CHAPTER 14

Judicial Non-Dependence: Operational Closure, Cognitive Openness, and the Underlying Rationale of the *Provincial Judges Reference*—The Israeli Perspective

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A. INTRODUCTION

As seen from a foreign jurisdiction, the Supreme Court of Canada's decision in the *Provincial Judges Reference*[1] appears to belong to a cluster of famous Supreme Court of Canada cases characterized by somewhat curious legal reasoning, a rather unsettling approach to the respective roles of courts and legislatures, but a sound and solid understanding of the result that should govern the specific case.[2] In terms of reasoning, the Court found that *any* negotiations between the government and the judiciary on financial matters may affect the independence of a judge presiding in a concrete criminal proceeding, given the fact that the prosecution is an agency of the government. This assertion appears rather far-fetched. The Court itself had to backtrack, by invoking the principle of necessity, when confronted with the legal implication of casting doubts on the validity of all judgments entered by "less than independent" provincial judges.[3]

1 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 [*Provincial Judges Reference*].

2 See for example *Reference re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 [*Patriation Reference*]; and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

3 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1998] 1 S.C.R. 3.

Furthermore, as many have noted, reading into the Constitution—with practically no textual support—an elaborate mechanism for remuneration of judges is difficult to reconcile with the notion of "interpretation" (as distinguished from legislation) and therefore it is unclear whether it is the role of judges to devise such a constitutional arrangement. But despite these shortcomings, the Court in the *Provincial Judges Reference* was correct. It acted to protect the operational closure—to use the Luhmannian term[4]—of the legal system from the potential encroachment of two intersecting systems: Politics and the Market. The *Provincial Judges Reference*, this chapter will demonstrate, is therefore not about judicial independence *per se*; rather, it is about the autonomy (or relative autonomy) of law itself. After demonstrating this conceptual point, this chapter will turn to the threats the Israel legal system faces from the neighbouring systems—Politics and the Market. It will then briefly outline recent developments that raise concerns regarding the mounting pressures Israeli judges face with respect to the dimensions and characteristics of judicial independence identified by the chief justice in the *Provincial Judges Reference*, namely the individual and institutional dimensions, and the security of tenure, financial security, and administrative autonomy.

B. JUDICIAL INDEPENDENCE: THE LIMITS OF THE CONCEPT

It is almost axiomatic that judicial independence is crucial for sustaining a democratic regime.[5] But what is unique about judges? Why is judicial independence more fundamental than the independence of other agencies? The *Provincial Judges Reference* analyzed the status of provincial judges by comparing their role to that of federal judges appointed under

4 Niklas Luhmann, *Social Systems*, trans. by John Bednarz & Dirk Baecker (Palo Alto: Stanford University Press, 1995); Niklas Luhmann, *Law as a Social System*, trans. by Klaus Ziegert (Oxford: Oxford University Press, 2004); Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993); Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter & Co., 1987).

5 For a classic discussion of the historical development of the concept see Shimon Shetreet, "The Struggle for Judicial Independence" in *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North Holland Publishing Co., 1976).

sections 96 and 100 of the Canadian Constitution. Yet shouldn't the concerns the case raises apply to other agents of the law as well? For example—to administrative judges? Or the attorney general's office? And if so, shouldn't we care about the independence of civil servants more generally, at least as far as they are entrusted with the determination of fact and the application of the law to these facts? It appears that the case for the independence of the tax assessor, the gun registrar, or the immigration officer should be equally maintained in a democracy.[6] If both judges and civil servants are there to uphold the rule of law, it is unclear that one should more independent than the other. Current theories on judicial independence, and especially those addressing the British civil service model, are somewhat vague on this point.

And let us examine the other part of the term judicial independence: do we really mean independence? Are judges independent? Are they not the servants of the law? After all, too much independence runs against a central democratic concept—accountability. In what sense are independent judges accountable? Notice, for example, the case at hand, which starts out by telling us that a provincial judge in Alberta announced that he was not going to follow the decision of Alberta's appellate division. While technically speaking the provincial judge was entitled to his position, because the decision of the appellate division was an advisory opinion—an answer to a reference from the Lieutenant Governor-in-Council (that is, the provincial cabinet)—there is little support in Canadian caselaw for the proposition that courts refer to previous references as holding lower precedential weight compared to decisions that settle actual cases and controversies. Would we want provincial judges to think of themselves as truly independent, including from opinions of the appellate division they perceive as erroneous?

The Court in the *Provincial Judges Reference* takes a stab at the notion of judicial independence by trying to provide two justifications for it. The Court argues that judicial independence *is necessary for maintaining public confidence in the impartiality of the judiciary*, and that such public confidence is crucial for the effective execution of the judicial role. Note that under this justification, independence is subservient to impartiality, which is both analytically curious[7] and empirically contingent upon the way in which public perception works. For example, in the case at hand, is there actual evidence to suggest that the public, or segments thereof, would have doubted the impartiality of judges who took a 5 percent pay cut? Moreover, if public confidence matters, it matters not only with respect to impartiality, but with respect to other key aspects of the judicial role. As the facts of the case reveal, a judge in a youth court threatened to walk out because of the 5 percent cut. Does such a warning not threaten to diminish public confidence in the judiciary by portraying the judiciary as a labour union? More troublingly, the case is one in which the judiciary itself determines the constitutionality of its terms of employment. A risk of loss of public confidence seems almost inevitable, given the perceived self-dealing.

In fact, a leading Israeli case addressed the very same dilemma, in a different context.[8] At issue were not salaries, but a coalition agreement, designed to "curb the activism of the Court" by instituting a committee of five lawyers (to be headed by a retired judge) whose role it was to review each judicial decision and determine whether the decision strays from the *status quo ante* in matters of religion. Where such infringement of the status quo was found, the committee was to recommend the appropriate legislation to "undo" the judicial intervention. Clearly, a threat to judicial independence—or at least the perception thereof—is posed by the scheme, because judges may be perceived as acting not according to their understanding of the law, but according to their desire to avoid being "overruled" by this political committee. Nevertheless, the Court upheld the legal validity of this agreement, with the swing vote specifically stating that public confidence in the judiciary demands that it refrains from intervening in matters directly pertaining to its own power, for fear of the perception of self-dealing.[9] The same could be said with respect to judges invoking their constitutional powers to review their salaries.

6 The Supreme Court of Canada acknowledged the impartiality of the public service as a key constitutional component in *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, by addressing (in para. 93) the "impartiality of the public service . . . as an essential prerequisite of responsible government." Yet clearly it does not follow that no negotiations between the public service and the government may take place.

7 Analytically, judicial independence is not necessarily an instrument; it may very well be an intrinsic feature of democracy, much like popular vote. Moreover, even if it is merely an instrument towards impartiality, it is unclear whether it is necessarily the best means to achieve this end. At least theoretically, impartiality can be achieved by creating equal dependency on all sides, thereby cancelling any undue advantage. In any event, independence may clash with impartiality, for example when the judiciary is confronted with matters pertaining to its own powers, as is the case in *Provincial Judges Reference*, above note 1.

8 HCJ 5364/94 *Velner v. Chairman of the Labor Party*, IsrSC 49(1) 758 (1994).

9 The opinion of Justice Goldberg, *ibid*.

The second justification offered by the Supreme Court of Canada is equally curious: judicial independence is important because, by guarding it, we ensure that the state acts in conformity with a legal rule. This is curious not only because of the apparent disconnect between the content of the norm—judicial independence—and the question of whether this norm is a legal rule or not—but also because of the specific design of the Canadian legal rules on point. As is well known, the Court had to wander to the realm of the preamble to the Constitution, beam itself to England, find there an unwritten legal principle about judicial independence (that raise deep questions regarding its boundaries, given the unique structure of the British judiciary)—and then import this unwritten principle into Canadian constitutional law (which, since 1982, is based on codified norms). So the notion of relying on a rule of law is somewhat troubling when ascertaining such a rule requires such a serpentine route. Perhaps it would have been more consistent had the Court relied on the enumerated right of a fair trial. In fact, in Israel the *Provincial Judges Reference* is taken as a warning sign regarding what could happen when preambles are written generously and interpreted creatively.

In short, as recognized by prominent Canadian scholars,[10] the notion of judicial independence requires further analysis; the term "independence" is imprecise, for independence implies the kind of freedom we would not necessarily associate with the judicial role. And it is not only judges that should enjoy "independence" in deciding concrete cases. In any event, the rationale provided by the Supreme Court in the *Provincial Judges Reference*—whether grounded in the preamble to the Constitution or derived from an enumerated right—raises more questions than it answers.

C. JUDICIAL INDEPENDENCE AS A FEATURE OF THE SYSTEM'S OPERATIONAL CLOSURE

Rather than focusing on the individual judge or even the judiciary as an institution, this chapter proposes to situate the question within the theor-

10 See for example, Peter H. Russell, "Toward a General Theory of Judicial Independence" in Peter H. Russell & David M. O'Brien, eds., *Judicial Independence in the Age of Democracy* (Charlottesville: University of Virginia Press, 2001). In the Israeli context, see the work of Shimon Shetreet: Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Dordrecht: Martinus Nijhoff Publishers, 1994); and Shimon Shetreet & Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985), especially. c. 16 (the Israeli case study).

etical framework put forward by Niklas Luhmann and then developed by Gunther Teubner under the title "system theory."[11] Obvious space limitations prevent the full exposition of this theory here. Suffice it to say that according to system theory the social world is comprised of various systems. A system, to borrow MacIntyre's definition of a social practice, is a "coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that from of activity, with the result that human conceptions of the ends and goods involved, are systematically extended."[12] Each such system is a site of knowledge and meaning; each is organized according to a certain internal logic; each is "self-referential" in the sense that its justification rests on foundational elements it establishes; and each system develops and expands (or "creates itself") by drawing on its own resources (or on resources it has imported from other systems and "translated" to fit its own logic, thereby converting these resources to its own). Perhaps most importantly in our context, each system is operationally closed, in the sense that it has its own rules and forms of operation with which it governs activities within the practice and with which it governs the absorption of information communicated from neighbouring systems. At the same time, as is implied by the need to regulate communication, each system is cognitively open in the sense that it allows the "immigration" of facts, ideas, norms, conventions, and so on from other systems; social systems are not sealed from their social surroundings. Under this conceptualization of the social world, the Law is a system; Politics is a system; Religion is a system; the Market is a system; Science is a system; the Media is a system, to name a few.

Judicial independence is a feature of the legal system: it is put in place in order to ensure that the law—and judges, as agents of the law—are not co-opted by the logic of the neighbouring systems, as such co-optation would entail the dissolution of law into something else. Independence is therefore the independence of the system; that is, its operational closure. Independence means retaining the cognitive openness to hear arguments raised or developed within other systems and communicated to the legal

11 Above note 4; Amnon Reichman, "The Dimensions of Law: Judicial Craft, Its Public Perception and the Role of the Scholar" (2007) 95 Cal. L. Re. 1619.

12 Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984) at 187.

system, but analyzing them (and reaching a conclusion) according to the systems' own internal logic and modes of reasoning.

Two systems threatened the legal system in the *Provincial Judges Reference*: Politics and the Market. The logic of politics is clear: the budget is an outcome of bargaining, governed by the relative power of the parties and by their ideologies. The logic of the legal system is antithetical to political bargaining, as the legal process is (or strives to be) premised on a deliberative quest for a reasoned judgment.[13] Placing judges in a position of a pressure group is not merely a matter of bad public relations; it runs against the logic of the system within which judges operate. In this sense judges are different from nurses, doctors, and firefighters who may also be barred from striking, but for other reasons; it is perfectly fine for nurses or doctors to demonstrate or join a political party to promote public investment in health. It would be problematic for judges or other members of the law enforcement sector to do the same. Furthermore, the logic of politics is to reward loyal performers and shun support from the opposition; since the Court could be in opposition to the executive, a pay cut could be the way politics either rewards or punishes a loyal or disloyal judiciary. While from the perspective of politics there is nothing wrong with securing the loyalty of the judiciary to the policies of the ruling majority, the logic of the law demands that such loyalty will be secured via the enactment of laws, not via salaries. Perhaps this is what was meant by the Court when it highlighted the importance of the rule of law. As was noted by many, the *Provincial Judges Reference* is singular since the pay cuts were across the (provincial) board (judiciary and executive alike), and thus the danger of such reward or punishment was greatly reduced. However, the question remains: should the cut have been across the board? Shouldn't provincial judges have been excluded, since their federal judicial counterparts—section 96 judges who, in essence, do the same job but whose salary is controlled by Parliament—did not have to take a cut? After all, the separation of powers in a federal democracy runs not only on federal-provincial lines, but also divides the branches, thereby placing the judiciary—federal and provincial—apart from the executive. Yet for the provincial judges to make their case that

13 Indeed, the Court gestured toward the importance of giving reasons, but in the context of the legislative response to the report of the commission; this, of course, is problematic, as political reasons may differ from reasons that would convince in law. The Court realized this tension and immediately backtracked. See above note 1 at paras. 181–82.

they should be treated on par with section 96 judges (and thus differently from the provincial executive) would have meant that they would have to form a pressure group, and thus succumb to the logic of politics.

The logic of the market is equally threatening: as a player in the market, I am willing to work harder if I am paid more. Such logic is in tension with the logic of the judicial role. Judges should not be thinking about their salaries when deciding whether it is "worth it" for them it to invest extra hours in a taxing case. Rather, they should be guided by their quest to do justice under the law. Again, the strike is not an option for the provincial judges, whereas other segments of the civil service could strike. The fact that some other segments of the civil service are barred from striking misses an important point: there is no reason in principle that the services provided by those segments, save, perhaps, for the services of the law enforcement agencies, would not be provided by the private sector as well. The reason, therefore, that these other segments are prevented from striking is because their services are prime necessities, not because they are an inseverable component of sovereignty itself, as is the case with the judiciary or the legislature (or, for that matter, the Queen). The pull by the market and its logic was particularly invidious in this case, given the two-tiered (federal-provincial) design of the Canadian system: the risk that (provincial) judges would be influenced by economic incentives ("should I spend the many extra hours needed to do a first rate job on the case before me, now that they pay me less?") could not have been ignored, especially since their "superior" (section 96) colleagues were immune from the cuts. Such differentiation runs the risk of further pushing the provincial judges to think in market terms. It also diffuses the ability of the legal system as a whole to resist such a co-optation and it obscures the possible infiltration of market-based operational logic into the law. It is quite clear why the legal system would act to reject the logic of the market as applied to judicial performance. Perhaps this is what was meant by the reference to a potential decrease in public confidence.

The resolution of the case, namely that the state may not reduce the salary of judges without creating a buffer between politics, the market, and the law, reveals an awareness to the underlying structure of the social system and the subsystems of which it is comprised. Despite its specific language, it is not judicial independence in itself that the *Provincial Judges Reference* stands for, but rather the operational closure of the law as a system.

Unfortunately, the Court might have gone overboard in prohibiting any form of negotiation between representatives of the finance minister and representative of the judiciary—not even in the form of exchanging documents designed to establish uncontested facts. Such an exchange arguably does not amount to the judiciary establishing a pressure group under the logic of politics, neither would it lead the judiciary to succumb to the logic of the market. Furthermore, it was somewhat unfortunate that the Court created a tension within the legal system by reaching out and basing its decision on the unwritten principles as a source for deciding the case. Such a tension threatens the operational closure of the legal system, because for the system to remain operationally closed the "moves" (the decisions) of its agents must remain in sync with the system's underlying logic; otherwise other agents within the system would come to question these decisions (or more specifically, would question whether these decisions fit the constitutive elements and ideal types of the system, as understood from within the system). Should such doubts persist, it would become increasingly difficult for the people performing the various roles within the system to maintain the internal viewpoint so essential for sustaining the integrity of the system. Put differently, the performance of the Courts is examined—not so much for its results, but for its reasoning—by the profession itself: colleagues, academics, and other professional institutions. While "independent" *vis-à-vis* agents of other systems, Courts, as agents of the legal system, are dependent upon the positive evaluation by the profession; professional accountability is crucial for maintaining operational closure. Persistent negative evaluation would lead to cynicism which may unthread the social construct called "the law" (as it would unthread any other social system). It is of course not the role of a scholar active in a foreign jurisdiction to evaluate the performance of the Canadian Supreme Court, but it appears that few have actually found the Court's explicit reasoning in this case fully convincing.

Yet despite the justified criticism of such features of the case, the Court was, as argued above, nonetheless correct not only in the final resolution, but also in insisting that the two dimensions (individual and institutional) and the three characteristics (security of tenure, financial security, and administrative autonomy) of judicial non-dependence are constitutionally protected under the right to a fair trial. In that respect, the *Provincial Judges Reference* offers a framework within which we can approach the evaluation of judicial non-dependence in other jurisdictions.

I now turn to examine the recent developments in the Israeli system that raise concerns regarding the operational closure of the legal system *vis-à-vis* pressures from the neighbouring systems, primarily, politics.

D. THE ISRAELI CASE: BACKGROUND

The viability of Israel as a democratic polity governed by the rule of law rests, at least in part, on the ability of its legal system to retain its operational closure, namely the ability to withstand pressures to dissolve into politics or to succumb to the logic of the market. The Supreme Court of Israel has played an instrumental role in maintaining law's integrity, and has earned the respect and cooperation of the bureaucracy (and specifically the Justice Ministry and the Prime Minister's office), of the political system (the Knesset and the political parties), of professionals within the legal system (lawyers and lower court judges), and of members of other systems, such as academics. While the first Supreme Court was appointed with political considerations in mind, and while it took five years to ensure that the salaries of judges would be kept at arm's length from the executive and while the Court suffered from an occasional lapse by bowing to political or economic "realities"[14] it is nonetheless safe to say that, from its inception the Court sought to maintain uncompromising professional standards: a commitment to the "formal" rule of law, coupled with a quest to ensure fit between legal form and the values of a Jewish and Democratic state. To that end, the Court applied the British *ultra vires* doctrine and expanded it by requiring not only that when infringing upon a basic right the executive be explicitly empowered by statute to do so, but also that in exercising its discretion the executive must infringe upon the right no more than is necessary (in order to avoid substantial harm, the prevention or mitigation of which lies within the authority of the specific agency). At the same time, the Court determined that in the absence of an explicit authorization by a written constitutional norm, it lacked the power to exercise judicial review over primary legislation. In 1969, the Israeli system

14 A clear example is the decline of the Court to exercise administrative judicial review to halt the confiscation of Arab land in the Galilee despite the evidence that underlying the confiscation were not "neutral" public interests but rather an ideological quest to transfer land to the Jewish state and thus an act of discrimination against the Arab citizens. See HCJ 30/55 *The Committee for Defending Confiscated Arab Land In Nazareth v. Ministry of Finance* IsrSC 9 1261 (1955).

developed a caveat of sorts to the British model of parliamentary sovereignty in matters pertaining to elections, but this caveat amounted to a procedural form of "self-binding" by the Knesset.[15]

As may be expected, the Court on occasion clashed with the executive, and such clashes led, in some cases, to an intervention by the legislature (controlled by the coalition governing the executive), but the legal culture according to which judges do not play politics and the legislature and the executive respect the rule of law as enunciated by the Court, was taken as a given. This perception is epitomized by the famous anecdote regarding the judicial decision pertaining to the legality of the settlement Elon Moreh,[16] the road to which was to be built on private land confiscated from Palestinians by the military commander. Prior to the legal challenge in this concrete case, Israeli Prime Minister Menachem Begin, in relating to statements that the Jewish settlements in the West Bank and Gaza in general are illegal because they contravene the Geneva Convention, stated that "there are judges in Jerusalem," implying that so long as the Israeli Supreme Court has not ruled otherwise, the settlements are legal. Having concluded that the confiscation of the private land in the Elon Moreh case was not a direct military necessity, the Court invalidated the act of the military commander, to which Prime Minister Begin replied again, "there are judges in Jerusalem," and acted according to the decision. Many take this example as exemplifying the respect for the rule of law and the relative independence enjoyed by the judges. More specifically, the judges took pains in distancing themselves

15 Confronted with a challenge to the validity of a statute that allegedly contradicted an entrenched provision of *Basic Law: The Knesset*, the Court in HCJ 98/69 *Bergman v. Minister of Finance* IsrSC 23(1) 693, relied on the attorney general's specific request that the Court avoid the question of whether it is empowered to exercise judicial review (and whether the Basic Laws are hierarchically supreme). In that case, and in subsequent two others, the Court accepted the state's invitation to rule on the merits—in all three cases the state argued that there was no contradiction between the Basic Law and the statute under consideration—and ruled against the state. As mentioned, the provision of the Basic Law was entrenched: it required that any contradicting law must enjoy the supporting vote of at least sixty-one (out of 120) Members of Knesset (MKs), Israel's Parliament, in all three readings, rather than the simple majority of MKs present in the vote. The legislature, in all three cases, re-enacted the "offending" law with the required majority, thereby muting any further legal challenges. For an English translation of the *Bergman* case, see Itzhak Zamir & Allen Zysblat, *Public Law in Israel* (Oxford: Clarendon Press, 1996) at 310 *et seq*.

16 HCJ 390/79 *Douykat v. The Government of Israel*, IsrSC 34(1) 1. For an English translation of the *Douykat* case, see Zamir & Zysblat, *ibid.* at 379 *et seq*.

from what they perceived as "political reasoning," namely reasons that pertained to the reasonableness of the commander's decision, and kept to strictly legalistic language of legal competence, rights, relevant considerations, procedures, and evidence.

This, of course, is not to portray the Israeli Supreme Court as acting irrespective of political pressures. The Court thus far avoided ruling on the legality of settlements built in the West Bank on land designated by the commander as "state lands," namely land that was not previously owned by any particular individual or association prior to the 1967 war. Elon Moreh, for example, was later built on such land. Political pressures were also present in other decisions of the Court, primarily pertaining to matters of national security.[17]

But all in all, it would be safe to say that Israel belongs to the exclusive club of states that remained democratic since their inception in no small part thanks to the ability of the Supreme Court to maintain the operational closure of the law (that is, to remain faithful to the system's forms and procedures as reflecting the system's understanding of forms and procedures befitting a democratic regime). Generally speaking, the Israeli Court's operational closure was accompanied with cognitive openness; it remained responsive to arguments raised in neighbouring systems, such as the political system, while resisting the pull to deploy rhetoric or develop doctrine in a manner that would be perceived by the political system as pertaining to goods unique to the political system (such as siding with the ideology of one political party against that of another) and thus seen as a "trespass." Rather, during its first five decades, the Court was relatively successful at transforming these arguments to legal arguments that, all in all, maintained consistency and coherence with the structure and logic of the law as an instrument concerned, in common law matters, with corrective justice, in statutory matters with being faithful to the

17 For an analysis of the performance of the Court regarding the occupied territories and in particular its performance regarding national security arguments, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002). For a case demonstrating the limits of judicial independence in Israel see HCJ 5793/92 *ACRI v. Minister of Defense* IsrSC47(1) 267 (1992) where pursuant to a murder of an Israeli soldier the Court allowed the deportation of 415 Palestinians from the Gaza strip, although under the governing doctrine only individual deportation was legally permissible. The Court accepted the A-G's argument that the deportation was of 415 individuals, and not a mass deportation. The Court further decided that the right of fair hearing was not violated because each deportee was entitled to such a hearing albeit after being deported to Lebanon.

distributive scheme set by the legislature, and in constitutional matters with restorative justice, namely with securing the bond that ties the various segments of the society into a rights-based polity. This meant that in many occasions the Court refrained from addressing a social dispute at all, and, in any event, refrained from assessing the consideration of the government's act for their reasonableness (or even for their proportionality) as that would have been considered a departure from the judicial role.

E. THE CONSTITUTIONAL REVOLUTION

In the 1990s, Israel experienced a "constitutional revolution." A central piece of the revolution was the adoption of two Basic Laws (*Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Vocation*),[18] which the Court has interpreted as not only conferring upon it the power to exercise judicial review over primary legislation, but also as elevating all the existing Basic Laws to the constitutional level.[19] Close examination of the workings of the Knesset suggest that this interpretation—especially the prong regarding the elevation of all basic laws to the constitutional plane—does not reflect a political choice made by the representatives of the people (although, technically, this interpretation was legally possible, and some members of the Knesset probably foresaw this possibility). Having announced its new constitutional powers in late 1995, the Court exercised them by striking down legal provisions as having no force or effect in five instances in the decade to come.

It took the legislature some time to understand the scope of the revolution and as of 1999, segments of the Knesset became more active in trying to limit that scope. Recently, in what may qualify as a full-blown backlash, proposals were introduced to restrict justiciability (for example, to withdraw from the Court's ambit of review matters pertaining to national security, or matters pertaining to immigration), to limit standing, or strip the courts from the power to exercise binding judicial review altogether. The Knesset is also busy working on a draft for a comprehensive constitution for the state of Israel—a worthy ex-

18 The basic laws were enacted in 1992 and amended in 1994 pursuant to a judicial *obiter* that suggested that the *Basic Law: Freedom of Vocation*—officially called Basic Law: Freedom of Occupation—would curtail the ability of the Knesset to proscribe the importation of non-kosher meat (HCJ 3872/93 *Mitrael Ltd. v. The Prime Minister* IsrSC 47(5) 485 (1994)).

19 CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*, IsrSC 49(4) 221.

ercise in and of itself—but its approach is adversarial at times: some segments of the Knesset are mainly concerned with undermining the ability of the Court to exercise judicial review and protect human rights. Such a confrontational atmosphere reflects on the ability of the Court to retain operational closure. The Knesset would certainly be within its legitimate scope of authority were it to introduce amendments to the basic laws, for example, introducing a limitation and notwithstanding clauses to the basic laws that lack these features; as is clear from the description above, the Israeli Court, in developing the "revolution," took its independence a tad too literally, and therefore a political reaction might be in place. However, tying the advance of such amendments to the possible outcome of specific cases pending before the Supreme Court raises serious concerns regarding the boundaries between law and politics.

Two other components of the revolution are worth mentioning. The first relates to the sphere of judicial review of administrative action, where judicial innovations have expanded standing, lowered the justiciability bar, and advanced the "patently unreasonable" cause of action to allow the Court to examine the discretion of the executive (for its reasonableness) on a relatively wide spectrum of issues. While the Court has used its power to invalidate governmental actions only very rarely—very few petitions to the Supreme Court, sitting as the High Court of Justice have been explicitly granted—the Court nonetheless became a key fixture in Israeli public life, with most important decisions passing, one way or another, under the scrutiny of the Court. The second component worth mentioning is the interpretative turn towards "purposivism," namely toward a theory of interpretation that seeks the "purpose" underlying the legislation, rather than being primarily concerned with the "natural" meaning of the words chosen by the lawmaker or with the actual intent of the legislature.[20] The legislature, the executive, and the bar were surprised by the latitude the Court was willing to demonstrate in interpreting statutes, secondary legislation, and even contracts.[21]

In our context, it is worthwhile to mention that one of the key exemplars of the purposive approach dealt with the issue of judicial salaries. According to *Basic Law: The Judiciary*, judicial salary is set by the Knesset

20 Aharon Barak, *Purposive Interpretation in Law*, trans. by Sari Bashi (Princeton: Princeton University Press, 2007).

21 See, for example, Civ.App 4628/93 *Aprofim v. State of Israel* IsrSC 49(2) 265 (1995).

and may not be singled out for a cut.[22] However, several economic factors led to the relative erosion of judicial salaries in the early 1990s. Among these developments were the high inflation of the mid-1980s (which was not fully compensated in the public sector at large, although some segments were better off in that respect than others primarily due to more effective bargaining); and the fact that pursuant to the transition to a free market economy (which entailed privatization on a large scale), the salaries in the private sector have dramatically increased. As a result, the relative position of judges has worsened, and there was a concern that judges were not adequately compensated for their hard work (which led to difficulties in attracting excellent candidates for judicial positions; the case in Israel is still that leading law firms pay considerably better than what the state pays its judges). A leading MK (himself a lawyer) decided to step into the breach by proposing legislation that would raise the salaries of judges, but only those "actively engaged in adjudication." This proviso was meant to ensure that other state officials, whose salary is linked by labour agreements to that of the judges, would not receive the raise, in order not to breach the budget framework. As soon as the legislation was passed, segments of the civil service tied to the judicial salary complained and the matter was brought before the Supreme Court.[23] The MK—Avraham Poraz—stood himself before the Court and explained in detail the legislative intent. The Court reacted negatively: it rebuked the MK for his attempt to tell the Court what the law means, and went on to interpret the law so as not to interfere with any collective agreement, thereby effectuating the raise to other segments of the public service. In so doing, it appears the Court was not only concerned with the principle of maintaining the integrity of labour agreements, but also with ensuring that the salary of judges would not be singled out for the better, lest it be singled out for the worse in the future.[24] It should be recalled that the

22 Section 10(a) of the Basic Law states that "[t]he salaries of judges and other payments to be made to them during or after their period of tenure or to their survivors after their death shall be prescribed by Law or by a decision of the Knesset or of a Knesset committee empowered by the Knesset in that behalf." Section 10(b) states that "[n]o decision shall be passed reducing the salaries of judges only."

23 HCJ 3265/95 *Poraz vs. The Government of Israel* IsrSC 49(3) 153 (1995).

24 As mentioned, judicial salaries in Israel are set by the Knesset. The convention is that the Finance Committee decides the matter, having heard from the Ministry of Finance and from the Manager of the Courts. *De facto*, the judges reach, via the Manager, an agreement with the Finance Ministry. In 1981 the Knesset reached the most recent framework of the judicial salaries and in the mid-90s updates were made (pursuant

Basic Law: Judiciary, which guarantees that judicial salaries would not be singled out for worse treatment, may be amended without recourse to any specific procedure (and no special majority is required). However, the legal culture, at least as we currently know it, would greatly discourage any such move, as it would be perceived a direct tampering with Israel's fundamental democratic design. It thus may well be that the Court's move was a step toward ensuring that the situation remains that way.

But on a broader view, this case, as others along the same "purposive" lines, have put the legislature on the defensive, given the minimal weight the Court accorded to the intent of the legislature. From the perceptive of the legislature, the Court appeared to have become overly insular, as some legislators felt that the Court was "changing the rules of the game" by acquiring greater political power to say what the law is despite the legislative intent on point, thereby increasing the tension with the political system.

F. THE PERCEIVED "UNDER-REPRESENTATIVE MAKEUP" OF THE SUPREME COURT

As the Supreme Court was perceived to be sliding into the value-laden language (and modes of reasoning) of the political system (where ideologies clash and the personal beliefs of the decision makers take centre stage), politicians begun to question the composition of the Court, suggesting that the bench was not "representative" enough of the various beliefs, attitudes, and backgrounds of the Israeli society. Bluntly put, the concerns were that there were not enough Jews of North African or Middle Eastern origin (Mizrachi Jews),[25] that there was underrepresen-

to Poraz's plan). This framework is still in place (it is in fact a legal norm—a secondary legislation—published in the official gazette). The committee's decision contains mechanisms for salaries' update, according to the inflation. Under the Israeli design the Chief Justice gets the highest salary in the public service—higher than the PM's. (In 2008 it stood at about 55K NIS a month; a descending scale places the salary of a justice of the peace at roughly 25K NIS a month, plus benefits). Judicial salaries serve as an anchor for other salaries in the public sector, but some segments of judicial benefits, such as health care, are tied the other way around (i.e., judges are linked to the services MKs get). Recently the Knesset decided to withhold raises to an entire segment of the public sector (which meant that judges and MKs did not get a raise) because of the economic crises and the negative price index. No challenges were made to this freeze.

25 There are two main groups of Jews, in terms of ethnic identity: Ashkenazi and Sephardi (or Mizrachi). Ashkenazi Jews are those who originate from Central and Eastern

tation of right-wing conservatives (in terms of the Jewish-Arab conflict), and conversely, that there were no Arabs on the Court. A committee was set to review the matter, headed by a Supreme Court justice. The committee concluded that the bench should not be "representative," since the logic of the legal system is different from the logic of the political system. However, the committee concluded that the composition of the Court should be "reflective" of the various cultures comprising the Israeli society, so as to ensure that the various experiences upon which judgment is premised would be voiced when the Court decides a complex case that touched upon matters in heated public debate.[26]

It is difficult to assess exactly whether the committee was successful in diffusing the political tensions regarding the composition of the Court, and whether the committee's report led, in practice to a more "reflective" Court, because until recently the debates of the judicial appointments and promotion committee were not made public (more on that to follow). *De facto*, the unofficial quota system (a Mizrachi seat, a religious seat, a woman, a member with a right-wing background) was abolished. As these lines are written, an Arab justice, five female justices, and two religious justices are part of the current twelve-member Court.[27] Four justices have in their background some affiliation with the political Right and one justice is a Mizrachi Jew. However, if the media is any indica-

European countries, and Sephardic or Mizrachi Jews originate from North African or Middle Eastern countries.

26 One main difference between "representation" and "reflection" centres on proportion. Whereas representation implies that the number of seats on the Supreme Court should be proportional to the size (or percentage) of the "represented" community in relation to the general population, "reflection" means only that the segment of the "reflected" community should have a voice on the bench. Another main difference goes to object represented or reflected. Representation implies the possibility of taking into account affiliation with a political party. Reflection, on the other hand, is geared towards culture and values, which need not correspond to any existing political parties.

27 According to the law (*The Courts Act* of 1984), the Knesset sets the number of Supreme Court justices by an ordinary resolution. In 2003 the number was set at fifteen (after previous resolutions had set the number at twelve, and then as a temporary five-years measure, increased the number to fourteen). However, the practice has been to appoint, of the fourteen or fifteen seats, up to three judges for a period not exceeding a year ("a temporary appointment"). These positions are designed to provide assistance for the caseload as well as determine whether these judges are worthy candidates for promotion. For the debate regarding this system see below. This practice has come under critique, because it may put the "temporary" judges in an uncomfortable situation *vis-à-vis* their colleagues (with whom they may disagree in a given case and who may be in a position to decide whether they are ultimately "elevated" to the Supreme Court).

tion to public sentiment, the Court is still perceived as leaning towards the liberal side, at least as far as the Jewish-Arab debate—perhaps the deepest divide in Israeli society—is concerned.

There is reason to believe that given the ongoing struggle with the Palestinians, the perception that the Court is more receptive to claims of Palestinians—which is an erroneous perception; the court is merely receptive to human rights claims—is a factor in the loss of public confidence in the Court (revealed repeatedly by public opinion polls). Such loss of confidence in the Court raises serious concerns regarding the ability of the legal system to maintain the operational closure should pressures from the political system or the media intensify. A possible indication for such a scenario is exemplified in the recent inability of the Court to deal with the constitutionality of the prohibition the Knesset has imposed on family unifications between Israeli citizens and residents of the West Bank. The statute—a temporary measure imposing strict restrictions which *de facto* force Arab-Israeli citizens to choose between remaining in Israel and being with their spouses and children—infringed the right to human dignity. While the majority of the justices found the prohibition over-inclusive and thus disproportional, the swing vote was unable to declare the law unconstitutional (even if the remedy would have allowed the legislature time to redraft a more narrowly tailored legislation); rather, the swing voter (and another justice) expressed hope that the measure would not be extended.[28] This decision is difficult to reconcile with the underlying mode of operation of constitutional law, since the swing vote—a highly regarded and experienced judge—did not put forward any legal reason, at least not one that coheres with precedent. Needless to say, the measure was extended (with a slight modification) and now the issue is before the Court again. It appears the Court sensed that its diminished institutional capital —which stems from the manner in which it has assumed the power to review the constitutionality of statutes but also from the accusation, unjustified as it may be, regarding its political leanings—chafes at its ability to maintain operational closure (namely, act in accordance with legal form). It is therefore delaying its decision for fear of political retribution.

Perhaps the most heated debate regarding judicial independence has arisen regarding the recent proposals, and subsequent amendment, to

28 HCJ 7052/03 *Adalah vs. Minister of Interior* IsrSC ILDC 393 (IL 2006).

the composition of the judicial nine-member appointments committee. Judges in Israel are appointed by the president pursuant to the nomination of the appointment committee, comprised of the justice minister (as chair), another representative of the government, an MK from the coalition, an MK from the opposition, three supreme court justices (selected by the Court), and two representatives of the bar (elected by members of the bar). The idea behind this design was to provide the profession—the justices and the lawyers—the majority (five members over the four members of the politically-elected branches). And indeed, over the years the committee has been instrumental in ensuring that the quality of the appointments to the Supreme Court was, all in all, first-rate. However, complaints of the over-representation of judges in the committee began to surface and intensify, in part as a reaction to the constitutional revolution (and the realization, by the political branches, of the consequences of having judges of "like-minded views" on the bench), and more recently as an expression of the justice minister's conviction that, evidence to the contrary notwithstanding, the professional level of the justices had declined and "left-leaning activist" judges overly preoccupied with public law matters were preferred over candidates more attuned to the "needs of the market."[29] Politicians accused the justices of using their power in a concerted manner to ensure that only jurists fitting their mould would be appointed to the Supreme Court. Consequently, suggestions were raised to decrease the number of judges on the committee, increase the number of politicians, add "neutral" members (such as from academia), or include judges from the district courts, as opposed to only the Supreme Court. While in principle it is not clear that the current design is superior to those proposed, the effect of such changes would likely be detrimental to the ability of the legal system to maintain its operational closure. Decreasing the relative weight of the justices would mean that it would become

29 The former minister of justice, Professor Daniel Friedmann, was unique: he was not a politician, but rather an acclaimed academic who won the Israel Prize for his work in contract law and unjust enrichment. His long-time friend and co-author was considered for an appointment to the Supreme Court, but rejected by the now-President of the Court Dorit Beinisch J., who, reportedly, did not approve of her and thought the Court did not need academics in private law matters. Recently, and for the first time in current history, two lawyers were appointed directly from private practice to the Supreme Court, having had no previous experience either in the judiciary or in the attorney general's office. In Israel, this move is unique, and at the very least it signals the sense among the bar that further attention should be paid to "lawyer's law."

possible to appoint candidates despite strong opposition of the justices, a scenario unlikely in the current design, because the members of the bar would usually concur with the justices (and the MK representative of the opposition usually votes against the government's position). Allowing "adversarial" appointments might threaten the collegiality of the bench, but more importantly, might also lead to the "politicization" of the bench in the sense that increasing the relative role of the political parties in the appointment process might result in the appointment of jurists who view their role on the bench as representatives of a certain political party. Fortunately, these proposals have thus far failed to gain sufficient support.

Instead, in 2008 the Knesset changed the law to require that an appointment to the Supreme Court would need a majority of seven out of the nine members of the committee. The practical outcome of this amendment is that the veto power of the judiciary was further institutionalized, since if all three justices object to an appointment it would fail to pass. But at the same time, a parallel veto power of the governing coalition was established. It would be impossible to appoint candidates to the Supreme Court without the consent of the justice minister, the other representative of the government, and the MK representing the coalition. This design may quell the concerns regarding the power of judges to "tap" a favourite of theirs since the coalition may block the judges, and thereby disrupts the "member brings a friend" mode of operation.[30] But at the same time, appointments to the Supreme Court may now become the subject matter of political agreements between the various parties that comprise the coalition. Consequently, judges who would like to be promoted to the Supreme Court now have to court not only the profession, but also ensure that they do not alienate the political parties likely to form a coalition in the foreseeable future.[31] Such a design might lead to an infiltration of the political logic into the legal system.

30 For similar reasons the justice minister was opposed to the appointment of temporary judges (mentioned above note 24), for this appointment reflects the choice of the president of the Supreme Court. For an analysis of the practice see Eli Salzberger, "Judicial Appointments and Promotions in Israel: Constitution, Law and Politics" in Kate Malleson & Peter Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press: 2006) at 241.

31 In Israel, that means the Likud, the Labour, and the religious parties, the latter being the surest bet (since any collation thus far was required the support of at least one religious party). It remains to be seen whether the formation of the center party Kadima—a split from the Likud (which includes some members of Labour, as well)—would become an equally enduring fixture of Israeli politics.

This amendment resonates with another amendment to the *Judiciary Act*—related to the selection of the president of the Supreme Court. According to convention, the president has been appointed by the appointments committee based on the seniority system: the most senior judge on the bench would become the president (upon the retirement of the sitting president at the age of seventy). As of 2008, the term of the president was limited (as will be elaborated below), although this change will take effect only upon the nomination of the next president. Furthermore, and more importantly in our context, whereas the judicial appointments committee decided on the identity of the president of the Supreme Court as a matter of convention, the law was amended to specifically grant the commission this power, and it is unclear whether the explicit authorization will prompt the committee to revisit the criteria for appointments. If it decides not to abide by the seniority rule, as advocated by the current justice minister, it may appoint a candidate best capable of running the administrative aspects of the system; but it may also appoint the person most aligned with the views of the politicians, assuming the politicians on the committee receive the support of at least one member of the bar. Equally troubling, abandoning the seniority system might lead sitting justices to campaign for the position of the president of the Supreme Court, thereby potentially breaching the operational closure of the legal system by prompting judges to be mindful, as part of deciding cases, to the effect this or that decision might have on their personal promotion.[32]

G. THE PERCEIVED CRISES IN CASE MANAGEMENT

The legal developments outlined above were accompanied by another important transition. Israel experienced a rapid growth in the number

32 In that context another development must be recognized: whereas in the past, the debates of the appointment committee were sealed, today the exchanges are leaked to the press almost immediately. While transparency is important—and toward that end the names under consideration by the committee are made public, so citizens may bring forth relevant information—revealing the arguments for and against each candidate leads to further politicization of the process, as the political actors are pressed to appear touting the line of their political party and promoting its ideology, whereas prior to the change there was greater room to debate on the merits of the person. More troubling, however, is the personal politicking the media focuses on—which candidate is supported or opposed by whom, what deals are cut, and so on—since this spectacle allows the media to exert its influence on who gets appointed. For more on the politics of appointments, see Salzberger, above note 30.

of lawyers during the 1990s—private law colleges were licensed and began to thrive—and the number of lawsuits per person rose dramatically. The number of judges and courtrooms, however, was not increased respectively, and thus the administration of justice has been faced with mounting pressures. Calls were made for redesigning the legal system so as to alleviate some of the pressure from the Supreme Court, which: (1) retained original jurisdiction to hear petitions against the state; (2) was the appellate instance for appeals "as of right" from the district courts; and (3) was the second tier of discretionary appeals from the Courts of the Peace[33] (the district court being the appellate tier "as of right"). A committee was formed to examine the structure of the system, again headed by a Supreme Court justice. It recommended that fewer matters will reach the Supreme Court as of right, and that the district court should gradually undertake the role of the appellate division, with original jurisdiction transferred to the Courts of the Peace. The reform has been partially successful; the bottleneck lies today with the Courts of the Peace and not the upper tiers. According to the manager of the courts—an independent agency acting as a liaison between the judiciary and the justice minister[34]—the system now processes roughly the same number

33 Generally speaking, the Israeli system is a three-tiered system: the Courts of the Peace (Magistrate Courts) handle civil claims up to a certain amount and criminal cases up to a certain severity. The district courts are the courts of general jurisdiction empowered to adjudicate all claims that do not fall within the jurisdiction of the Courts of the Peace (or any other judicial authority, such as the family courts or the religious tribunals). It also has an appellate jurisdiction over Courts of the Peace judgments and family courts (as well as jurisdiction to review the decisions of a host of administrative tribunals). The Supreme Court sits as an appellete Court over district court decisions and—and this is rather unique—sits as a high court of justice empowered with original jurisdiction to review the decisions of all governmental agencies including the Knesset, as well as the decisions of the religious courts and the labour courts.

34 The manager of the courts is appointed by the justice minister with the consent of the chief justice to implement the "administrative order" of the court (*Courts Act*, 5744-1984, s. 82) and is considered an independent agency. While the law does not require the manager to be a judge, the tradition is that this function is fulfilled by a district court judge. Under Israeli law, the justice minister is in charge of the administration of the courts, and may issue bylaws (usually after consulting with the chief justice) to that effect. It would then be the duty of the manager to implement these bylaws, a function that will be carried out with the professional input of the chief justice in mind. The presidents of the various courts (and the chief justice) retain the power to allocate the cases among judges (or to panels) within their respective courts and control the timing of the hearings (although the latter function is routinely delegated to the secretary of each court, unless the case is of unusual importance). Beyond fulfilling

of cases entering the system, but a backlog of some 450,000 cases remains. The pressure on the system is reflected in the time-lag between filing a suit and getting a date for a preliminary evidentiary hearings, in the subsequent lag for court dates, and finally in the time that lapses between the conclusion of the trial and the judicial decision.[35] In order to better manage the judicial output, stricter caseload goals were set for justices of the peace, and statistical tools were introduced to measure the management of judicial time. The manager also resorted to economic incentives, by suggesting that parts of the benefits judges may apply for may be contingent upon meeting the caseload criteria set by the manager's office.[36] Some judges raised concerns regarding the effect of such managerial tools on judicial independence. Most notably, Judge Agmon-Gonen, then of the Court of the Peace in Jerusalem, suggested that the threat to judicial independence from within the system—namely from the manager of the court—is greater than the external threat from the political branches.[37] In the terminology of the *Provincial Judges Reference*, Judge Agmon-Gonen was raising the independence of the individual judge, but *vis-à-vis* the judiciary. According to Judge Agmon-Gonen, adopting the Market logic of cost-benefit analysis clashes with the logic of individual rights, and primarily the right to fair trial (a day in court) of the litigants in a concrete case. Any serious examination of judicial independence—the autonomy of the legal system—must therefore include an inquiry into the tension between the managerial discretion of the individual judge and the authority of the system to govern that discretion. While judges of course should be mindful of the queue of litigants waiting for their time—and their right to a speedy trial—they cannot, much like doctors, appear to be compromising the level of care

purely judicial functions, presidents of the courts (and the chief justice) also deal with judicial disciplinary matters (both directly or via the judicial ethics committee, appointed by the chief justice and comprised of the chief justice and two other judges).

35 The legislature has attempted to set deadlines for handing down a decision, but these deadlines are not always kept, and in some cases for the better (since the dispute is complex). The Supreme Court, in any event, is not under an obligation to hand down its decision within a certain timeframe, and on some occasions months (and years) pass before a decision is rendered.

36 Such benefits include a sabbatical and the authorization to teach a class.

37 Michal Agmon-Gonen, "Judicial Non-Dependence? The Threat From Within" (2004) 10 Hamishpat 1. See also Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in *Judicial Independence*, above note 7 at 590.

they administer in a particular case. The system is currently managing the tension by nominating retired judges (aged seventy to seventy-five) to sit as "associate judges"; by placing further limits on procedural rights (such as the right to appeal, the right to be heard in person, or the burden necessary to avoid summary judgments); by pressuring parties to settle out of court; and by monitoring the length of time it takes judges to reach a decision, which, as will be further developed below, includes disciplinary measures. But the tension remains.

The pressure to reach a more "efficient" system has not been solely the business of the manager of the courts. After all, the manager was acting at least in part as a result of pressure from the political branches, who themselves were responding to pressure from the bar and the media. Administratively, each court in Israel is headed by a president and one or more vice-presidents, charged with, in addition to their judicial duties, attending to the administrative dimensions of running a court. Traditionally, the position was for good behaviour, namely until retirement. Recently, the justice minister decided to intervene, and proposed legislation, adopted by the Knesset, to limit the term of courts' presidents and vice-presidents to one term of seven years. The justification for the amendment was that since the position is demanding, a turnover would produce better (and more energized) management. A further justification asserted that being too long in position of managerial power overly insulates the presidents and vice-presidents. Despite the good intentions, the effect of this measure may very well threaten the operational closure of the system. The convention thus far has been that the prerogative to promote judges was the province of the president of the Supreme Court (even if the appointment itself was made by the justice minister). This convention might change as the minister may become more involved in judicial promotion and, consequently, in judicial politics. Moreover, the quicker turnover might lead to deeper involvement of the political branches. (It should be recalled that in Israel the justice minister is a political figure, usually an elected MK, and in any event an appointee of the prime minister.)

In that context, the proposal of the justice minister, to appoint "nomination commissions" that would scout for possible candidates and then advise the justice minister on the best persons for the position of presidents and vice-presidents, was met with resistance from the judiciary and the academia. The commissions, according to the proposal, would have been headed by retired judges nominated by the justice minister.

The concern was that such a design would increase judicial politics (and diminish the relative position of the president of the Supreme Court by creating a mechanism that could counter the president's choices, even though the commissions were to have the power of recommendation only). As stated by the president of the Supreme Court, Justice Dorit Beinisch, judges would be pushed into ongoing campaigning in order to promote their candidacy. If this indeed were to occur, it would constitute a threat to judicial independence in the sense that the logic of the legal system would be modified (or "hacked") by the logic of the political system. Under the compromise eventually reached between the justice minister and the president of the Supreme Court, nomination commissions were indeed established, but headed by sitting judges: commissions for presidents of the district courts are headed by Supreme Court justices, and commissions for presidents of Courts of the Peace by district court judges. The executive is represented indirectly only, via the manager of the courts (who, as stated, acts as a liaison with the justice minister) and via a retired judge who used to preside over nominations in the civil service. Time will tell whether campaigning will occur and whether the logic of the legal system will be threatened by politics.

An interesting footnote to this amendment has to do with salaries: the president and the vice-president of courts receive additional compensation (at their base salary and also for their administrative duties). In the past, they would carry their duties until retirement, whereas now they would complete their term and return to the bench as "ordinary" judges. This would entail taking a pay cut. It is unclear whether such a cut infringed upon the Basic Law, and in any event, the claim regarding the dangers of slipping into the logic of economic incentives might rear its head in the Israeli context. The matter is currently under consideration at the justice and finance ministries.

H. THE PERCEIVED LACK OF ACCOUNTABILITY MECHANISMS REGARDING PROFESSIONAL ETHICS

As mentioned above, judicial independence (that is, the operational closure and cognitive openness of the legal system) is relevant not only to external pressures (from politics or the market) but also to pressures within the legal system. In that respect, we must recognize the role the bar plays. While the bar may pose a risk for judicial independence, it is also essential for maintaining it. The bar is the Court's main resource for ensuring that the judiciary is not co-opted by politics or market considerations. Lawyers, as officers of the Court (namely as officers of the legal system) are the legions the Court relies on when the political storms brew and ideas regarding jurisdiction stripping, court packing, or the like, are floated. The support of the bar is contingent, to no small degree, on the professional esteem the Court enjoys. Traditionally, the Israeli Court was held in high regard by leading members of the bar. The justices were of the highest calibre, and the decisions—even if criticized—were studied with the utmost respect. This still is the case. However, the bar began to sense a lack of judicial attention to civil and criminal cases (the "ordinary cases," as distinguished from the high-profile constitutional cases), which led to a clash between the bar and the Supreme Court in the late 1990s. This was resolved in part by changing the rules of procedure so that arguments before the Supreme Court in civil and criminal matters would be primarily in writing (and kept short). But the unease persisted. Questions were raised regarding the choices justices made in hiring clerks, with the implication that personal or familiar connections played a role. Concerns were also raised regarding the lack of clear rules with respect to recusal. A petition requesting that a Supreme Court justice recuse himself given his personal ties with a lawyer in the case was filed with the Supreme Court by a third party (a journalist). The Court unfortunately declared that its own ethical guidelines were not binding upon itself, and thus opened itself to criticism by the media and the bar.[38]

The next decade saw the tension between the bar and the judiciary focused on the lower courts: the bar claimed that some judges were misconducting themselves by arriving unprepared, by treating lawyers disrespectfully, or by otherwise acting in a manner unbecoming a judge. The bar asked for an official channel through which to launch complaints, and suggested that an annual feedback mechanism be devised by the judiciary. The latter vehemently opposed the idea, quoting concerns of judicial independence: with the sword of the evaluation process hanging over their heads, judges might be pressured into appeasing the lawyers rather than run the trial according to their best professional

38 CrimA 1182/99 *Horowitz v. State of Israel* IsrSC 54(2) 49, 51-52, upheld, although in softer language, in HCJ 1622/00 *Itzhak v. President of the Supreme Court* IsrSC 54(2) 54. The facts of the case were unique, since the request for recusal came from a reporter, not from parties to the criminal case.

understanding. The bar insisted, and formed its own process of judicial evaluation by sending a questionnaire to all members of the bar and publicizing the ranking of the various lower court judges. The judiciary responded by boycotting any and all events organized by the bar, including the yearly gathering of the legal profession in the resort city of Eilat. The bar eventually backed down, but not before two reforms were implemented. First, the Commission for Complaints against Judges (or the Judicial Ombudsman) was established. This commission, headed by a retired Supreme Justice, was empowered by law to examine complaints against the manner in which judges conduct the trial (not, of course, the merit of their decision, but the way they behave towards the litigants, the duration of the trial, and other such managerial matters). This mechanism also monitors delays in the trials, referred to above, and may discipline judges whose managerial conduct was found lacking. Second, binding ethical rules for the judiciary were promulgated, dealing primarily with matters of conflict of interests, and a judicial ethics commission was established to enforce the rules.[39]

These developments demonstrate that the operational closure of the system relies not only on the ability of the system to resist the pressure from external systems, but also on its ability to manage the professional relations within the system. Judicial non-dependence encompasses also "independence" from the bar and, on an individual level, from the Administration of the Courts. Yet for judicial independence to be a meaningful concept, the "dependency" of judges on the support they receive from the professional community (and consequently, their professional accountability) must also be acknowledged.

I. CONCLUSION

The Israeli democracy has long enjoyed judicial independence; its legal system was sufficiently closed to resist modification and "hacking," but cognitively open to accommodate claims raised by neighbouring systems. However, recent developments raise the concerns that the level of friction between the systems—law, politics, and the media—has increased. On paper, the Israeli Court is stronger than ever: it is armed with the

39 The ethical rules are available on the Supreme Court of Israel's website, online: The State of Israel Judicial Authority elyon1.court.gov.il/eng/home/index.html.

power to exercise constitutional judicial review; it is equipped with sophisticated interpretative tools; and it has developed advanced doctrines in administrative law which allow it to decide on the reasonability of almost all governmental decisions. However, the resistance of the political system is such that the Court is actually weaker. It cannot use its powers pursuant to the doctrine's internal logic for fear the political system would retaliate. The procedural protections against amending the Basic Laws governing the judiciary are basically non-existent, and the *Basic Law: The Judiciary* is not amended out of respect of the political parties to constitutional convention. This convention may prove too weak, should the Court hand down a truly controversial decision. Moreover, every now and then, the political system wags a bill that would strip jurisdiction or curtail the power of the court in some other way, so as to put the Court on notice. The executive system is also showing signs of resistance: the government is now frequently "taking its time" to fully comply and effectuate orders of the Court, forcing petitioners to bring applications for contempt of court (at which point the executive complies, at least partially, with the Court's order). Members of the bar (and the academia) are less willing to rise to the defence of the Court (although the Court still enjoys their support, even if to a lesser degree), due to their unease regarding the manner in which the constitutional revolution has come about. All in all, the Court is "lonelier" today, in the sense that agents of neighbouring systems, such as the academy, the bureaucracy, political parties, the media—and even agents within the legal system, such as the bar—are less willing to actively defend the independence of the judiciary to further develop Israeli law at its discretion.

In a sense, the Israeli Court has been more "Canadian" than its Canadian counterpart in trying to lead the way towards a better democracy. The *Provincial Judges Reference* is certainly a noble attempt at that. But Canada (and the Canadian judiciary) enjoys a written, comprehensive constitution which explicitly states its supremacy, whereas Israel operates with incomplete Basic Laws the Court has (originally) declared as constitutional. Hopefully the Knesset will proceed with its quest to complete a comprehensive constitution (in a less adversarial manner) despite the deep-seated misgivings some politicians harbor towards the judiciary. Preferably, such a constitution would include adequate protections to the judiciary, including to judicial salaries, in the form of a buffer similar to the one set out by Chief Justice Lamer in the *Provincial Judges Reference*.