“There Are Still Judges…”

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THIS WEEK I WON A DUBIOUS distinction: a groundbreaking Supreme Court judgment has been named after me.

It is an honor I would have gladly dispensed with.

MY NAME appeared at the head of a list of applicants, associations and individuals, which asked the court to cancel a law enacted by the Knesset.

Israel has no written constitution. This unusual situation arose right from the beginning of the state because David Ben-Gurion, a fierce secularist, could not achieve a compromise with the orthodox parties, which insisted that the Torah already is a constitution.

So, instead of a constitution, we have a number of Basic Laws which cover only a part of the ground, and a mass of Supreme Court precedents. This court slowly arrogated to itself the right to abolish Laws enacted by the Knesset which contradict the nonexistent constitution.

STARTING FROM the last Knesset, extreme right-wing Likud Members have been competing with each other in their efforts to castrate the Supreme Court one way or another. Some would stuff the court with right-wing judges, others would radically limit its jurisdiction.

Things came to a head when a group of far-right Likud members launched a veritable avalanche of bills which were clearly unconstitutional. One of them, and the most dangerous one, was a law that forbade people to call for a boycott of the State of Israel and, in a sinister way, added the words “and of territories held by it”.

This revealed the real aim of the operation. Some years before, our Gush Shalom peace organization had called on the public to boycott the products of the settlements in the occupied territories. We also published on our website a list of these products. Several other peace organizations joined the campaign.

Simultaneously, we tried to convince the European Union to do something similar. Israel's agreement with the EU, which exempts Israeli wares from customs, does not include the settlements. But the EU was used to closing its eyes. It took us a lot of time and effort to open them again. In recent years, the EU has excluded these goods. They have demanded that on all merchandise “made in Israel”, the actual place of origin be stated. This week, 16 European foreign ministers called upon the EU foreign affairs chief to demand that all products from the settlements be clearly marked.

The law passed by the Knesset not only has criminal aspects, but also civil ones. Persons calling for a boycott could not only be sent to prison. They could also be ordered to pay huge damages without the plaintiff having to prove that any actual damage had been caused to him or her by the call.

Also, associations which receive government subsidies or other governmental assistance under existing laws would be deprived of them from then on, making their work for peace and social justice even more difficult.

WITHIN MINUTES after the enactment of this law, Gush Shalom and I personally submitted our applications to the Supreme Court. They had been prepared well in advance by advocate Gaby Lasky, a talented young lawyer and dedicated peace activist. My name was the first in the list of petitioners, and so the case is called: “Avnery v. the State of Israel”.

The case laid out by Lasky was logical and sound. The right of free speech is not guaranteed in Israel by any specific law, but is derived from several Basic Laws. A boycott is a legitimate democratic action. Any individual can decide to buy or not to buy something. Indeed, Israel is full of boycotts. Shops selling non-kosher food, for example, are routinely boycotted by the religious, and posters calling for such boycotts of a specific shop are widely distributed in religious neighborhoods.

The new law does not prohibit boycotts in general. It singles out political boycotts of a certain kind. Yet political boycotts are commonplace in any democracy. They are part of the exercise of freedom of speech.

Indeed, the most famous modern boycott was launched by the Jewish community in the United States in 1933, after the Nazis came to power in Germany. In response, the Nazis called for a boycott of all Jewish enterprises in Germany. I remember the date, April 1, because my father did not allow me to go to school on that day (I was 9 years old and the only Jew in my school.)

Later, all progressive countries joined in a boycott of the racist regime in South Africa. That boycott played a large (though not decisive) role in bringing it down.

A law cannot generally compel a person to buy a normal commodity, nor can it generally forbid them to buy it. Even the framers of this new Israeli law understood this. Therefore, their law does not punish anybody for buying or not buying. It punishes those who call on others to abstain from buying.

Thus the law is clearly an attack on the freedom of speech and on non-violent democratic action. In short, it is a basically flawed anti-democratic law.

THE COURT which judged our case consisted of nine judges, almost the entire Supreme Court. Such a composition is very rare, and only summoned when a fateful decision has to be made.

The court was headed by its president, Judge Asher Gronis. That in itself was significant, since Gronis already left the court and went into compulsory retirement in January, when he reached the age of 70. When the seat became vacant, Gronis was already too old to become the court president. Under the then existing Israeli law, a Supreme Court judge cannot become the court's president when the time for his final retirement is too close. But the Likud was so eager to have him that a special enabling law was passed to allow him to become the president.

Moreover, a judge who has been on a case but did not finish his judgment in time before retiring, is given an extra three months to finish the job. It seems that even Gronis, the Likud's protégé, had qualms about this specific decision. He signed it literally at the very last moment—at 17.30 hours of the last day, just before Israel went into mourning at the start of Holocaust Day.

His signature was decisive. The court was split—4 to 4—between those who wanted to annul the law and those who wanted to uphold it. Gronis joined the pro-law section and the law was approved. It is now the Law of the Land.

One section of the original law was, unanimously, stricken from the text. The original text said that any person—i.e. settler—who claims that they have been harmed by the boycott, can claim unlimited indemnities from anyone who has called for this boycott, without having to prove that they were actually hurt. From now on, a claimant has to prove the damage.

At the public hearing of our case, we were asked by the judges if we would be satisfied if they strike out the words "territories held by Israel", thus leaving the boycott of the settlements intact. We answered that in principle we insist on annulling the entire law, but would welcome the striking out of these words. But in the final judgment, even this was not done.

This, by the way, creates an absurd situation. If a professor in Ariel University, deep in the occupied territories, claims that I have called to boycott him, he can sue me. Then my lawyer will try to prove that my call went quite unheeded and therefore caused no damage, while the professor will have to prove that my voice was so influential that multitudes were induced to boycott him.

YEARS AGO, when I was still Editor-in-Chief of Haolam Hazeh, the news-magazine, I decided to choose Aharon Barak as our Man of the Year.

When I interviewed him, he told me how his life was saved during the Holocaust. He was a child in the Kovno ghetto, when a Lithuanian farmer decided to smuggle him out. This simple man risked his own life and the lives of his family when he hid him under a load of potatoes to save his life.

In Israel, Barak rose to eminence as a jurist, and eventually became the president of the Supreme Court. He led a revolution called "Juristic Activism", asserting, among other things, that the Supreme Court is entitled to strike out any law that negates the (unwritten) Israeli constitution.

It is impossible to overrate the importance of this doctrine. Barak did for Israeli democracy perhaps more than any other person. His immediate successors—two women— abided by this rule. That's why the Likud was so eager to put Gronis in his place. Gronis' doctrine can be called "Juristic Passivism".

During my interview with him, Barak told me: "Look, the Supreme Court has no legions to enforce its decisions. It is entirely dependent on the attitude of the people. It can go no further than the people are ready to accept!"

I constantly remember this injunction. Therefore I was not too surprised by the judgment of the Supreme Court in the boycott case.

The Court was afraid. It's as simple as that. And as understandable.

The fight between the Supreme Court and the Likud's far-right is nearing a climax. The Likud has just won a decisive election victory. Its leaders are not hiding their intention to finally implement their sinister designs on the independence of the Court.

They want to allow politicians to dominate the appointment committee for Supreme Court judges and to abolish altogether the right of the court to annul unconstitutional laws enacted by the Knesset.

MENACHEM BEGIN used to quote the miller of Potsdam who, when involved with the King in a private dispute, exclaimed: "There are still judges in Berlin!"

Begin said: "There are still judges in Jerusalem!"

For how long?