

Judicial Appointments and Promotions in Israel - Constitution, Law and Politics

Eli M Salzberger*

1. Introduction: Judicial Selection as a Source for Israel's Democracy

It is said that out of the very many new states established after the Second World War, only very few have managed to establish and maintain a real democracy, a liberal democracy.¹ Israel is one of them.

Many scholars view the fact that Israel established and managed to maintain a democracy almost as a miracle. It inherited the legal system of a colonial regime – the British Mandate. Most of its founders were lacking democratic tradition in their countries of origin. It has been in a constant state of war since its establishment. Israel is also one of the few countries in the world in which there is no written constitution, which limits the powers of government and guarantees individual rights. Separation of powers, both horizontal – between central and regional or local government, and vertical - between the executive and the legislature, does not exist in Israel either. It is a parliamentary democracy in which the powers of the executive evolve from a unicameral legislature. Under all these circumstances it seems indeed like a

• Professor of law, University of Haifa Faculty of Law, Israel. I would like to thank Shay Gimelstien and Amir Tabenkin for valuable research assistance.

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¹ A real democracy is not only a system in which representatives are periodically voted into duty by majority of the citizens. A real democracy, a liberal democracy, is a political system where the rule of law enshrined to protect individuals and minorities, founded on the principles of individual liberty, civic equality, popular sovereignty and government by the consent of the governed.

miracle that Israelis can be proud of some (though certainly not all) of the unique components of Israeli democracy.

What is the possible explanation for Israel's democratic success? I believe that a key to this enigma lies with the legal institutions in Israel and especially its judiciary. The Supreme Court of Israel, together with other legal institutions, such as the Attorney General and the prosecution agencies, managed to construct important features of Israel's democracy and protect others. The Israeli case indeed proves that an independent judiciary is perhaps the most crucial condition for a successful democratic state,² and it is not surprising, therefore, that some scholars prescribing the desirable procedure for the democratization of Iraq hold that the first institution that ought to be established there is an independent judiciary, long before democratic elections are to take place.³

The story of the Israeli judiciary and especially its Supreme Court is a fascinating one. Without the protection of a constitution to guarantee its independence, it was through the actual conduct of the judges that the judiciary gradually gained public trust and admiration. This began with decisions in the midst of the 1948 Independence War, invalidating various ministerial orders (including various orders by David Ben Gurion), continued with the construction of a judicial-made bill of right from the early 1950's, and culminated with the tough hand the judges are demonstrating in recent years against irrational and corrupt politicians. In repeated studies from the

² On a similar claim regarding the connections between an independent judiciary and economic success see Douglas North, *Institutions, Institutional Change and Economic Performance* (1990).

1980's onwards, the judicial branch in Israel was ranked second to the army in terms of public appreciation and confidence, whereas the politicians – legislators and government ministers - were ranked in the bottom of the tables.⁴

This public esteem enabled the judges to become crucial partners in public decision-making in Israel, to construct a judiciary-made bill of rights and to engage in checking and balancing the decisions of the other branches of government. In the 1950's and up to the 1970's, this was done within the legal formalist jurisprudence and discourse. In the 1980's, and especially since the appointment to the Court of Justice Aharon Barak, and his leadership as the Chief Justice, the Supreme Court shifted from a formalist approach to a non-positivist, value based discourse. In the 1990's Israel went through an era of enhanced legalization, which was apparent in stronger emphases on constitutional norms and discourse, in the increasing strength of legal institutions, and in a greater public sense of the power of litigation.

The law and the courts have become one of the country's most significant political establishments. Above all, the Supreme Court of Israel emerged as the dominant branch of government. It moved center-stage in the collective decision-making process in Israel, affording an unprecedented degree of intervention in the conduct of the other branches of government, and thus attracting ever-greater attention, but also growing criticism, from the Israeli media and public. The quality of the Israeli judiciary and especially its

³ See, for example, Jeffrey L. Spears, *Sitting on the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and other Bad Actors in Post-Conflict Iraq and Beyond*, (2004) *Mil. L. Rev.* 176: 96, p. 171.

Supreme Court was acknowledged recently by Lord Wolf, the Lord Chief Justice of England and Wales, who declared that the Israeli Supreme Court is one of the best courts he is aware of world wide.⁵

How does all this come about? How did the Supreme Court of Israel managed to establish its powers in the first place, without any guarantees of structural constitutional independence?⁶ I believe that three main sources for the power of the Israeli Supreme Court, which are connected to each other with mutual causal influences, are the Court's jurisdiction and structure as inherited from the Mandatory regime, the Court's composition during Israel's formative years and the judges' selection procedure set in the early 1950's.

The Supreme Court is the single institution heading the judiciary in Israel. It is the court for appeals in criminal and civil matters, as well as the high court of justice. In the latter capacity the Court hears petitions against all governmental bodies, including various tribunals and courts that are outside the general courts system. Currently, the Court hears more than 10, 000 cases a year sitting in panels of three judges or more. The number of seats in the Court increased from 5 in 1948 to 14 today.

From 1948 for nearly three decades, more than half of the Supreme Court seats, together with the occupancy of other key legal positions, such as senior officials in the Ministry of Justice and the State Comptroller office, were held

⁴ A recent survey of the confidence of Israelis in state institutions in comparative perspective is Arian, Nahmias, Navot and Shany (2003)

⁵ Lord Wolf's Address at the Hebrew University, as reported in Haaretz 5.12.03

⁶ On structural judicial independence see Salzberger, A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary, *International Review of Law and Economics* (1993) 13: 349, pp. 350-352.

by Jewish German Jurists. These jurists formed a pact with the jurists who were educated in the Anglo-American legal system, establishing a unique Israeli liberal tradition. This tradition was very different from the East-European political style, which dominated the other branches of government, a style or governance with distinct anti-liberal elements.⁷

The public trust that these judges gained in the first few years of statehood paved the way to the *Judges Act 1953*, which established the procedure for appointments of judges to all courts in Israel. This system in which the professionals on a judicial appointments commission have the majority vote in the selection of judges enabled Israel to maintain a Supreme Court with a high degree of professionalism, free of party politics, corruption and the like. The public trust in the judiciary brought about further strengthening in the structural independence of judges in *Basic Law: Judicature* enacted in 1984. Thus, the semi-accidental composition of the Court together with the selection procedure of judges enabled an independent and liberal Court, which managed to construct and protect democracy in Israel. However, the growing role of the Court in public decision-making brought about in the last few years increasing attacks from various circles in Israel against the system with specific calls to change the procedure for the appointment and promotion of judges.

In the remainder of this paper I will elaborate on the history of judicial selection in Israel, the results of this procedure and the main contemporary issues under debate.

⁷ On the “German” presence in the Israeli Supreme Court and its heritage see: Fania Oz-Salzberger and Eli Salzberger, *The Hidden German Sources of the Israeli Supreme Court Tel Aviv University Studies in Law*

2. Historical Survey

The prime objective of the British Mandatory regime (which was established in 1917 after the occupation of Palestine from the hands of the Ottomans) was not to construct a liberal democracy in Palestine, but rather to create a centralized and effective government, which would enable limited autonomy to the local Jewish and Arab populations. These objectives resulted in a compact structure of the judiciary – a three tiered general courts system – comprising peace courts, district courts and a Supreme Court, from which a discretionary right of appeal to the Privy Council in London was granted.⁸

Appointment of all judges was entrusted to the High Commissioner, while the Supreme Court appointees had to be approved in London.⁹ Judges were to hold office during His Majesty's pleasure.¹⁰ From the 1930's, however, the High Commissioner formed an informal advisory committee consisting of representatives of the Bar and presiding judges, to assist him in judicial selection, and from 1943 the members of this committee were appointed by the Chief Justice. Jewish and Arab professionals, non-political figures were appointed to the peace and district courts (by 1948 nine out of twenty district courts judges and thirteen out of forty one peace court judges were Jewish), but the nine-members' Supreme Court was manned mainly by British judges with a representation of one Jew and one Arab. For this reason the Supreme

(2000) 15: 79.

⁸ The Mandatory structure of government was regulated by the *Palestine order in Council 1922*, which can be regarded as the constitutional norm during the rule of the British from 1917 to 1948.

⁹ This was regulated first by Section 14 of the *Palestine Order in Council 1922*, which referred to all appointments in the civil service and later, specifically to judicial selection in the *Courts Ordinance 1940*.

¹⁰ Section 15 of the *Palestine Order in Council 1922*.

Court also gained the powers of a high court of justice. All petitions against the government or applications for judicial review were under the exclusive jurisdiction of the Supreme Court.¹¹

The purpose of this centralized public law enforcement system was to keep the judicial review of government within the hands of the Mandatory regime, or out of the hands of the local judges, but when the State of Israel was established in 1948 and the structure of the courts was maintained,¹² this feature became one of the sources for the unprecedented emerging power of the Supreme Court. In principle this is still the situation today, which is a source for pride by many Israeli scholars - every person with a grievance against the government can petition directly to the Supreme Court and does not even have to be represented.¹³ For similar reasons the Mandatory regime did not introduce the jury system to the Palestine judicial system. All trials, criminal and civil, were heard and decided by professional judges only. This feature was also inherited by the Israeli legal system, and it is another source for the contemporary powers of the Israeli judiciary, when compared to equivalent institutions around the world.

¹¹ Section 43 of the *Palestine Order in Council 1922*.

¹² The first statute enacted by the new Israeli legislature was *Law and Administration Ordinance 1948*. The law provides for the principle of continuity of the Mandatory law and institutions. Section 17 deals specifically with the judicial system.

¹³ To this institutional feature one should also add the substantive component. The Supreme Court, sitting as a High Court of Justice, has the competence to “deal with matters in which it deems necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal” (section 15 of *Basic Law: Judicature*, previously section 7 of the *Courts Act 1957*). The intention of the Israeli legislature was to keep the Mandatory jurisdiction of the High Court of Justice which was regulated in the section 43 of the Palestine Order in Council and section 7 of the Courts Ordinance 1940. which read “The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the administration of justice”. However, in the course of translation the

Preparations for an independent state had already begun a couple of years before the end of the British Mandate and were accelerated after the UN Partition resolution of November 1947. A special body called the People's Assembly was formed, comprising 37 representatives of various organizations and political parties. This body appointed a committee to deal with the legal structure and institutions of the future state. With regard to the courts, it was decided to maintain the general structure of the three tiered general courts system, and to leave the conduct and composition of the peace and district courts intact.

The Supreme Court was a slightly different story. First, there was a controversy as to its place of seat. Jerusalem was under siege and there were proposals to establish the new Supreme Court in Tel Aviv. More importantly, since most of the Mandatory Supreme Court judges were British, the composition of the Court was an issue to be deliberated. A solution according to which the British judges would be invited to sit in the Court, as was, for example, the situation in independent Kenya or India was rejected.¹⁴

Formally, the first Law to be enacted after the *Declaration of the Establishment of the State of Israel* by the Provisional Council (the same People Assembly which declared itself as a provisional legislature) was the *Law and Administration Ordinance*, which declared the continuity of law and institutions and transferred all powers of the High Commissioner to the

“administration of justice” turned to the broader concept of “interests of justice” which is the formal foundations for the Court’s very broad perception of its jurisdiction and for judicial activism in Israel.

¹⁴ On India see George H. Gadbois, Jr, *The Selection and of Indian Supreme Court Judges* (in this book)

Provisional Government.¹⁵ This included the power to appoint judges. However, the government declared that because of the great importance of the composition of the Supreme Court, its judges should be appointed by the Provisional Council upon nomination by the Minister of Justice. In other words, the government delegated to Parliament the competence to appoint judges, maintaining its powers to nominate the candidates. This was the appointment procedure until the enactment of the *Judges Law* in 1953.

The initial composition of the Supreme Court, which, as I argued earlier, is largely responsible for Israel's success as a democratic state, was almost an historical accident. With the establishment of the state of Israel, the first Minister of Justice became Felix Rosenblüth (Hebraicized to Pinhas Rosen), born and educated in Germany before and during the Weimar era, a rather untypical background for the political map of those days. Rosen formed an inner circle in the spring and summer of 1948 to establish the Israeli ministry of Justice, which included several Yekkes (the nick name for this small population of German speaking Jews, immigrated to Palestine in the Thirties with the rise of Nazism).

His most important impact was his proposals to appoint Moshe Smoira as the first President of the Israeli Supreme Court. In an interview after his retirement, Rosen openly admitted that he preferred "Yekkes" in the legal establishment because they were honest and law-abiding.¹⁶ This statement can be understood not only as a praise for the German Jewish immigrants, but also as an insinuation of Rosen's view of the morality of the leaders of Israel's

¹⁵ *Law and Administration Ordinance 1948*, section 14, The continuity of law is regulated in section 11.

¹⁶ Shlomo Erel, *The Yekkim – Fifty Years of German-speaking immigration to Israel* (1985 – in Hebrew), p. 187

other branches of government, most of whom were born east of the river Oder.

The persistent German presence at the Supreme Court, which amounts to nearly 50 percent of its judges in the first three decades of the state of Israel, was largely due to Smoira's appointment by Rosen. Among the first five judges of the Court, two were graduates of Anglo-American universities (Olshan and Heshin); two judges were graduates of Austrian or German universities (Smoira and Donkenblum), and the fifth judge (Assaf) was not a jurist but a Rabbi. This first composition reflects also a political balance of powers. The five judges were not politicians but each represented a connection with the main political forces comprising the government – Smoira and Olshan to Mappai (the Labor movement), Donkenblum to the Liberals, Assaf – an ultra orthodox Jew – to the religious parties, and Heshin – was a district court judge during the Mandate and represented continuity. Gad Froomkin, the only Jewish representative in the Mandatory Supreme Court, was not appointed because he was seen to be too closely identified with the British rule.

This composition did not include any representatives of the left (the Communists and Mapam) nor of the right (the Revisionist movement). However, this fact did not prevent an overwhelming majority of the Provisional Council from approving of the composition (by a secret ballot). Criticism was expressed that in order to enable a real selection process a greater number of candidates should be brought so that the legislature would be able to choose from, and that the suggested composition did not

sufficiently reflect the “workers culture” of the emerging state, but there were no objections to any of the individual names.¹⁷

This balance between the Anglo-American and the Continental-German schools was maintained in the first two additions to the Court - Agranat, who was born in Louisville, Kentucky and graduated from the university of Chicago, and Silberg, Lithuanian by birth and a graduate of the universities of Marburg and Frankfurt - and indeed this reflects also the appointment of further judges after the enactment of the *Judges Act* in 1953. It is difficult to see such continued equilibrium as merely accidental. All in all, among the first 25 judges appointed to the Supreme Court between 1948 and 1979 36% were German natives. The legal education of 36% of the 25 first judges was obtained in German universities (this figure overlaps with, but is not parallel to, the 36% German natives), while only 28% obtained their education in English or American universities, 12% in East Europe and 20% in Palestine-Israel.

Israel is said to have a mixed legal system. Although it inherited The British law, many statutes in important areas of law, mainly private law, enacted since the establishment of the state adopted Civil Law doctrines. This was a direct consequence of the Yekkes’ presence in the Ministry of Justice and in the Supreme Court. American influence, mainly in the area of constitutional law, can also characterize the Israeli substantive legal arrangements. The western legal world is usually divided between the Anglo-American legal systems and the European-Continental ones, but it seems that the more

¹⁷ On the parliamentary debate see Rubinstein, Shoftei Ertetz (The Judges of the Land- in Hebrew) (1980), pp. 66-68,

important distinction that emerges from this research is not the Common law versus Continental law. It is a distinction between the liberal tradition, both Central-European and Anglo-American, and a very different, East-European political style. which the judges observed in the other governmental institutions, a style which had distinct anti-liberal elements. This pact between the “Yekkes” and the Anglo-Americans is one of the major contributions to the development of an independent judicial brunch of government, with a style of government which differed substantially from those of the other branches of government in Israel. The dramatic success of this style of government, which in the last decade has begun to exercise significant power over the other branches, is yet to be explained.

The government initiated the Judges Act already in 1951, but it did not pass the third reading until 1953. The law increased the structural independence of the judiciary by holding that judges would have tenure until the mandatory retirement age of 70, and that their wages could not be decreased separately.¹⁸ But the most significant component of this law was a new procedure for the appointment and promotion of judges. In an interesting move the government and the Knesset gave up their powers to appoint judges and the law established a committee to perform this task, while giving the formal appointing power to the President of the State. Originally the composition of the committee was supposed to include 2 Supreme Court judges, the Attorney General, the Dean of the Hebrew University Law Faculty (which was then the only law school in Israel), 2 government ministers, 2 parliament members and a representative of the Bar (then – the Legal Council). The composition that was approved in the final version

¹⁸ section 15-21 of *the Judges Act 1953*

included 3 Supreme Court judges, 2 representatives of the Bar, 2 cabinet ministers and 2 Knesset members, without the academic representative and the Attorney General. This change was significant as it guaranteed a majority of 5 to 4 for non-politicians (the judges and the Bar members) and it gave the 3 Supreme Court judges an advantage being the largest group in the committee. As a balancing measure the Minister of Justice (one of the two ministers in the committee) was to preside over this committee.

Opposition to the motion was voiced by the left – the Communists and Mapam, who argued that the power to appoint judges should be left to the Knesset, so that the politics of appointing judges will be clear and transparent to the public. However, eventually the law passed by a big majority.¹⁹

The system of appointing and promoting judges that was adopted in 1953 is still in force today. In 1984 the Knesset replaced the *Judges Act* by *Basic Law: Judicature*, which retained the procedure for the selection of judges, but upgraded its normative status to a basic law, to be part of Israel's Constitution. In addition, small changes in the wording of the article strengthened the status of the selection committee as the final decision-making body regarding the appointment and promotion of judges and reinforcing the fact that the role of the President of the state is purely a formal one.

In 1984, therefore, the Knesset reaffirmed the system and increased the structural independence of the judiciary, at the same time as reaffirming the

¹⁹ The debate is transcribed in *Divrei Haknesstet* (the official Gazette) 9: 423-443, 2431-2450.

jurisdiction of the Court or its substantive powers.²⁰ Although currently the process for changing basic laws is formally as easy as changes to regular legislation, i.e. by a majority vote in the Knesset, informally the Knesset is more cautious in amending basic laws than amending regular legislation, and in the future the amalgamation of the basic laws into a coherent constitution will remove the possibility of changing the selection procedure by simple majority. Hence, the 1984 law can be seen as an increase in the structural independence of the judiciary.

3. Analysis of the Judicial Selection Process in Israel

The basic framework of judicial selection for the general courts system in Israel has been in practice for more than 50 years now. Its most important component is the judicial appointments and promotions statutory committee. The nine members committee represents the three branches of government plus the legal profession. Politicians - 2 parliament members elected by the Knesset, traditionally one from the opposition, and two government ministers one of whom is the Minister of Justice, the chair of the committee - have an important input, but the majority of members are professionals - 2 Bar members, elected by the Council of the Bar for three years, and 3 Supreme Court justices, the President of the Court and two judges elected by all the Court's members for a period of three years. The Supreme Court judges are the biggest block.²¹ The general success of this system led to the adoption of

²⁰ Supra note 13. Despite the fact that by 1980 the Supreme Court had already a record of an activist court, especially as a High Court of Justice (e.g. allowing applications from of Palestinians from the territories occupied by Israel in 1967, and invalidating a law of the Knesset on the grounds that it violates an entrenched article in a basic law), the Knesset has not changed its jurisdiction, and by encoring the jurisdiction in a basic law it, in fact, increased the power of the Court.

²¹ One can argue that the Bar members are also politicians of sort. Indeed sometimes the candidates for elected positions in the Bar ran on political tickets, or with some association with political parties.

its principles in relation to other specialized courts, such as labor courts, military courts and even religious courts, each with the necessary variations.²²

Candidates for judicial positions can be practicing lawyers or legal academics with a minimum period of experience (5 years to the peace court, 7 years to the district court and 10 years to the Supreme Court) prior to the nomination.²³

The law also allows a “significant jurist” to be a nominee to the Supreme Court, provided that he or she gains the support of three quarters of the selection committee members. In practice, most peace courts’ judges are selected from among private and public practitioners (mainly prosecutors). Most district courts’ judges are either peace courts judges who gain promotion, or senior prosecutors and other state legal office holders who are nominated directly to the district court. The Supreme Court judges are either district court judges who gain promotion, or very senior state legal officers, such as the Attorney General or State Attorney, or, occasionally, senior academics.²⁴

Nominations for the committee’s consideration can be made by the Minister of Justice, The President of the Supreme Court and any three members of the committee.²⁵ In practice, this requirement means that in most cases the

However, as lawyers are the direct clients of courts and judges, usually the professional considerations in this committee outweigh the political ones

²² For example, for selection of judges to the labor courts one of the ministers in the committee is the Minister for Labor and Welfare (*Labor Courts Act 1969*, section 4). The composition of the selection committees to the military courts and the various religious courts are regulated in the respective acts of legislation dealing with these courts’ competence and institutional set up.

²³ Section 2 of the *Courts Act [Consolidated Version] 1984*.

²⁴ The current president of the Court – Aharon Barak, for example, was a law professor who was appointed in 1975 as the Attorney General, and subsequently was appointed to the Supreme Court in 1979. Itzhak Zamir did the same route. Two other law professors were appointed directly to the Supreme Court – Menachem Elon and Itzhak Engelrad.

²⁵ Section 7 of the *Courts Act [Consolidated Version] 1984*.

nominees are agreed upon by the Minister and the President of the Court. The committee also elects the President of the Supreme Court when this position becomes vacant (with the retirement of the President at the age of 70). Traditionally the most senior judge in the Court is automatically elected to be the President.

The balance between professionals and politicians in the selection committee brought about several interesting features, which can characterize the actual composition of the Israeli courts and especially that of the Supreme Court.

From the early days of the committee's work, it was the politicians who pushed for a more representative Court. The religious parties in the Knesset demanded a seat be reserved for an orthodox judge. David Ben Gurion wanted a judge from a Spharadic background. He initially expressed this wish already in the early Fifties, and repeated it more vocally following the 1959 riots in Wadi Salib, Haifa. Menachem Begin, shortly after he was elected to the Prime Minister's office in 1977, expressed a desire to see to an Arab judge on the Supreme Court Bench. The judges in the committee who almost always voted en block after consultation with their fellow Supreme Court judges were generous in appointing Spharadic, orthodox and Arab judges to the lower courts, but insisted that appointment to the Supreme Court should be based only on merit.

Eventually, a seat for a religious judge was reserved on the Supreme Court's bench. The first composition of the Court even included a Rabbai who was not a jurist, but after Rabbai Assaf passed away an orthodox Jurist was appointed to the bench (Moshe Silberg) and unofficially at least one seat for

an orthodox Jew has always been reserved since. The first Sparadic was appointed to the Supreme Court in 1962 (Eliyahu Mani) and since than at least one seat for a spharadic judge is unofficially reserved.²⁶ The first woman judge was appointed to the Supreme Court in 1977 (Miriam Ben Porat), but since then the number of women judges has increased steadily to about a third of the Court, and its next President is going to be a woman – Dorit Beinish.²⁷ In the Israeli judiciary as a whole there is now a majority of women judges.

Although Arab judges are well represented in the peace and district courts, the first Arab was appointed as a temporary Supreme Court justice only in 2000 (Zuebi), and after his one-year term another Israeli Arab was appointed as a temporary appointment (Gubran),²⁸ and on May 2004 gained a permanent seat. The bottom line, therefore, is that mainly due to the politicians input to the selection process, in comparison to other countries, the composition of the courts in Israel, including the highest instance, has always been more heterogeneous from the perspective of ethnic origins, gender and religious beliefs.²⁹

Having said this, the 3 judges block in the committee managed to maintain the ideological tone of the Court, which has always been more liberal and dovish

²⁶ On the politics of specials seats in the SC see Michael Birnhack and David Gusarski, Designated Chairs, Dissenting Opinions and Judicial Pluralism (1999) *Iyunei Mishpat* 22: 499 (in Hebrew).

²⁷ The unbroken tradition is that the committee selects the President of the Court, according to seniority in the Court. In other words, to this position the most veteran SC judge is automatically elected.

²⁸ On temporary appointments to the Israeli Supreme Court see Salzberger, Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings From the Supreme Court of Israel (2001) *Israel Law Review* 35: 481.

²⁹ In a dramatic meeting of the selection committee on May 2004 four new judges were selected for the Supreme Court – two women, one of whom is the State Attorney despite a vocal opposition of some politicians who portrayed her as politicians persecutor, the first Arab to gain a permanent seat in the Court and the former Attorney general who is also an orthodox Jew.

than that of the government and the Knesset. To be more precise, on a left-right axis with regard to the most important issues of public controversy in Israel – peace, security and human rights – the Court has always been left of the other branches of government. The same applies to the Court's position with regard to the second important area of public debates – the relation between religion and state: the Court has always been more liberal than the other branches. With regard to economic and social policies, in the era of Israeli socialism, or, under the rule of the Labor movement (which lost its hegemony in 1977 after thirty years in power), the Court can be seen as holding more liberal views than that of the government, but in recent years with the dominance of libertarian government policies, the Court is slowly shifting left to represent a more social justice orientated stances.

In this sense of ideological position, the politics of the Israeli Supreme Court are very different from the rather traditional Conservative tenor (and composition) of the English judiciary, and the perception of the law as an upper classes and Tory territory there.³⁰ It is also different from the American swinging Supreme Court, which, depending on vacancies, and because of the political nature of judicial selection, turns towards the political colors of the Administration with lasting effects on future Administrations. In other words, while in the US, one can point to periods in which the Supreme Court has been more liberal than the administration and other times in which the Court has been more conservative than the administration, in Israel the Supreme Court has always maintained a more progressive stances than the other

³⁰ See Martin Shapiro, *Courts* (1981); Salzberger, "The English Court of Appeal: Decision-Making Characteristics and Promotion to the House of Lords", *Global Legal Policy: Among and Within Nations* (ed. Stuart Nagel) (2000), pp. 223-251; and more specifically on the personal backgrounds of the English Judiciary Burton Atkins, "Judicial Selection in Context: The American and English Experience" (1989) *Kentucky Law Journal* 77: 577.

branches. Recently, the former Dean of Tel Aviv University Law Faculty defended the ideology of the Court basing his argument on System analysis.³¹ The law, argued Menachem Mautner, in response to calls to bring about a more diverse Supreme Court not only in terms of ethnic, gender and religion, but also in terms of values and ideologies, is a separate cultural system and thus the membership in the Court is exclusive to those who subscribe themselves to liberal values. The commitment to this value system, according to Mautner, ought to be a pre-condition for appointment.

Another vantage point on the ideological position of the Court on both levels of normative and positive analyses is a separation of powers one. The Israeli structure of government lacks important components of separation of powers, which can limit the raw power of the majority and shift the collective decision-making outcome from a simple majority towards a more qualified or super majority. Lack of vertical separation between central and local government, lack of vertical separation between the legislature and the executive and a unicameral legislature with strict proportional representation system, leave the judiciary and especially the Supreme Court as the only balancing power against the raw majority. This structural explanation can explain not only the stances that the Supreme Court occupied but also the intensity of its voice and role in collective decision-making in Israel.³²

³¹ Menachem Mautner, *The Selection of Judges to A Supreme Court in a Multi-Cultural Society* (2003) *Mechkarei Mishpat* 19: 423 (in Hebrew).

³² For a more elaborate and analytical explanation see Salzberger, *Supra* Note 6, Stefan Voigt and Eli Salzberger, *Choosing not to Choose: When Politician Choose to Delegate Powers* (2002) *Kyklos* 55: 289; Salzberger and Voigt, *On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe*, *Theoretical Inquiries in Law* (2002) 3: 207.

On the level of positive analysis one can argue that the unprecedented judicial activism in Israel in the last decade is the result of the lack of proper separation of powers combined with decreasing ability of the political branches to reach coherent and far-sighted or long term public decisions which is leading to the delegation of decision-making powers to the Courts. This was not the case in the era of the Labor hegemony, and indeed, the increasing activism of the judiciary and especially that of the Supreme Court can be traced to the early Eighties when the Labor hegemony ended.

On a normative level of analysis one can justify the Court's activism as the only counter-majoritarian mechanism and as a device for considering long-term considerations beyond the election cycles.³³ Whatever the case may be, the independence of the judiciary provided by the political branches in their legislation, among which is the procedure for judicial selection, enabled the Supreme Court to fulfill this task.

4. The Contemporary Debate About Judicial Selection in Israel

It is this last point - the growing intervention of the Court in the decision-making of the other branches - which brought about a wave of criticism and calls for reforms. The attack on the Court was launched about seven years ago by ultra orthodox circles, especially the Shas party, and by the extreme right wing in Israel. It is fascinating to observe how these circles adopted

³³ On a complete normative argument regarding the role of the courts in a liberal democracy see Salzberger and Elkin Koren, *The Effects of Cyberspace on the Normative Economic Analysis of the State*, in *Law and the State: A Political Economy Approach* (Alain Marciano and Jean-Michel Josselin eds) (forthcoming).

insights from the American Critical Legal Studies movement, portraying the law as part of politics, portraying the Supreme Court Justices as an old elite, which tries to maintain its domination through the tool of law.

More recently some mainstream Likud Knesset members, headed by the Speaker of the Knesset, have joined these attacks. A motion in the Knesset to establish a constitutional court, bypassing the Supreme Court, was defeated several months ago by a very close vote (ironically, those who put forward this motion, the right wing and ultra orthodox, do not believe in a constitution and constitutional values in the first place).³⁴ In January 2004, though, the Knesset passed a decision expressing concerns about the Supreme Court's trespassing into the legislature's territory.³⁵ This can be seen as the lowest point in the history of the relations between the judiciary and the other branches of government in Israel since the 1952 clash between the Minister of Justice and the President of the Supreme Court around sentencing policies, which culminated in an unprecedented letter sent by The President of the Court. Itzhak Ulshan, to the members of the Knesset.³⁶

In 2000 the mounting criticism of the Court led to the appointment of a committee to re-examine the selection procedure of judges.³⁷ The committee, headed by the former Attorney General and Supreme Court Justice, Itzhak Zamir, praised the existing system.³⁸ It highlighted all the features added to

³⁴ The Knesset official Gazette no. 678 19.5.03

³⁵ See <http://www.knesset.gov.il/Tql/mark01/h0000969.html#TQL>. This decision was voted after the Court, in a case challenging budgetary cuts in social benefits for the poor, asked the State to provide a policy statement with regard to standards of minimal existence, based on the Basic Law: Human Dignity and Freedom.

³⁶ On this affair see Rubinstein, *Supra* Note 17, pp. 97-101.

³⁷ Formally this committee was appointed by the Judicial Selection Committee. In practice it was the government who initiated this move.

³⁸ *The Report of the Committee for the Examination of Judicial Selection* (March 2001)

this system since 1953, which were meant to make the selection process more transparent and procedurally just,³⁹ and it recommended secondary changes, which are currently being implemented. They focus on making the selection procedure more professional and transparent.

Thus, for example, although it recommended that the committee's deliberations should not be open to the public, it did propose to publish more widely the names of the candidates on the committee's agenda 21 days before its deliberations. This added to the existing rule, which enables the general public to submit objections to specific candidate chosen by the committee during a period of 21 days following the committee's decisions.⁴⁰ It also proposed to invite all the candidates for a first judicial position for a one-week assessment course in which a more extensive and multi-disciplinarian impression can be obtained of the candidates.⁴¹ Similarly, a sub-committee (3 members from the selection committee) is to hold interviews with the candidates. The committee rejected calls to make the judiciary more representative, but it did recommend a more reflective composition of the courts, i.e. that they ought to reflect the composition of the Israeli public.

The differences between representative and reflective looks at first glance as marginal, but in fact they are substantial. Various politicians called for a more representative court in order to overcome its anti-majoritarian nature. In other words, they want the Supreme Court to represent the various views in society

³⁹ These procedural requirements are mostly regulated by the *Courts Act [Consolidated Version] 1984* and accompanying regulations.

⁴⁰ The duty to publish the names of the candidate and the 21 days objections phase are regulated by *The Adjudication Regulations (The Working Practices of the judicial Selection Committee) 1984*, as they were amended in 1997.

⁴¹ Chapter 8 to the Committee Recommendations, Supra Note 37.

in a similar way to the Knesset. The committee rejected this view, emphasizing that the essence of the Supreme Court is to balance the majority. The committee agreed, though, that there should be a greater effort that the composition of the court would include judges from different ethnic and religious background. Implicitly the committee embraced Mautner's view that judges should be loyal to the spirit of law, i.e. to basic liberal and democratic values, but within these parameters an attempt should be made to grant a voice to different groups in society.⁴²

These recommendations, which are being implemented, have not prevented various politicians to declaring their intention to try and change the law, especially the composition of the selection committee (increasing the number of politicians and other representatives outside the profession, or decreasing the number of judges from 3 to 2, thus breaking their dominance). Recently the Knesset has considered new legislation that will force the judges in the committee to provide an independent assessment of each of the nominees, rather than producing a collective decision of all the Supreme Court judges (who are currently being consulted on the candidates before each meeting of the selection committee). Currently, the Constitution and Law Committee of the Knesset is reviewing all Basic Laws, in order to prepare their amalgamation into a unified constitutional document. In the course of this process changes to the committee's composition are likely to be put on the table.

5. Conclusion

⁴² In a sense this is what exactly happened in the early years of the state where the Yekkes interacted with the Anglo-Americans on the bench, creating a unique Israeli liberal tradition.

Similarly to Israeli substantive law, the institutional structure of the Israeli judiciary can also be portrayed as a mixed system. Like most Common law countries it has a general courts' system with a supreme court, which functions as a court for criminal and civil appeal and as a court for public law cases as well as a constitutional court (in most civil law countries constitutional courts are totally separated from the general system and this is the case also for administrative courts). Likewise, the judges in Israel are senior jurists whose judicial position is a second or third career, rather than a career based judiciary as in most Continental countries. The judiciary in Israel is rather compact – about 500 judges in a three instances hierarchy. These judges enjoy the highest salaries in the public sector and a high social status.

The main institutional features which resemble more the Continental system are the lack of jury, the role of the minister of justice as the top administrator of the system and the selection process of judges. Selections committees dominated by professionals were more common until recent years in Civil law countries (e.g. Spain, Italy, Portugal and France), although some Common law countries are currently considering a shift towards this judicial selection mode.

Since the Israeli judicial selection process was established in 1953 and especially since the enactment of the Courts Act of 1984 and accompanying regulations, the process has been marked by increasing formalization. Vacancies for judicial positions are formally publicized, candidates must complete an application form, accompanied by recommendations, they have

to go through a preliminary interview of a sub-committee of the selections committee, a one-week evaluation course, and their names are published 21 days before the committee considers their applications. Likewise, judges who seek promotion have to go through a parallel formal process, to present 10 judgments and recommendations of the president of their courts.⁴³ The Zamir committee proposed to establish an advisory committee for judicial promotions, appointed by the judicial selection committee and comprised of senior district court judges, who currently do not have a formal voice in the selection process.⁴⁴ This recommendation has not been implemented yet.

Israeli scholars are unanimous in the view that over the last fifty years the judicial selection committee has broadly been a great success. The judiciary established its reputation for independence, integrity and intellectual ability in the early years of its existence and improvements to the process of judicial selection have built on these foundations. The result is that the appointments process has been an important factor in the successful establishment of the state of liberal democracy in Israel. Nonetheless, the Israeli political sphere today can be characterized by the increasing ineffectiveness of the decision-making of the political branches of the state and a growing delegation to the courts, which manifests itself by increasing judicial activism.⁴⁵ Correspondingly, we witness a de-legitimizing campaign against the legal establishment. One of its symptoms is the mounting calls to change the

⁴³ For more details on the formal procedure preceding judicial appointments and promotions in Israel see Shetret, *Justice in Israel: A Study of the Israeli Judiciary* (1994)

⁴⁴ Section 71 of the report, *Supra* Note 37.

⁴⁵ More on the growing judicial activism in Israel see Shetret, *The Critical Challenge of Judicial Independence in Israel*, in Peter Russell and David O'Brien (Eds.), *Judicial Independence in the Age of Democracy* (2001).

selection process of judges. The combination of the two – the delegation and the delegitimising - is a dangerous process for Israeli democracy.

The story of the Israeli Supreme Court can serve as an interesting case study in the development of a theory of the state. On the one hand, it supports the Madisonian argument that the right structure of government, and more specifically the right division of powers, can be sufficient to nourish a liberal democracy. On the other hand, it proves that such division ought to be entrenched in a formal constitution. Otherwise, changing and difficult circumstances, combined with irrational political forces, can undermine a vital foundation on which the future success of the democratic process rests. A reform of the judicial selection process in Israel towards more transparency and procedural justice might be desirable but I do hope that it will not bring to throwing the baby out together with the bath water.