rights NGOs are interested in promoting long-term proposals, short-term considerations, namely, the maximizing of immediate results will shape their political perceptions and force them to narrow the scope of their proposals to ensure success.

Under these conditions, major strategies are goal-oriented ones. However, in order to succeed they should accord with the viewpoints of the public and the politicians on the subject, and the interests of the bureaucrats (especially those of the Minister of Finance).

It seems there is no alternative to adopting a dual strategy that includes understanding and acting within the structural and cultural rules in order to promote the institutionalization of human rights, possibly even in their broad, universal context. At the same time, human rights advocates must include a processual local culture, which includes long-term activities such as local and community initiatives, public hearings and involvement in education, in their efforts to alter perceptions about the guarantee of human rights in Israeli society.

In the last two decades in Israel, numerous attempts at reform in the government arena have been made in various areas, but have not left a significant mark. In order to regain governability, there is a need for three intertwined reforms: reform in government – emphasizing the responsibility of holders of public office, reform in the relationship between the High Court of Justice and the Knesset, and reform that empowers the Israeli consumer – the consumer of public services. A system of checks and balances is essential in order to overcome the structural and cultural obstacles that impede the guarantee of human rights in Israel. Such reforms would also change the clear preference in the majority of public systems in Israel for favoring personal interests over those of the public, thus creating a lack of trust between the citizens and their government, and a lack of trust in democracy together. Behaving in accordance with personal interests is a natural part of all human behavior (Wildavsky, 1979). A British parliamentary committee sums up this phenomenon as follows: "The essence of the problem... is that the balance of advantage between Parliament and Government in the day-to-day working of the Constitution is now weighted in favor of the government to a degree which arouses widespread anxiety and is inimical to the proper working of our parliamentary democracy."²⁰

Nevertheless, public systems in the modern world, especially the new public management reforms recently adopted in many developing countries, are based on and seek to increase the checks and balances intended to prevent players from acting solely in their own interests. Indeed, in some cases they might even benefit from acting in the interests of the public. In Israel this is not the case.

²⁰First report from the Select Committee on Procedure (1977-1978) HC 588 par. 1.5. quoted in Gavin Drewry "Select Committees and Back-Bench Power," in Jeffrey Jowell and Dawn Oliver, eds., in *The changing constitution*, Clarendon Press, Oxford, 1985, p. 136; and in András Sajó, *Limiting government. An introduction to constitutionalism*. CEU Press, Central European University Press, 1999. p. 199.

In his book *Public Management in Israel: Development, Structure, Functions and Reforms* Itzhak Galnoor raises an interesting paradox with regard to democracy. Israel does well on all the general indicators of democracy, including political competition, orderly regime change, a high level of citizen involvement, and freedom of the press. These scores should rank Israel high on the scale regarding its public service ethic, but this is not the case. Galnoor provides a persuasive explanation of that paradox—“the weakening of the central governance authority was not accompanied by a change in the rules of the game, nor were sufficient resources allocated to it” (Galnoor, 2011: 137). Indeed, the view that a public service ethic is less important to the Israeli state than are other interests, such as financial or political gain, apparently continues to prevail.

Such a realization depends on the existence of an internal enforcement system that makes the players understand that acting solely in their own interests would be thwarted by other players and thus actually harm their own personal interests. Such a system is rooted in public responsibility and accountability, which in the broad sense does not, in fact, exist in public systems in Israel. Indeed, these systems have assimilated the alternative political culture, leading to a situation where everyone attempts to find ways to increase his or her personal benefits at the expense of the implementation of human rights without fearing any internal enforcement mechanisms. Thus, non-governance, an alternative political culture, the increased judicialization of politics, and the placing of personal interests over those of the public typify the problems in the current system and serve as the major obstacles to correcting them.

Our examination of the politics of defending human rights at the national domestic level results in several key conclusions. First, despite the many normative justifications for human rights, there are a large number of impediments to the establishment of human rights in law. These impediments do not necessarily arise from a lack of awareness on the subject, or from a desire to deprive minorities of their rights, but are part of the structural factors that affect every political process. Thus, for example, the lack of demand by the public for human rights could arise from a lack of awareness, but could equally arise from the problem of collective action. Second, the politics of defending human rights is very complex, involving the Court and the NGOs as well as the relationships between the politicians, bureaucrats (military and intelligence organizations; labor and immigration authorities, the police) and the public. Neglecting the strategies and interests of these players may prove fatal in terms of defending human rights. Third, the political culture that has been established in Israeli society since the 1980s favors a bottom-up orientation. Therefore, changes in political culture and society cannot be imposed from the top down but must evolve from the bottom up. Directing all human rights strategies toward an elitist institution such as the Supreme Court may have results in the short term, but in the long run changes in attitudes as well as policy decisions about defending human rights are likely to emerge due to demands from society.

Fourth, our analysis highlights the activity of non-governmental organizations in promoting human rights and their focus on the legal channel. The analysis points out the potential harm that such activity could cause to attempts to establish

democratic and liberal norms and a strong civil society. Furthermore, non-governmental organizations must concentrate their efforts on putting direct pressure on the political system at the same time as designing a comprehensive framework for action, targeted at the general public. By empowering the court, human rights organizations disconnect these issues from the vast majority of Israeli citizens, abandoning efforts at changing their attitudes. Therefore, the strategies of the NGOs must also include attempts at mass mobilization that will create the basis for these organizations to turn to the legislative authorities.

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