Judicial Activism in Israel

Eli M Salzberger*

1. Introduction

The Israeli judiciary is portrayed by both Israeli and non-Israeli scholars as one of the most activist judiciaries in the world,[1] but also as one of a very high quality. The quality of the Israeli judiciary and especially of its Supreme Court was acknowledged recently by Lord Wolf, the former 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.[2] I believe that these two characteristics in the Israeli case are interrelated – the quality of the judges in Israel have a baring on their willingness to be activist, and this activism influences their quality perception. Whether one can generalize from the Israeli case will be left as an open question in this chapter.

The aim of this chapter is to describe the manifestations of judicial activism in Israel in various fields of law and to analyze the sources of this activism. For this purpose a definition of judicial activism is in need. There are various and different such definitions to an extent some scholars cast a doubt whether this concept is at all prolific and can be a basis for scientific

* Dean and professor of law, Faculty of Law, University of Haifa. I am grateful to Yair Merom for valuable research assistance.

[1] See, for example, Y. Dotan, "Judicial Accountability in Israel: The High Court of Justice and the Phenomena of Judicial Hyperactivism", 8 *Israeli Affairs* 87 (2002) ; M. Edelman, "The Judicialization of Politics in Israel", 15 *Int'l Pol. Sci. Rev.* 177 (1994)

[2] Lord Wolf's Address at the Hebrew University, as reported in Haaretz 5.12.03. Lord Wolf repeated this statement in a conference honoring President Barak with his retirement from the Supreme Court, held in the Faculty of Law, University of Haifa on December 27th 2006.

comparative analysis. Within the limited scope of this paper I cannot delve into this interesting debate and will limit myself with identifying two major groups of definitions of judicial activism, attempting to describe the Israeli judiciary as activist according to both grand approaches.

One group of definitions can be viewed as emerging from a jurisprudential vantage point, the other from a political science or theory of the state viewpoint. The jurisprudential gateway offers a non-relational definition of judicial activism – examining to which extent courts allow themselves leeway, freedom and discretion in interpreting existing norms (constitutional and legislative and indeed common law ones) and to what degree the courts allow themselves departures from previous rulings – the degree of changes in the law the source of which are the courts. The main framework of analysis here is a theory of the law, theory of judicial discretion and interpretation.

The political science gateway adopts a relational definition to judicial activism, focusing on the role of courts in shaping collective decision-making in society relative to the role of the other branches of government – the legislature and the executive, and in relation to the public opinion. In this category emphasis is given to the area of public law and to the degree in which courts scrutinize and review decisions of the other branches of government. The main framework for this kind of analysis is the theory of the state, in general, and the doctrine of separation of powers, in particular.

The courts in Israel can be regarded as activist according to both grand definitions. They have become one of the country's most significant law-

makers, as well as political establishments. Above all, the Supreme Court of Israel emerged as a 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.[3]

It is not surprising, therefore, that judicial activism is on the scholarly agenda in Israel for the last 35 years and on the public agenda for the last 20 years. One of the leading law journals in Israel had dedicated a whole volume to judicial activism in Israel already in 1992.[4] In recent years, the public debate around the issue was very much instigated by the rhetoric and reasoning that characterizes the Supreme Court in the era of Justice Barak (who was appointed to the Supreme Court in 1979 and retired as its President on 2006) and especially following his academic publications beginning with the book on judicial discretion, published in 1987,[5] However, I will try to show in this chapter that judicial activism can characterize the Israeli Supreme Court from the very beginning of its operation in 1949.

This chapter will elaborate on judicial activism of the Israeli judiciary, and especially its Supreme Court according to both definitional approaches. Section 3 will focus on public law and mainly on the political science definition of judicial activism, while Section 4 will focus on private law vis-

[3] See, for example, Evelyn Gordon, Is it Legitimate to Criticize the Supreme Court, 1998(3) *Azure* 1 (1998)
[4] Tel-Aviv University Law Review ("Iyunei Mishpat"), vol. 17 Special Issue: Judicial Activism in Israel (1992-1993) [Hebrew].
[5] A. Barak, *Judicial Discretion* (Yadin Kaufmann trans., 1989) (1987).

à-vis the jurisprudential vantage point. Section 2 will offer some possible sources for the intense activism of the Israeli judiciary, and Section 5 will offer some concluding remarks and future prospects.

2. The Sources for Judicial Activism in Israel

Judicial activism of the Israeli judiciary and especially of its Supreme Court is a consequence of an intriguing combination of institutional and personal factors, among which are the structure of Israel's political system and separation of powers, the fact that Israeli legal system can be classified as a mixed legal system, the judicial selection procedure which secured high level of judicial independence and presence of academic jurists at the Supreme Court. I will elaborate below on each of these factors. However, in the last 25 years Israeli judicial activism has been greatly influenced by the jurisprudence of Aharon Barak who has just retired from the Supreme Court after 28 years on the bench and 11 years as the President of the Court. Let me begin with a short summery of Barak's legal and judicial philosophy, which was both inspired by the founding generation of Israel's legal system, and had an immense influence on the contemporary dominant Israeli jurisprudence and Israeli judges self-perception of the judicial roles.

2.1 Aharon Barak's Theory of Law

One of the main sources for judicial activism in Israel in the past 25 years has been the theory of law of Aharon Barak, who was appointed to the Supreme Court of Israel in 1979 and served as its President from 1995 until the mandatory retirement at the age of 70 which he reached in September

2006. Prior to his appointment to the Supreme Court, Barak served as Israel's most powerful Attorney General who among, other things, brought to the resignation of Prime Minister Yitzhak Rabin in 1977 (resignation which, subsequently, brought to the election of the first right wing government in Israel's history). Before that, Barak was a professor of law and Dean of the Faculty of Law at the Hebrew University, specializing primarily in private law. But it is mainly his writings since the 1980s in the realm of public law and legal and judicial theory, which positioned Barak as one of the world champions of legal activism, although he himself does not think the term "judicial activism" is a meaningful and useful one.[6] These writings provided a solid theoretical bedrock for his judicial decisions and the prevailing judicial approach of Israel's Supreme Court and, in fact, the whole judiciary in Israel.

Barak adopts a Dworkinian concept of law. His first major book in this realm – on judicial discretion was published in 1987,[7] one year after Dworkin's *Laws Empire*. This book was followed by five thick volumes on judicial interpretation (1992-2001),[8] alongside dozens of article on various aspects of the judicial role, the Israeli legal system, its legal sources and traditions. Like Dworkin, Barak adopts a broad concept of the law, which includes not only the traditional legal sources such as written norms and precedents, but also unwritten principles and doctrines. Every human situation or conflict, according to Barak, is governed by the law; the law has

[6] A. Barak, "Foreword: a Judge on Judging: The Role of Supreme Court in a Democracy", 116 *Harv. L. Rev***.** 16, 27 (2002).
[7] A. Barak, *Judicial Discretion* (Yadin Kaufmann trans., 1989) (1987).
[8] A. Barak, *Interpretation in the Law* (1992-2001). The 5 volumes are: vol. 1: The General Theory, vol. 2: Statutory Interpretation, vol. 3: Constitutional Interpretation, vol. 4: The Interpretation of Contracts, vol.5: The Interpretation of wills.

answers to every question. However, unlike Dworkin who argues that every question has only one legal answer, Barak believes that judges do have discretion.

In other words, Barak takes a different position from both H.L.A Hart and Ronald Dworkin with regard to judicial discretion. While Hart, holding a positivist and narrow approach of the law, argues that in many cases there is no legal answer to a dispute brought to a court and, therefore, judges perform extra-legal discretion,[9] and Dworkin believes that there is no judicial discretion because every question brought to the court has only one correct legal answer,[10] Barak holds that in many cases judges do have discretion, but this discretion is within the law. Judicial discretion exits, according to Barak, in relation to determining the facts relevant to settle a dispute, in the choice of norms that govern the dispute and in relation to the content of the norms. Judges have to choose among the possible solutions, which are all solution within the law. An option is within the law if the legal community views it as a legal option, or that its selection does not bring to astonishment or lack of trust by the legal community.[11]

Barak distinguishes between three types of legal discretion – interpretation, feeling gaps and the need to develop the law. Interpretation sets the boundaries of existing legal text – statutory or judicial - and in performing interpretive activity a judge operates as a quasi-subordinate or delegated legislature. The judicial activity of feeling gaps is beyond existing norms; it

[9] H.L, A Hart, *The Concept of Law* (1961), p. 77-96.
[10] R. Dworkin, *Law's Empire* (1986) p. 238-258. R. Dworkin, *Taking Rights Seriously* 81 (1977). R. Dworkin, "Judicial Discretion", 60 *J. Phil*. 624,(1963) p. 624-625.
[11] A. Barak, *Judicial Discretion* (Yadin Kaufmann trans., 1989) (1987), p. 7-27.

does not engage in interpreting texts but in creating them. In this activity the judge operates as a quasi-legislature. Legal development includes mitigating contradictions or correcting mistakes in existing legal norms and in this activity the judge is acting not as a quasi legislature but as a full-fledged legislature. Barak asserts that in the Continental legal tradition judges have the authority to engage in interpretive activity and in feeling gaps in legislation (but not in precedents); in the Common Law tradition judges have the authority to engage in interpretive activity, in feeling gaps in previous precedents (but not in legislation) and in developing the law. As a mixed legal system, judges in Israel have the authority to engage in interpretation, in feeling gaps in both legislative and judicial norms and in developing the law.[12]

Barak's most extensive endeavor is a theory of legal interpretation. In performing interpretive work, judges ought not be seen as agents of the legislature or another text creator, but as "junior partners". Interpretation has two stages: first the judge has to find all possible meanings, which have a textual anchor in the norm subject to interpretation. Among these possibilities the judge has to adopt the option, which materializes the purpose of the text. The purpose is neither the dictionary meaning of the text (literal meaning or textual interpretation), nor the intent of the drafter of the text. Purpose includes both subjective and objective elements, the latter of which includes principles and legal doctrines of the legal system. In this description there is again resemblances to Dworkin's theory of interpretation that specifies two similar stages – finding all the options which *fit* the past

[12] Foundation of Law act, 1980, 34 L.S.I 1981 (1979-1980). A. Barak, *Judicial Discretion* (Yadin Kaufmann trans., 1989) (1987), p. 83-89, 105-110. A. Barak, "Gaps (Lacuna) in the Law and the Israeli Experience", *Mishpatim* 20 (1993) 233, [Hebrew].

history of the legal system and choosing among them the most *justified* solution.

The combination of Barak's broad concept of the law (which itself enables to distinguish from within the law between the various judicial activities, a distinction that is not possible for a positivist like Hart), his departure from Dworkin regarding judicial discretion and the application of these theoretical conjunctures to the Israeli legal system, paves the way to an ultra activist judiciary.

2.2 The Israeli political system

Despite the immense intellectual influence of Aharon Barak on the judiciary in Israel, I believe that judicial activism characterizes the Israeli judiciary and especially its Supreme Court from the very establishment of the State of Israel in 1948. In a special volume of Tel Aviv University Law Review – Iyunei Mishpat – on judicial activism in Israel, published in 1993, Professor Mauntner wrote on a shift from formalism to values in the jurisprudence of the Israeli Supreme Court, which he identifies as taking place from the early 1980s.[13] However, one can argue that the main shift was with regard to judicial rhetoric rather than the substantive conduct of the judiciary vis-à-vis judicial activism according to both grand definitions. It was after all the generation of Israel's Supreme Court founding fathers that had launched the construction of a judicial-made bill of rights, that had issued orders against Israel's first Prime Minister – David Ben Gurion – in the midst of the

[13] M. Mautner, "The Decline of Formalism and the Rise of Values in Israeli Law", 17 *Tel-Aviv University Law Review* 503 (1993) [Hebrew].

Independence War and that had used broad interpretive concepts to departure from English precedents. What can thus be the additional sources for judicial activism in Israel? One possible explanation is the mixed character of the Israeli political and legal system and its structure of government.

The Israeli political system is an intriguing combination of a Westminster and a Continental-European type of parliamentary democracy, with an increasing effective American flavoring.[14] The State of Israel emerged from the British rule of Palestine, and it inherited major components of the British system of government. Thus, as in the UK, there is no real separation of powers between the legislature and the executive. But unlike the British system, Israel adopted proportional representation, which means a multi-parties unicameral parliament and coalition governments. In a separation of powers system, such as the one in the US, the judiciary has a great degree of freedom or discretion, resulting from the inability of the other branches to reverse its decisions. Such a structure of government creates conditions for judicial activism (in terms of the political science definition). This structural component has significant bearing on the explanation of the differences between the American and the British judiciary: in the UK, due to its parliamentary system, the judiciary has far less freedom to make decisions immune to reversal by the other branches, which are likely to bring to a less activist judiciary.[15]

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[14] A. Arian, *Politics in Israel: The Second Generation* (1985). P. Medding, *The founding of Israeli Democracy*, 1948-1967 (1990).

[15] Eli M Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or :Why Do We Have an Independent Judiciary", 13 *International Review of Law and Economics* 349 (1993),

The coalition structure of governments in Israel compensates for the lack of separation of powers, because collective public decisions require the consent of different parties with diverse ideologies, interests and motivations (instead of the consent of different sources of governmental powers as is in the US). Indeed, one can argue that in a system of separation of powers or coalition government more decision-making powers will be delegated to the judiciary than in a first-past-the-vote parliamentary system. This structural explanation for judicial activism is based on the analytical framework of Law and Economics and Public Choice, on which I elaborated elsewhere.[16]

This framework can provide an important explanation for the fact that the Israeli judiciary, and especially its Supreme Court, despite its historical "British" roots and organizational similarities (e.g. the panel system), has been distancing itself from the English judiciary in its growing activism and involvement in political matters long before the English judiciary took this direction. It can also explain why we witness growing activism of the Israeli judiciary in the past 25 years: since the election of the first right-wing government in 1977 Israel's political system can be characterize as less stable. Frequent changes of government, reliance on small parties and on a larger number of parties in the coalition brought to more delegation of collective decision-making powers to the Supreme Court, making it more activist.

2.3 Judicial Activism as a Consequence of the Israeli form of Separation of Powers

[16] Ibid. See also Stefan Voigt and Eli M Salzberger, "Choosing Not to Choose: When Politicians Choose to Delegate Powers", 55 *Kyklos*, 289 (2002).

A close 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 horizontal 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 activist nature of the judiciary, but also the substantive stances that the Supreme Court occupied and also the intensity of its voice and role in collective decision-making in Israel.[17]

On the level of positive analysis one can argue that the unprecedented judicial activism in Israel in the last decades 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 collective 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 until 1977, 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.

[17] For a more elaborate and analytical explanation see Salzberger, Supra Note 15, Stefan Voigt and Eli Salzberger, Supra Note 16, 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 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.[18] Whatever the case may be, the independence of the judiciary provided by the political branches in their early-days legislation, among which is the procedure for judicial selection (on which I elaborate below), enabled the Supreme Court to fulfill this task.

2.4 The Israeli legal system as a mixed legal system,

Like the political system and structure of government, the Israeli legal system combines elements from English Common Law and European Civil Law, with an increasing effective American and recently Canadian constitutional impact.

Palestine was under Ottoman rule for 400 hundred years (1514-1914) and the Ottoman law, consisting of the Mejelle – the Ottoman code (1864-1876) which was based on Islamic law and on civil codes, mainly the French – was the main source of law. One of the liberal elements, which had been introduced by the Ottomans – autonomy for each religious community to regulate its affairs in the realm of personal status matters (family law) for its members, is still the prevailing legal framework In Israel today. In 1917 Palestine was conquered by Britain. The same year saw the Balfour declaration – a letter sent by the British Foreign Secretary to Lord Rothschild endorsing the policy to "view with favor the establishment in

[18] On an 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 Alain Marciano and Jean (eds.*) How to Shape A Democratic State,* 2005.

Palestine of a national home for the Jewish people". In 1920 Britain was entrusted by the international community with a Mandate on Palestine. This Mandate (foreign rule were the occupant is the trustee of the League of Nations) was part of the fourth category of Mandates, applied to previously Ottoman territories, which were fairly developed and on their way to independence.

The Palestine Order in Council enacted in 1922 and served as the constitutional norm during the Mandate years, held (article 46) that Ottoman law will continue to be in force, in addition to new laws enacted by the Mandatory government. Courts were instructed to apply to English Common Law and principles of Equity when faced with problems solved neither by Ottoman law nor by new legislation. With the establishment of the State of Israel in 1948, the substantive Mandatory law was incorporated to Israeli law through article 11 of the Law and Administration Ordinance,[19] thus maintaining the Common Law and Equity as the residual law, alongside Ottoman and Mandatory legislation.

Along the years and due to the significant presence in the Ministry of justice of immigrants from Continental Europe, especially German Jews, the Knesset – the Israeli parliament – has enacted various statutes, mainly in the fields of private law, replacing Common law with Civil Law legal thinking combined with some legal principles of Talmudic Jewish Law. Noticeable examples are the Laws of Contracts (1970 and 1973), The Law of Agency (1965), The Law of Sales (1965), the Law of Inheritance (1965) and the Law of Unjust Enrichment (1979). In recent years a special law reform

[19] Section 11 of the Law and Administration Ordinance, 1948, the Palestine Gazette, Sup. No. 1.

commission is working to amalgamate all these statutes into an original Israeli civil code. In 1980 the links to the Common Law were formally abolished with the enactment of the Foundations of Law Act.[20] This Law replaces the Common Law and Equity – the residual sources of law set by article 46 of the Palestine Order in Council - with Israeli Common Law: in case of question brought to a court which is not answered by legislation, precedent or analogy, the court is called to apply "the principles of freedom, justice, equity and peace of Israel's heritage".[21]

It is impossible in this framework to elaborate on the hundreds of pages of academic articles and courts extensive discussions of the Foundations of Law Act and the meaning of "the principles of freedom, justice, equity and peace of Israel's heritage". However, there is no question that the unique substance of Israeli law, combing increasing number of original legislation adopting both Common Law and Civil Law doctrines, alongside past layers of law and an original residual source of law, called upon the courts to be creative and activist (this time according to a jurisprudential definition) in interpreting the law and providing for legal coherence.

2.5 The Israeli courts structure

Another source for judicial activism in Israel is the structure of the judiciary and especially the jurisdiction of the Israeli Supreme Court. Again, a brief historical account can assist to understand the current arrangements.

[20] Foundation of Law Act, 1980, 34 L.S.I. 1981 (1979-1980)
[21] Id. at Section 1.

When the Mandatory regime was established in Palestine following World War I and despite the continuity of substantive law, the Palestine Order in Council set a new structure of courts. The prime objective of the British Mandatory regime 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 tiers 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.[22]

Jewish and Arab non-political professionals jurists 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 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.[23]

The purpose of this centralized public law enforcement system was to keep 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

[22] 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.
[23] Section 43 of the *Palestine Order in Council 1922*.

established in 1948 and the structure of the courts was maintained,[24] 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 or other public authority can petition directly the Supreme Court and does not even have to be represented. When the State of Israel was established the only change in this institutional structure of the courts was abolishing the right to appeal to the Privy Council in London, a factor that increased even further the powers of the new Israeli judiciary and especially that of the Supreme Court.

To this institutional feature one should also add a 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".[25] The intention of the Israeli legislature was to keep the Mandatory jurisdiction of the High Court of Justice which was regulated in 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 "administration of justice" turned to become the broader concept of "interests of justice" which is the

[24] 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.
[25] section 15 of *Basic Law: Judicature*, previously section 7 of the *Courts Act 1957*

formal foundations for the Court's very broad perception of its jurisdiction and for judicial activism in Israel, as will be elaborated later.

For similar reasons of maintaining maximum control, 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. Despite the establishment of various other courts, such as Labor courts and military courts, the judiciary in Israel today remained a compact and hierarchical system, comprising around 500 judges in the general system, headed by a powerful Supreme Court which serves as a last instance of appeals in criminal and civil matters and encompass an original jurisdiction in the realm of public law – both administrative and constitutional matters. The Supreme Courts currently hears more than 10,000 cases a year.[26]

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 well as a court for public law cases and as a constitutional court (in most civil law countries constitutional courts are totally separated from the general system and in some of them this is the case also for administrative courts). Likewise, the judges in

[26] Due to the increasing load of public law cases of the Supreme Court some of its powers were delegated in 2000 to the district courts in *The Administrative Affairs Courts Act 2000*,. However, the jurisdiction of the district courts is limited to specific and minor matters, whereas the general public law jurisdiction is still in the hands of the Supreme Court as a first and last instance.

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 that 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, which, in my opinion, is a major source for judicial activism. 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.[27]

2.6 The Composition of the Judiciary and Judicial Selection

A crucial source for judicial activism in Israel is the composition of the Israeli judiciary and especially the composition of the Supreme Court. In fact, I believe that this important feature can explain not only judicial activism but also the intriguing fact that Israel belongs to a very small club of countries which managed to have uninterrupted democracy in the last 60 years, and among even a smaller club of democratic countries which were established after World War II. This is indeed an enigma in light of the fact that Israel is in constant state of emergency since its establishment and one of

[27] K. Malleson and P. Russel, (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*. 2005.

the few countries in the world in which there is no written constitution, which limits the powers of government, guarantees individual rights and secures the independence of the 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,

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 its first powerful leader, 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 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.[28]

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

[28] A recent survey of the confidence of Israelies in state institutions in comparative perspective is: A. Arian, D. Nahmias, D. Navot and D. Shany *The Israeli Democracy Index* (2003),

legal formalist jurisprudence and discourse. In the 1980's, and especially under the leadership of Meir Shamgar (1983 -1995) and Aharon Barak (1995-2006) as Presidents of the Court, 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.

How does all this come about? I believe that the Court's composition during Israel's formative years and the judges' selection procedure set in the early 1950's are important explanations. Again a historical note is in place. As explained above, the prime objective of the British Mandatory regime was not to construct a liberal democracy in Palestine, but rather to create a centralized and effective government. These objectives resulted in the compact structure of the judiciary and in depositing the power to appointment all judges to the High Commissioner, while the Supreme Court appointees had to be approved in London.[29] Judges were to hold office during His Majesty's pleasure.[30] 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.

When the State of Israel was established in 1948 the structure of the courts was maintained. All powers of the High Commissioner were transferred to

[29] 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 by the *Courts Ordinance* 1940.
[30] Section 15 of the *Palestine Order in Council 1922*.

the Provisional Government.[31] 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 was almost an historical accident. 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 1930s with the rise of Nazism). His most important impact was the nomination of 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.[32] 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 other branches of government, most of whom were born east of the river Oder.

[31] Law and Administration Ordinance 1948, section 14. The continuity of law was regulated in section 11.
[32] S. Erel, *The Yekkim – Fifty Years of German-Speaking Immigration to Israel* (1985) [Hebrew], 187

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.[33] Among the first five judges of the Court, two were graduates of Anglo-American universities, two judges were graduates of Austrian or German universities and the fifth judge was not a jurist but a Rabbi. This balance between the Anglo-American and the Continental-German schools was maintained in the first two additions to the Court 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 justices 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.

The western legal world is usually divided between the Anglo-American legal systems and the European-Continental ones, but it seems that the more important distinction that emerges from the case of the Israeli Supreme Court is not the Common law versus Civil 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

[33] 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* (2000) 15, 79.

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 decades has begun to exercise significant power over the other branches, is yet to be explained.

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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.[34] 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. The composition of the committee, which has not changed since 1953, includes 3 Supreme Court justices, 2 representatives of the Bar, 2 cabinet ministers and 2 Knesset members. Thus, despite political input of the two Knesset members (traditionally one from the opposition) and two ministers, there is a majority of 5 to 4 for non-politicians (the judges and the Bar members) and it gives the three 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) is presiding over this committee.

[34] section 15-21 of the Judges Act *1953*

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 jurisdiction of the Court and its substantive powers.[35] 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, the tradition is that 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.

The judicial selection process, which is common to all judicial posts in Israel and in which the professionals on the judicial appointments commission have the majority vote, enabled Israel to maintain a Supreme Court and

[35] 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.

subordinated courts with a high degree of professionalism, free of party politics, corruption and the like. The semi-accidental composition of the Court in 1949 together with the selection procedure of judges paved the way to a liberal and activist Court, which managed to construct and protect democracy in Israel.

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 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 unofficially 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 and at least one seat for an orthodox Jew has always been reserved since. The first Spharadic was appointed to the Supreme Court in 1962 and since then at least one seat for a spharadic judge

is unofficially reserved.[36] The first woman judge was appointed to the Supreme Court in 1977, but since then the number of women judges has increased steadily to about a half of the Court, including its new President– Dorit Beinish.[37] 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,[38] and on 2004 another Arab judge 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. This feature can explain the high public trust in the Supreme Court, which enabled the Court to adopt its activist style.

Be that as it may, the judicial selection procedure and the dominance of the three Supreme Court justices in the committee managed to maintain the ideological tone of the Court, which has always been more liberal and dovish 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

[36] On the politics of specials seats in the SC see M. Birnhack and D. Gusarski,"Designated Chairs, Dissenting Opinions and Judicial Pluralism", 22 *Iyunei Mishpat* 499 (1999*)* [Hebrew].

[37] 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.

[38] 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", 35 *Israel Law Review* 481 (2001).

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.[39] 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 branches. Recently, the former Dean of Tel Aviv University Law Faculty defended the ideology of the Court basing his argument on System Analysis.[40] The law, argued Menachem Mauntner, in response to calls to bring about a more diverse Supreme Court not only in terms of ethnic, gender and religion,

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[39] See M. 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), 223-251; and more specifically on the personal backgrounds of the English Judiciary Burton Atkins, "Judicial Selection in Context: The American and English Experience", 77 *Ky. L.J* 577 (1989).

[40] M. Mautner, "The Selection of Judges to A Supreme Court in a Multi-Cultural Society", 19 *Mechkarei Mishpat*: 423 (2003) [Hebrew].

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.

Following the analysis of the possible sources for judicial activism in Israel, it is now time to elaborate on the manifestations of such activism in both realms of public and private law. I will begin with the fields of public law, in which judicial activism is manifested mainly vis-à-vis the other branches of government, and then turn to the areas of private law, in which judicial activism is manifested mainly vis-a-vis broad and expansive interpretation of written norms and precedents.

3. Judicial Activism in the Realm of Public Law

Although the mix nature of the Israeli legal system is more apparent in the areas of private law, as many statutes enacted from the establishment of the state shifted Israeli substantive law away from doctrines of the Common Law towards the form and substance of the Civil law legal thinking, it is the realm of public law that provoked the bitter debates within the legal community and the public in large about judicial activism and the role of the Supreme Court. Here also the jurisprudence of the Israeli Supreme Court can be characterized as mixed one. Although the basic foundations of public law, especially administrative law, were British, along the years the Supreme Court imported many elements of American constitutional law, Canadian Constitutional law and indeed from the jurisprudence of the constitutional courts in Continental

Europe. In order to understand judicial activism in the area of public law, some institutional and historical background will be helpful.

3.1 Historical and institutional background

As elaborated above, when the State of Israel was established it inherited the British Mandatory courts structure and the substantive law that was in force during the Mandate years. Thus, the newly established Supreme Court inherited the powers of the Mandatory Supreme Court with original jurisdiction of a High Court of Justice, hearing applications by individuals against the various branches of government and other public bodies, with the traditional causes of intervention developed by English administrative law. However, the constitutional process that began in 1948 and has not been concluded since brought the Court to seek additional doctrines and sources for the development of Israeli public law and jurisprudence with an activist nature.

The 1947 Partition Resolution of the United Nations, which laid the international law foundation of the establishment of Israel, also portrayed the foundations of the constitutional structure of Israel. The resolution set a date for electing a constituent assembly, while a provisional government is to be in charge. It also portrayed important elements of the substance of the constitution, among which are parliamentary democracy with proportional elections, equal rights and fundamental freedoms.

A few hours before the termination of the Mandate, the Provisional Council ratified unanimously the Declaration of the Establishment of the State of

Israel, portraying the new state as Jewish and Democratic, The Declaration holds that the State of Israel:

> "…will be open for Jewish immigration and for the ingathering of the exiles; it will foster the development of the country for the benefit of all its inhabitants; it will based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective or religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations..". [41]

Elections for a 120 members Constituent Assembly were held on January 1949, but the newly elected body declared itself as the legislature entitled the Knesset and it decided in 1950 against the immediate construction of a constitution. Instead, it ordered that the Knesset committee for Constitution, Law and Legal Matters to prepare gradually basic laws which will eventually be amalgamated into a constitution.[42] The first Basic Law was enacted in

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[41] Declaration of the Establishment of the State of Israel , 1948, 1 L.S.I 1 (1948),available at http://www.knesset.gov.il/docs/eng/megilat

[42] The "compromise" the first Knesset reached in 1950, known as the "Harari Resolution". For full text on the Harry resolution see DK (1950) 1743 , Also available at: http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4

The Resolution states: "The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State's constitution."
For a description of the Harari Resolution, see Gary J. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* 106 (1993). D. Barak-Erez, "From an Unwritten to a Written Constitution: The

1958 dealing with the Knesset. Additional 8 Basic Laws were enacted between 1960 and 1988, dealing mainly with the various powers of government and the structural elements of the constitution. The last Basic Law in this group – Basic Law the State Comptroller – enacted in 1988 - regulated the fourth branch of government. However, the normative status of the basic laws was not dealt with and the substantive parts of a constitution, primarily a bill of rights, were left for future deliberations. The legal status of the Declaration of Independence was also left in vague. These absent elements called for judicial consideration and creativity.

Following several failed attempts of Knesset members, mostly from the political center-left parties to enact a comprehensive basic law with an entrenched bill of rights,[43] the tactics of the pro-human rights camp changed and in the early 1990s they decided to try a different path – enacting separate basic laws dealing with specific rights, which eventually be amalgamated into a bill of rights as part of a comprehensive constitution. The result was two basic laws, which were enacted in 1992 and slightly modified in 1994 – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.[44]

Israeli Challenge in American Perspective", 26 *Colum. H. R. L. Rev*. 309, 315 (1995). A. Shapira, "The Status of Fundamental Individual Rights in the Absence of a Written Constitution", 9 *Isr. L. Rev*. 497 (1974); A. Shapira, "Judicial Review Without a Constitution: The Israeli Paradox", 56 *Temp. L.Q*. 405 (1983).

[43] See for example: Draft Basic Law: Bill of Fundamental Human Rights, 1983, H.H. 1612, p. 111; For the history of the failed proposals to enact civil rights in Israel, see A. Rubinstein, *The Constitutional Law of the State of Israel* 704-707 (1991) [Hebrew]; R. Hirschel, "Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order", 46 *Am. J. Comp. L*. 427 (1988); See also A. Shapira, "Why Israel Has No Constitution", 37 St. Louis U. L. J. 283 (1993).

[44] Basic Law: Freedom of Occupation (S.H. 1994, No. 1454, p. 90) repeals and replaces the former Basic Law on Freedom of Occupation enacted in 1992 (S.H.1992, No. 1387, p. 114). Basic Law: Human Dignity and Liberty (S.H. 1992, No.1391, p. 150). The full text of this law is reprinted in 31 Israel Law Review 21-25 (1997).

Aharon Barak, already a veteran Supreme Court Justice at the time, was an active partner to these efforts. He appeared several times in front of the Knesset's Constitution, Law and Legal Matters Committee, and was instrumental in the Committee's choice for the Canadian Charter as the model for the structure of the Laws.

The new Basic Laws refer for the first time to the Declaration of Independence. Thus, article 1 of Basic Law: Freedom of Occupation reads: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel". The Laws also state for the first time the character of the State of Israel as a Jewish and Democratic State. Thus, section 1 of Basic Law: Human Dignity and Liberty reads: " The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." Among the rights mentioned in this law are the rights for life, body integrity and dignity, the right to property, the right to liberty and freedom of movement, the right to privacy and to intimacy.

But the most innovative part of the two Laws are the limitations articles (article 8 in Basic Law: Human Dignity and Liberty and Article 4 of Basic Law: Freedom of Occupation), which read: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is

required". The Laws, however, do not set any enforcement mechanism or provide for judicial review. They also do not specify what is the procedure for their amendment. All these questions, as well as the interpretation of the scope of rights guaranteed by them were left to judicial development, and paved the way to increasing judicial activism.[45]

3.2 Judicial Activism in early days of the State of Israel

From its very establishment, the Israeli Supreme Court did not hesitate to show substantive independence.[46] It issued injunctions against the Government in the midst of the Independence War of 1948, invalidating various decrees and orders.[47] It fell short, however, from performing judicial review of legislation as contradicting the rights and freedoms specified in the Declaration of Independence, holding that the Declaration is not a valid norm in Israel's pyramid of norms. In one of its first decisions – Leon v. Gubernick– the Court rejected the applicant's argument that Mandatory emergency legislation is not valid anymore in Israel as it contradicts the rights and freedoms specified in the Declaration of Independence.[48] The Court held that it has the authority to declare invalidity of a norm as contradicting (ultra vires) a higher norm, and that it is even willing to consider the arrangement in Article 1 of the Swiss Code according to which if the question raised to the Court has answer neither in legislation nor in precedent, the Court would set a

[45] Davis Kretzmer, "The New Basic Laws on Human Rights: A Revolution in Israeli Constitutional law?" 26 *Isr. L. Rev.* 238-246 (1992).; Menahem Hofnung, "The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel", 44 *Am. J. Comp. L.* 585-604 (1996)
[46] For the definition of substantive independence see Eli M Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary", 13 *Int'l Rev. L . & Econ* 349-379 (1993)
[47] See, for example, HCJ 7/48 Alkarbutli V. The Minister of Defense [1993] ISRSC 2(5) 15.
[48] HCJ 5/48 Leon & Others v. Acting Districts Commissioner of Tel-Aviv (Yehoshua Gubernik) [1948] ISRSC 1 58; IsrSJ 1 41.

solution as if it is the legislature. However, it ruled that the Declaration of Independence cannot be regarded as a valid legal norm and especially not as a constitutional norm.

When delivering these early decisions, the judges believed that a full constitution would be soon enacted. When this did not happened and the Knesset passed the 1950 Harari decision, which set the course for the gradual enactment of basic laws, the Court changed its attitude towards the Declaration of Independence. In the key 1953 decision of Kol Haam the Court ruled that although the Declaration cannot be considered as a constitution, it expresses the credo of the State of Israel and that statutes ought to be interpreted in light of the rights and freedoms specified in it.[49] This decision can be viewed as the foundation of a judge-made bill of rights, to which we will return below. But it is also significant in respect to a change of the Courts' rhetoric from a formal- English style of reasoning to an American-grand style, which can characterize an "activist" court.[50]

3.3 Judicial activism in form – access to the High Court of Justice

As elaborated before, the British inheritance to the State of Israel was a very centralized system of public law enforcement. The Mandatory regime's intention was to keep the review of public authorities in the hands of British judges with a tight scrutiny of the High Commissioner, but this institutional structure enabled the Israeli Supreme Court to become a key player in public

[49] HCJ 25/53 Kol Ha'am v. The Minister of Interior [1953] ISRSC 7 165.
[50] Karl n. Liewellyn, "A Realistic Jurisprudence – The Next Step", 30 *Colum. L. Rev*, 479-513 (1930).

decision-making in Israel. Let me relate first to the form of operation of the Court, before elaborating on the substantive norms it created.

In order to understand the practical, social and cultural impact of the Court its formal institutional structure ought to be viewed alongside the possibilities of day-to-day access to the Court. It can be very promising to have a court with formal powers to review any activities of the government, but if the access to it is very complicated or costly its effectiveness fades. Unlike equivalent institutions in other legal system, the access to the Israeli High Court of Justice is extremely easy, and the relief is fairly quick and efficient. One does not need to go through lower instances, there are no witnesses or regular trial procedures, the application to the Court is inexpensive and one does not even have to be represented.

According to regulations issued by the Minister of Justice,[51] the procedure of the Court is as follows: the petitioner applies for an order nisi, which oblige the reviewed authority to give reasons why its decision, act, or non-act should not be quashed. The petition has to be accompanied by an affidavit and a small fee. It is brought before one judge who can issue the requested order nisi or forward the petition to a panel of three judges, which can issue the order nisi or reject the petition. If an order nisi was issued, the respondent has to submit a reply within a set period of time, supported by an affidavit. Subsequently, there is a hearing in front of a panel of three or more judges, followed by a decision to make the order nisi absolute (allowing the petition) or to dismiss the petition.

[51] Regulations of Procedure of The High Court of Justice, 1984, K.T 6490, 2321.

A successful application to the High Court of Justice must overcome three hurdles. First, the Court should be convinced that the matter is within its jurisdiction or competence. Second, since the powers of the Court are discretionary, the applicant has to convince the Court that the petition ought to be decided. This is the stage in which questions of standing, justiciability, theoretical questions, clean-handedness etc. are dealt with. Third, the applicant has to show that the law has been violated by the respondent and that he or she are entitled to a relief. Let me demonstrate first the Court's activist approach with regard to the first two stages. The last stage relates to the substantive law applied (and indeed created) by the Court, on which I will elaborate later. The scope of relieves, which was also broadened by the Court with the years will not be dealt with in this limited framework.

3.3.1 Jurisdiction and Competence of the Court

The Mandatory and later the Israeli legislature defined the jurisdiction of the High Court of Justice with a very broad, though somehow vague, wording.[52] The Court has avoided a comprehensive discussion of the interpretation of its jurisdiction and of the relations between the two important subsections of the article defining of its powers. Instead, it took a pragmatic approach, dealing with the particular cases brought to it. The general outcome, though, is a very "liberal" interpretation of the Court's jurisdiction. In fact, the Court appears to see no limitations to its jurisdiction, other than questioning its discretion on

[52] Section 15(a) of Basic Law Judicature specifies that the HCJ will "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 (b) specifies that "without any prejudice to the generality of the previous subsection (a)" the Court is empowerd to issue Habeas Corpos, Mandamus, Certiorari and Prohibition – whereas those subject to review are State and local authorities and other bodies and individuals who exercise any public function by virtue of law.

whether to hear a case on its merits (the second hurdle). Even when jurisdiction could have been a major issue, the Court opted to present the question as issues of justiciability or discretionary powers, which means that if the state representative does not object to a decision on the merit the Court could move to hear the case, rather than dealing with the question of jurisdiction which ought to be raised by the Court even if both sides agree to its deliberation.

Let me elaborate on two key areas in which the Court held an activist view regarding its jurisdiction

Judicial Review of Legislation

One of the most striking examples for this "tactic" and the High Court of Justice's liberal interpretation of its jurisdiction is connected to its role as a constitutional court. In this sense two Israeli Supreme Court decisions can be regarded as equivalent of the famous American 1803 case of Marbury vs. Madison: The 1969 Bergman Case and the 1995 Mizrahi case.

As elaborated above, the First Knesset decided to enact basic laws rather than the immediate enactment of a constitution. Basic Law: the Knesset was the first to be enacted. Section 4 of this law reads "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset". Towards the 1969 general elections the Knesset enacted a law, dealing among other things, with the allocation of state funds to finance the coming election campaign. According

to this statute, parties not represented in the incumbent Knesset were not entitled to any financial assistance from the state. The bill passed three readings, but in two of them the majority amounted to less than half (61) of all Knesset members.

Aharon Bergman, a lawyer, petitioned to the Supreme Court asking it to order the Minister of Finance not to act according to the law. This was an indirect attack on the validity of the law (rather than a direct attack – asking the Court to declare the invalidity of the law). The main argument of the petitioner was that the law is ultra vires because it violates the elections equality, and thus in violation of section 4 of Basic Law: the Knesset, which can be altered only by majority of the Knesset members (61) required in all stages of the legislation. The Attorney General, on behalf of the respondents, being assured in the solid case of the State, namely the validity of the statute, did not argue a lack of jurisdiction. Instead he argued on the merits of the case, that the requirement of equality refers only to the election system – meaning one vote to each voter – and not beyond that.

The Court, following the lack of argument on behalf of the respondents, decided to table for future considerations the question whether it is authorized at all to examine the validity of Knesset legislation on the basis of its substance, a question that the Court dubbed “justiciability”. On the merits of the case, it opted for a broad interpretation of “equality”, ruling that section 4 is about more than the mere technicality of carrying out the elections, and that

the Finance Law contradicts the principle of equality because it discriminates between old and new parties.[53]

The activist approach of the Court is apparent by the broad interpretation of the statute (which apparently was not envisaged by the Attorney General who did not object a decision to the merits of the case), which laid the foundations for the primacy of the equality principle in substantive Israeli public law; it is also apparent by the Court's classification of the question. The preliminary question in the Bergman case – whether the Court has competence to exercise judicial review of legislation – was, in fact, a question of jurisdiction and not justiciability. The Court did not want to define it as such because had it done so it could not have avoided dealing with it. A lack of jurisdiction or competence invalidates a court's decision and, therefore, the court ought to raise and deal with it even if it is not raised by the parties. The Supreme Court, probably intentionally, set the question aside, as well as another important question – that of the applicant's standing - in order to create a precedent of judicial review of legislation.

Several petitions to the Supreme Court were made on the same basis after the Bergman case and in all of them the Court treated the issues on their merit and even broadened its interpretation of the equality principle specified in section 4. Thus, for example, in the 1982 case of Rubinstein, the Court invalidated a statute, endorsed and passed with the support of the two big parties (coalition and opposition) in the tenth Knesset. The statute increased retroactively the ceiling of the allowed election campaign expenditures; meeting it was a

[53] HCJ 98/69 Bergman v. Minister of Finance [1969] IsrSC 23(1) 693; IsrSJ 8 13.

condition for a state financial support. The Court allowed the petition of several small parties, holding that the stature discriminates between those parties, which kept their expenses within the original ceiling, and those, which exceeded it.[54]

During the 1980s there were several initiatives in the Knesset to enact a basic law guaranteeing fundamental rights and freedoms.[55] The Supreme Court handed down during this decade two interesting decisions which can be read as an expression of dissatisfaction with the Knesset's failure in this regard, and as a hint that the Court itself will perform judicial review of legislation on the basis of infringement of human rights even with no written constitution or specific powers to do so. In both decisions the remarks of the judges were an obiter dictum. The 1986 case of Cohen dealt with an amendment to the Penal Code introducing a new substitution for light prison sentences in the form of communal work. The amendment authorized the Minister of Labor and Welfare, to apply the law gradually in different parts of the country. The petitioner, a convicted prisoner who could not benefit from the new arrangement since it has not been implemented yet in his district, petitioned the Supreme Court. President Shamgar observed that the petitioner was actually asking the Court to invalidate legislation of the Knesset on the basis of discrimination.[56] He wrote that he is leaving open the question whether the

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[54] HC 141/82 Rubinstein MK v. The Speaker of the Knesset and others [1983] IsrSC 37(3) 141. English summary in 20 Is. L. R (1985) 491.

[55] See for example: Draft Basic Law: Bill of Fundamental Human Rights, 1983, H.H. 1612, 111; For the history of the failed proposals to enact civil rights in Israel, see A. Rubinstein, *The Constitutional Law of the State of Israel* 704-707 (1991) [Hebrew]; R. Hirschel "Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Orde"r, 46 *Am. J. Comp. L*. 427 (1998); See also A. Shapira, "Why Israel Has No Constitution", 37 *St. Louis U. L. J*. 283 (1993).

[56] HCJ 889/86 Cohen v. The Minister of Labor and Welfare [1987] IsrSC 41(2) 540, summarized in English in 23 Isr. L. R (1989) 513

Court can invalidate discriminatory law, as he does not find the specific law in question as violating equality.[57]

The revolutionary edge in President's Shamgar remark was that he left as open the question of judicial review of legislation, not against entrenched provisions enacted by the Knesset itself, but against an unwritten bill of rights. What was implicit in Shamgar's remark was written explicitly three years later by Justice Barak, again as an obiter in the case of LAOR. Barak wrote:

> In theory there is a possibility that a court in a democratic society will invalidate a law that contradicts basic principles of the system, even if these principles are not established in a rigid constitution or in an entrenched basic law. There is nothing axiomatic in the approach that law cannot be invalidated on the basis of its content. In the invalidation of a law which severely violates basic principles, there is neither a violation of the principle of the sovereignty of the legislature, as sovereignty is always limited; nor is there a violation of the principle of separation of powers, as this principle is based on the idea of checks and balances of government. Nor is there an injury to democracy, as democracy is a delicate balance between majority rule and human rights and basic principles; in this balance the mere safeguarding of human rights and basic principles cannot be perceived as undemocratic. Such invalidation does not harm the judiciary, as its role is to

[57] The Deputy President Ben Porat concurred with the result, but held that it is irrelevant whether the Knesset legislation is discriminatory or not – and prima facia it is indeed discriminatory – because the Court lacks the jurisdiction to invalidate legislation of the Knesset even if it is discriminatory.

> maintain the rule of law, including the rule of law over the legislature…. According to our social and judicial conventions, this Court does not take up the jurisdiction to invalidate laws that contradict basic principles of our system. We inherited this convention from the English doctrine, and we have developed it according to the realities of our own democracy. We have followed these lines for more than 40 years; they express the social agreement in Israel and enjoy the consensual support of our enlightened public. Only against this background can one understand the debate on the need for a rigid constitution and judicial review (my translation –E.S).[58]

This remark was a very typical technique of Justice Barak, which was meant, through an obiter, to pave the way for a future change in the Court's restrictive approach towards judicial review. In other words, according to Barak's jurisprudential perception that the astonishment of the legal community sets the boundaries of valid interpretation within the law, such a side remark meant to prepare the legal community not to be astonished by future actual performance of judicial review of legislation as violating basic principles of the system. Barak's remark was intended also to signal to the other branches of government about such a possible change and to encourage them to act and enact a bill of rights.

This signal was intercepted by the Knesset. As elaborated above, in 1992 it enacted two basic laws dealing with segments of a bill of rights – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. The

[58] HCJ 142/89 LAOR Movement v. The Speaker of the Knesset [1990] IsrSC 44(3) 529

laws adopted the model of the Canadian Charter, but they failed short from specifying an enforcement mechanism or empowering the courts to perform judicial review. Here we get to the second Israeli Marbury vs. Madison – the 1995 decision of the Mizrahi Bank. This was a civil appeal in which a Bank attacked indirectly the validity of legislation of the Knesset that declared debt dropping of communal villages (Kibutzim and Moshavim) in order to overcome serious economic crises they suffered. The Bank argued that the law violates the right to property specified in Basic Law: Human Dignity and Liberty. The Court sitting in a rare bench of nine judges dismissed the appeal, holding that although the statute infringes the right to property, it meets the terms specified in section 8 of the Basic Law – it is meant for a worthy cause and it is proportional.

However, the judges (Justice Heshin dissenting) added 457 pages of an obiter in which they recognize the authority of the Knesset as a constituent assembly and, adopting the American model, acknowledging the power of any court (not only the Supreme Court) to perform judicial review of legislation against basic laws enacted by the Knesset in its hat as a constituent assembly. Newly appointed President Barak in his opinion even finds support for his conclusions in the Jurisprudence of Hans Kelsen, H.L.A Hart and Ronald Dworkin.[59]

[59] CA 6821/93 The United Mizrahi Bank v. Migdal – Commual Village [1995] IsrSC 49(4) 221.

The lengthy obiter was the basis of actual judicial review of legislation performed by the Supreme Court (first in 1997) and subordinate courts several times since. [60]

The Jurisdiction of the High Court of Justice over the Occupied Territories

It is not easy to conclude which of the powers that the Israeli Supreme Court decided to take up is more remarkable vis-a-vis judicial activism, but the decision to review applications from the territories occupied by Israel in 1967 is certainly a strong candidate. While the power to review legislation without a written constitution might be more innovative from a jurisprudential point of view, the power to review applications from the Occupied Territories has been more important politically and more significant for the role of the judiciary among the other branches of government.[61] It was also a significant international precedent. Never before did an occupier allow its legislative or administrative acts to be challenged before its own courts by individuals from the territory it occupied. The quick deliberation and decision-making of the Israeli Supreme Court made it an important actor in day-to-day military matters and in the spotlight of heated public controversies.

The first case in which the High Court of Justice was asked to review a decision of the Military Commander of the Occupied Territories was decided

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[60] HCJ 1715/97 Association of Investment Management in Israel v. Minister of Finance [1997] IsrSC 51(4) 367; HCJ 1030/99 Oron (MK) v. The Chairman of the Knesset [2002] 56(3) 640. HCJ 6055/95 Zemah v. The Minister of Defense [1999] IsrSC 53(5) 241; HCJ 1661/05 The Regional Council of Gaza v. The Knesset [2005] IsrSC 59(2) 481.

[61] D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and The Occupied Territories* (2002).

on June 20th 1967, less than ten days after the end of the Six Days War.[62] In a similar way to the approach of the Attorney General in the Bergman case, the Attorney General declared that he would not challenge the competence of the Court to review acts of the military authorities in the Administrated Areas. Behind this decision stood Meir Shamgar, the military Advocate General then, the Attorney General from 1968 (during the Bergman case) and judge and President of the Supreme Court later. Lack of jurisdiction or competence has never been argued by the State with regard to applications from the Occupied Territories, and this policy was extended to applications from southern Lebanon following the 1982 Israeli invasion to Lebanon.

Shamgar knew very well that an argument of lack of jurisdiction has good chances to be accepted by the Court. In fact, the Supreme Court had never ruled positively that it encompass this competence. As in the Bergman case, the Court avoided raising the issue at its own initiative; and, similarly to the Bergman case, since this is a matter of jurisdiction the Court could have – and maybe should have – raised the issue, despite the lack of such argument on behalf of the State. Shamgar adopted this policy, according to his own testimony, in order to safeguard human rights and the rule of law in the Occupied Territories. Shamgar also envisaged, and this proved to be so, that giving the residents of the Territories the access to the Israeli Supreme Court would force the military authorities to consult the State attorneys on the legality of their actions before taking them. Indeed, such consultations have led the army and the Government to cancel many planned measures and to moderate others, sometimes because of sheer delays caused by these

[62] Stekol vs. The Minister of Defense (unpublished)

deliberations.[63] The low statistics of successful applications from the Occupied Territories cannot, therefore, reflect the impact of the Court on the policies of the Government and the army in the Territories.

Opening the doors of the Supreme Court to petitions related to the Territories, brought also to activist substantive law regarding the review of military authorities and the balance between security considerations and human rights, as will be elaborated below.

3.3.2 The Discretionary powers of the Court

A Court which has such a wide, almost unlimited, jurisdiction and easy access and quick relief must have some mechanisms for closing its doors to some of the petitioners on certain issues. Some of the common reasons given to justify these mechanisms are: to prevent a flooding of cases; to prevent courts from getting into political issues and to avoid cases which cannot be decided according to legal considerations. Many supreme courts can choose the cases to be deliberated and decided on their merits. The Israeli Supreme Court sitting as a High Court of Justice as the first and last instance has to decide in all cases brought to it, which amount to several thousand cases a year (in addition to thousands of cases which it has or can – on the basis of a second appeal - decide in its capacity as the supreme civil and criminal court).

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[63] Dorit Beinish, the new President of the Supreme Court and formerly the head of the High Court of Justice Devision in the State Attorney's office and the State Attorney, testified on these effects, as reported by M. Negbi, Justice *Under Occupation: The Israeli Supreme Court Versus The Military Administration in The Occupied Territories* (1981) [Hebrew] p. 15-16. Interestingly, one of the Supreme Court judges who opposed the involvement of the Supreme Court in the Territories was Alfred Witkon, who probably was a political dove. His opposition was based, in contrast to the prevalent left-wing view, on the belief that such involvement will advance the integration of the Territories into Israel and will delay a political solution. See Negbi, ibid, at 19-20.
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Following the English model, and for this matter also the American one, the wording of the empowering provision of the High Court of Justice does grant the Court discretion whether to hear a case to its merits ("it shall hear matters in which it deems it necessary to grant relief for the sake of justice"). The traditional categories for exercising this discretion are standing (Locus Standi), justiciability (or political question), clean-handedness, theoretical issues and premature or belated petitions. Aharon Barak's prevailing jurisprudence believes that every question has an answer in the law. Everything is justiciable, he once argued,[64] prompting fierce criticism from various segments of the Israeli public. I will demonstrate here how the Israeli Supreme Court, adopting Barak's idea had relaxed, almost annulled, the requirements of standing and justiciability – the two most important discretionary hurdles.

Standing

The rule regarding standing, inherited from the Mandatory High Court, was extremely narrow. The applicant had to show that the attacked authority was declining to fulfill an obligation towards the applicant, which had been imposed on the authority by (a written) law.[65] The rule diminished to a minimum the number of successful applications to the Mandatory High Court, because there were very few obligations imposed on the Mandatory authorities with regard to the inhabitants of Palestine.

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[64] HCJ 910/86 Ressler v. the Minister of Defense [1988] IsrSC 42(2) 441, English summary in Isr. L. R (1990) 133; HCJ 1635/90 Zarzevski v. The Prime Minister [1991] IsrSC 45(1) 749.

[65] See Zeev Segal, *Standing Before the Supreme Court Sitting as a High Court of Justice* (Second Edition, 1993), 78-79 [in Hebrew].

Already in the course of the 1950s the Israeli High Court of Justice unchained itself from the mandatory precedents, agreeing to recognize the standing of applicants if they could show that the attacked authority harmed their own legitimate interest. Thus, for example in the 1962 case of Cohen, in which this criterion was stated by Justice Berenson, the Court agreed to hear an application of a news reporter who was refused a status of a military reporter by the Ministry of Defense, despite a lack of any written obligation on the Ministry to grant such a status.[66]

A second significant change occurred in the 1980s when the Court was willing to recognize not only individuals who were able to show that their individual interest was harmed, but also public petitions. One of the interesting examples in this regard are the repeated attempts to plea against the exemption of Yeshiva students (students of rabbinical seminars) from military service. The Defense Service Law 1959 authorized the Minister of Defense to defer the military service of individuals for reasons set by the law. As early as 1948, following demands of the religious parties, the Government decided to defer (in practice – to waive) the military service of a fixed number of yeshiva students every year; the quota has been increased with the years. The first petition against this policy was made in 1970 by a reserve officer who argued that this practice is ultra vires and discriminatory. The Court dismissed the

[66] HCJ 29/62 Cohen v. The Minister of Defense IsrSC 16 1023; 4 SJ (1962) 160. For references to other cases see Adi Parush, *The Place of Justice Considerations in The Decisions of High Court of Justice*, 13 Tel-Aviv University Law Review, 453, 468 (1988) [Hebrew].

petition on the grounds of lack of standing, as it found that the petitioner could not show that he personally was affected by the deferment.[67]

Following further relaxation of the standing requirement in a different case – a petition against the decision of the Interior Minister not to use his powers to set summer time in Israel, granted to him by the Mandatory Time Determination Ordinance[68] - a second petition against the exemption of yeshiva students from army service was launched. This petition was refused, but this time the Court acknowledged the standing of the petitioner, and the petition was dismissed by the majority on the basis of lack of justiciability.[69] This decision paved the way in the late 1980s to opening the doors of the High Court of Justice to any "public" petitions, not only for individuals arguing on behalf of public causes but also to various organizations representing public interest. The Association for Civil Rights in Israel might be the most notable example. The liberalization of the standing rule, thus, brought not only to expansion of the Court's powers, but significantly changed the public landscape and structure of civil society in Israel and gave a major impetus for the establishment of dozens, if not hundreds, of public interest groups and associations whose access to the Supreme Court is almost always open.

Justiciability

With the broad jurisdiction that the High Court of Justice took upon itself and the relaxation of the standing requirement, one of the only effective

[67] HCJ 40/70 Baker v. the Minister of Defense IsrSC 24(1) 238. English Summery in 6 Isr. L. R (1971) 129.
[68] HCJ 217/80 Segal v. The Minister of the Interior IsrSC 34(4) 429
[69] FH 2/82 Ressler v. The Minister of Defense [1982] IsrSC 36(1) 708

mechanisms left with the Court to avoid deciding applications on their merits was justiciability. Interestingly, this threshold barrier was not an established part of the Mandatory legacy or of English law in general.[70] It was imported to Israeli law by President Smoira from American law,[71] in the 1951 case of Jabutinski. This petition was launched following the resignation of the Ben Gurion Government in 1951 and the decision of the President not to assign the role of forming a new government to another Knesset Member and rather call for new elections. The petition was dismissed on grounds of lack of justiciability.[72]

Lack of justiciability has since had been used by the Court to dismiss applications in various cases using various rationales, such as the lack of legal criteria or the unsuitability of the judicial process to resolve the case;[73] the doctrine of separation of powers and the Court's restraint from involvement in matters given exclusively to the discretion of the other branches of government, such as foreign affairs and defense policies;[74] the explicit desire of the Court to protect itself from involvement in controversial issues which

[70] Because of the limited jurisdiction of the Mandatory High Court and the equivalent English courts at the time, and because of a narrower substantive constitutional and administrative review, English public law in the past was probably not in need of this kind of a barrier. However, following recent expansion in the grounds of review, the need for such a doctrine did eventually arise. Compare, for exaple, Bromley LBC v. Greater London Council [1982] 2 WLR 62 with Council of Civil Service Unioun v. Minister for Civil Service [1985] AC 374.

[71] The equivalent American doctrine, also entitled the "political question" was introduced in the 1849 case of Luther v. Borden, 7 HOW 1, 12 LED 521 (1849)

[72] HCJ 65/51 Jabutinski v. Weizman, [1951] IsrSC 5(1) 801.

[73] E.g. HCJ 319/65 Albalada v. The Hebrew University of Jerusalem [1966] IsrSC, 20(1) 204, in which the petitioner attacked a decision of the Hebrew University to extend the duration of law studies .

[74] E.g. HCJ 186/65 Reiner v. the Prime Minister, IsrSC 19(2) 485, in which the petitioner attacked the Governments decision to establish diplomatic relations with West Germany and HCJ 561/75 Ashkenazi v. the Minister of Defense [1976] IsrSC 30(3) 309, in which the petitioner asked the Court to order the Minister of Defense to conduct an inquiry into the events which brought and occurred during the 1973 Arab-Israeli War

could diminish the public confidence in the Court and its status; and the need of the Court to protect itself from a flooding of cases.

Already in the mid 1960s other judicial voices were heard. In the 1965 case of Oppenheimer Justice Silberg stated with reference to the doctrine of justiciability: "I am not ashamed to say that I have never understood the nature of this deformed fetus (my translation – E.S)".[75] In this case the Court was asked to order the Minister of Interior and Health to issue regulations implementing a new legislation for environmental protection. The statute authorized, but not ordered, the Minister to issue such regulations. The Court made the order nisi absolute, holding that the intention of the legislature would be hindered without implementation of the Law by regulations.

In the early 1980s some judges drew a new distinction between justiciability, which relates to the question of a legal criteria to resolve the matter brought to the Court, and justiciability, which relates to self-restraint of the Court out of respect to the other branches of government or apprehension about the threat of politicalization of the judiciary.[76] These categories were later dubbed by Justice Barak "normative justiciability" and "institutional justiciability". This distinction was made in a ruling that gave the final blow to the concept of justiciability. It happened in the third round of the yeshiva students' military service deferment case. The same petitioner of the 1981 case sensed the changing winds in the Supreme Court and decided in 1986 to challenge again the policy of the Government to exempt an increasing numbers of yeshiva

[75] HCJ 295/65 Oppenheimer v. the Minister of Interior and Health [1966] IsrSC 20(1) 309, 328, English summary in 1 Isr. L.R.(1966) 479.
[76] HCJ 89/83 Levi v. the Chairman of the Finance Committee of the Knesset [1984] IsrSC 32(2) 488 and HCJ 652/81 Sarid v. the Speaker of the Knesset [1982] IsrSC 36(2) 202, Englisg summary in 18 Isr. L. R (1983) 279.

students from military service. The decision was delayed for several years, but when it was finally handed out in 1988 it turned out that justiciability as a threshold barrier had been abolished. Justice Barak, who wrote the decision, said:

> …there cannot be a situation in which there is no applicable legal norm, and this includes a political act or a matter of policy. Every act, be it a political or policy matter as much as it may, is captured in the world of law, and there is a legal norm which relates to it, determining whether it is permissible or prohibited…
>
> It is the principle of separation of powers which justifies judicial review of government acts, even if they are of political nature, because its task is to guarantee that each branch of government will operate within its boundaries according to the law, and through this separation of powers will be maintained (my translation – E.S).[77]

This decision invited various new petitioners to apply to the High Court of Justice in many issues that traditionally were perceived as not suitable for judicial review, and also to broadening the reviewed bodies, as I will demonstrate below with regard to the internal matters of the legislature. Thus, in 1991 the Supreme Court dealt extensively with the justiciability of a political agreement. The case was brought to the Court by a person who wanted to challenge the legality of a coalition agreement between the Likud party and a small party, which was about to join the Government. Although

[77] HCJ 910/86 Ressler v. the Minister of Defense [1988] IsrSC 42(2) 441, English summary in Isr. L. R (1990) 133

the judges' views differed on the extent of justiciability of such agreements, the petition was partly allowed and parts of the agreement were declared void and null.[78] (add Walner)

The abolishment of the requirement of standing and the liberalization of the threshold of justiciability broadened judicial review, the sort of applicants to the High Court of Justice and the reviewed bodies. Limited examples are provided in the next subsection.

3.3.3 Judicial review of the Knesset and the Attorney General

A special case of an activist approach in the area of jurisdiction and justiciability, is the willingness of the Court to review internal matters of the Knesset and decisions of the Attorney General, especially in his capacity as the supreme state prosecutor. The developments in the judicial review of the Knesset are particularly interesting in the light of the English doctrine of parliamentary privilege, according to which the courts are barred from dealing with internal matters of Parliament. Indeed, from the early years of the State of Israel until the 1970s, the Supreme Court refused to allow petitions regarding the business or procedures of the Knesset and its committees. Signs of change came in 1980 with two petitions of Knesset Members against the decision of the Knesset House Committee. The Supreme Court dismissed these applications on their merits, avoiding the questions of jurisdiction and justiability.[79]

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[78] HCJ 1635/90 Zarzevski v. The Prime Minister[1991] IsrSC 45(1) 749.
[79] HCJ 248/80 Cohen v. The Speaker of the Knesset [1980] IsrSC 34(3) 813; HCJ 753/80 SHELI v. The Speaker of the Knesset [1981] IsrSC 35(2) 819.

A further signal was the 1981 petition of Flatto Sharon, A Knesset Member who was suspended from the Knesset following a decision of the Knesset House Committee, after being convicted for a financial offence. The State Attorney argued that this is not a matter subject to judicial review, but the Court decided, by a majority of four against the opinion of President Landau, to Intervene. It held that since the Knesset House Committee is a body carrying out public functions under law, the Court has jurisdiction to review its decisions.[80]

The Court made a step forward in the 1981 case of Sarid, MK. Unlike the previous cases which dealt with quasi-judicial powers of the Knesset, in this case a Knesset Member asked the Court to quash a decision of the Speaker to postpone a no-confidence vote for a few hours (enabling several coalition members, who were out of the country, to return in time in order to save the Government from defeat). Justice Barak ruled that the Court had jurisdiction to decide the case, as the Speaker of the Knesset is a public authority carrying out public functions by virtue of law. The question, he wrote, is whether it is appropriate for the Court to deliberate the merits of the case.

The answer to this question, Barak wrote, had to balance two conflicting interests: the safeguarding of the rule of law in the legislature, and the requirement that the Court respects the exclusive rights of the Knesset to decide its own internal matter, as deriving from the doctrine of separation of powers. Barak held that the appropriate balance should take into account the degree of harm done to the Knesset's inter-parliamentary arrangements and the extent to which it affects the foundations of Israel's constitutional

[80] HCJ 306/81 Flatto-Sharon v. The Knesset House Committee [1981] IsrSC 35(4) 118.

structure. He ruled that in this case, despite the far-reaching political implications (the prospective fall of the Government), the harm done to the inter-parliamentary arrangements and to the constitutional foundations is minor and, therefore, the independence and exclusiveness of the Knesset ought to prevail.[81]

The Sarid precedent opened the door for a period of unprecedented involvement of the Supreme Court in the internal maters of the Knesset, the most significant cases being five petitions of Meir Kahane, an extreme right-wing Knesset Member. In the first case decided in 1985, The Court applied the Sarid test and quashed a decision of the Speaker of the Knesset to deny Kahane the right to place a no-confidence motion on the Knesset agenda on the grounds that traditionally one-man faction are not entitled to propose no-confidence. The Court ruled that the current case involves allegedly significant harm to parliamentary life and constitutional foundations, which outweighs the sovereignty of the Knesset and separation of powers.[82]

In the second case, the Court quashed a decision of the Speaker who refused to place two of Kahane's bills on the Knesset's agenda because of their racist content. Justice Barak ruled that the expected damage to the parliamentary system and constitutional foundations are too great to justify judicial self-restraint, and to the merits, that the discretionary powers of the Speaker and the Presidium in tabling a bill is only technical - to ensure that the bill is

[81] HCJ 652/81 Sarid v. The Speaker of the Knesset [1982] IsrSC 46(2) 197, English summery in 18 Isr. L. R (1983) 279.
[82] HCJ 73/85 Kach Faction v. The Speaker of the Knesset [1985] IsrSC 39(3) 141, English summery in 22 Isr. L.R.(1987) 219.

phrased and drafted in such a way that it could be a law if accepted – and not substantive. [83]

The Speaker of the Knesset refused to follow the Supreme Court's ruling. Instead, he managed to pass an amendment to the Standing Orders of the Knesset, which authorized the Presidium not to place on the Knesset's agenda racist bills. It is quite exceptional that a ruling of the Supreme Court is not carried out, but the consensual de-legitimization of Kahane and his movement (including a statement of support for the Speaker issued by the Association for Civil Rights in Israel) were also exceptional circumstances. And the Court partly gave in. It dismissed a third petition by Kahane, asking, on the bases of the Contempt of Court Ordinance, to compel the Speaker to comply with the previous decision or to face imprisonment or fine. The Court's reasoning was that in the previous decision only a declaratory remedy was granted and not a mandamus.[84] The Court also dismissed a subsequent petition to quash the amendment to the Standing Orders. The reasoning of the five judges sitting on the bench differed. Three of them (President Shamgar, Deputy President Ben-Porat and Justice Barak) gave the unconvincing reason that according to the Sarid test this is a case in which the Court ought to show self-restraint. It is noteworthy that one of the other judges, Justice Eilon, rejected in his lengthy opinion the Sarid test for the intervention of the Court in the Knesset's affairs. He held that the Court ought not to intervene in Knesset decisions made within its functional authority.[85]

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[83] HCJ 742/84 Kahane v. The Speaker of the Knesset 39(4) PD 85, English summary in 22 Isr. L. R (1987) 219

[84] GC 306/85 Kahane vs. The Speaker of the Knesset [1985] IsrSC 39(4) 485, English summary in 22 Isr. L.R. (1987) 219

[85] HCJ 669/85 Kahane v. The Speaker of the Knesset [1986] IsrSC 40(4) 393.

However, the Court continued to apply the Sarid test and in 1987 it allowed a petition by an extreme left-wing MK whose immunity was withdrawn following participation in a PLO meeting and identifying himself in a speech he gave there with PLO views. The Court quashed the Knessset's decision, ruling that the actions of Miari MK were within his substantive immunity or privilege.[86] In the last twenty years around 50 petitions for judicial review of internal matters of the Knesset were made. Those petitions dealt with various matters such as disciplinary sanctions against Knesset members, agenda setting, committees' work and voting procedures.[87] Although the vast majority of them were dismissed, there is no doubt that the activist approach taken by the Court puts the parliament under tight scrutiny, unprecedented in most other legal systems. Moreover, it invites Knesset Members to stage a legal battle once they realized that they lost the political one. Indeed many of the petitions are made by Knesset Members who are not satisfied with the way the Knesset conducts its affairs or with its substantive decisions.

The willingness of the Court to review other governmental branches, not traditionally subject to judicial review, was extended to the President of Israel and one of his major significant functions – the authority to pardon. In 1986 the President decided to pardon 7 employees of the General Secret Services in the aftermath of the stormy affair of bus line number 300 kidnapping by terrorists. The decision of the President was challenged at the Supreme Court.

[86] HCJ 620/85 Miari v. The Speaker of the Knesset [1987] IsrSC 41(4) 169 Summary in Emglish in 23 Isr. L. R. (1989) 518.

[87] A recent example of a long decision of the Supreme Court regarding the voting procedure of an important annual bill which is passed together with the State annual budget and adjusts different laws to comply with the budget is HCJ 5131/03 Litzman MK v. The Speaker of the Knesset [2004] IsrSC 59(1) 577 .

Although the petition was dismissed by the majority, all the judges held that in exercising the pardon powers the President is subject to judicial review.[88]

In 1990 the Court ruled that the Attorney General's power to indict is not immune from review either. The Court quashed a decision of the Attorney General not to press charges against several bank managers who were suspected in artificial trading of their own bank stocks, in the aftermath of one of the more significant financial crises in Israel - the crash of the banks stocks value that brought the stock market to plunge. The Court ruled that the discretion of the Attorney General whether charges can be proved in court and especially with regard to lack of public interest as a reason not to indict, are subject to review by the same standards of any other governmental or administrative decision.[89] It is interesting to note, however, the in subsequent cases, the Court made a step back holding that the discretion of the Attorney General is broad and the Court's review ought to be narrow.[90]

3.4 The Substantive Law Applied by the High Court of Justice

So far, I elaborated on the gateways for public law enforcement or judicial review in Israel, or on the first two hurdles an applicant has to pass in order to get a relief – convincing the Court that it has jurisdiction to hear the case, and that the matter brought to it is such that the Court ought to hear. I tried to demonstrate the increasing liberal attitude of the Court in both these realms

[88] HCJ 428/86 Barzilay v. The Government of Israel and others [1986] IsrSC 40(3) 515.
[89] HCJ 935/89 Ganor v. The Attorney General [1990] IsrSC 44(2) 485.
[90] HCJ 2534/97 Yahav v. the State Attorney [1997] IsrSC 51(3) 1. The Court in this case refused to intervene in the decision of the State Attorney not to press charges against the Prime Minister.

and the activist way in the Court opened its doors to every petitioner and against all other branches of government. The most important stretch of the way is the substantive law applied by the Court – the stage in which the Court has to be convinced that the applicant has a cause and that the public authority under review violated his or her rights. I will not be able in this framework to elaborate on all the interesting developments in substantive public law by the Israeli Supreme Court, but I think that the few examples I chose are characteristic for the Court's approach and have a similar direction to the path it took with regard to jurisdiction and discretionary powers – expansionist and activist.

3.4.1 A Judge-made bill of rights – Freedom of Expression and Derivative Liberties

As early as 1949 the Supreme Court began to develop a judicial made bill of rights, when it ruled in the Bejerano vs. the Minister of Police case that freedom of occupation is a basic and natural right and that preventing a person from engaging in an occupation according to his choice can be based only on explicit legislation.[91] However, the cornerstone of the Israeli judicial made bill of rights was the 1953 decision of the Court in Kol Haam vs. the Minister of the Interior.[92] Interestingly, although this is the case in which the Court's attitude towards the Declaration of independence has changed,[93] it dealt with freedom of expression, which is not mentioned at all in the Declaration.

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[91] HCJ 1/49 Bejerano v. Minister of Police [1949] IsrSC 2 80

[92] HCJ 25/53 Kol Ha'am vs. The Minister of Interior [1953] IsrSC 7(1) 165.

[93] See the text around footnote

The applicants in Kol Haam asked the Court to quash an order issued by the Minister of Interior suspending the publication of two Communist newspapers for periods of 10 and 15 days. The order was issued following an editorial in these newspapers, which the Minister viewed as inciting and endangering the public security. It was based on powers confirmed to him by the Mandatory Press Ordinance. This law empowered the Minister to suspend the publication of a newspaper for such period as he may think fit if "any matter appearing in a newspaper is, in the opinion of the High Commissioner in Council, likely to endanger the public peace".[94] The decision was written by Justice Agranat (who was later appointed as the President of the Court), born and educated in the USA. Agranat, using "Grand Style",[95] opens the lengthy decision with a long explanation on the importance of freedom of expression in a democratic society and its desired scope. Subsequently, Agranat incorporates the American constitutional discourse of the First Amendment into Israeli law. He identifies the conflict of interests involved in this case as freedom of expression versus public security in the light of Israel's emergency situation, rules out the "bad tendency approach" and adopts the "near certainty" test as the test the Minister ought to employ when he considers whether the published material is likely to endanger the public peace. Applying the test, the Court finds that the orders of the Minister were unlawful and sets them aside.

The decision in Kol Haam and the judicial style it formed set an important precedent for the Supreme Court. In the 1962 case of Filming Studios the Court extended the "near certainty" test to news bulletins screened in the

[94] Section 19(2) of the Press Ordinance
[95] Karl n. Liewellyn, "A Realistic Jurisprudence – The Next Step", *30 Colum. L. Rev* 431, (1930) 479-513.

cinema.[96]. In the 1986 La'or case it was applied to censorship of a theater play. The Censorship Board refused to approve a play drawing similarities between IDF soldiers in the Occupied Territories and the Nazi regime because of its allegedly pejorative, instigating and hurting character. Justice Barak, on behalf of the Court, quashed the decision, narrowing the "near certainty" test even further by holding that only near certainty for a serous and severe harm to the public order will justify a censorship of a play.[97] This decision brought to the abolition of plays censorship altogether by the Knesset. The same criterion was later applied to reverse decisions to censor the film "the Last Temptation of Christ" as hurting Christian religious feelings,[98] and to censor short scenes from the film "the Empire of the Senses".[99]

In the 1988 case of Scnitzer the Court intervened in the discretion of the military censorship and overturned its decision to bar the publication of a newspaper article revealing the identity of the Director of the Mossad.[100] The Court rejected the Censor's argument that the publication can harm the Mossad and physically endanger its director, holding that the application of the "near certainty" test leads to the victory of freedom of speech.

The "near certainty" test was extended in the 1979 case of Sa'ar also to the freedom of assembly and demonstration.[101] According to section 85 of the Police Ordinance, a license from the police is required for a political

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[96] HCJ 243/62 Filming Studios in Israel Ltd. v. Geri and the Films and Plays Censorship Board IsrSC 16 2407.
[97] HCJ 14/85 La'or and others v. The Films and Plays Censorship Board IsrSC 41(1) 421
[98] HCJ 806/88 Universal City studios v. Council of Reviewing Movies and Plays [1989] IsrSC 43(2) 22.
[99] HCJ 4804/94 Station Film Company Ltd v. Council of Reviewing Movies and Plays [1995] IsrSC 50(5) 661
[100] HCJ 66/88 Schnitzer v. the Minister of the Interior and Police 34(2) PD 169. This kind od censorship is regulated by section 87 of the Mandatory Defence (Emergency) Regulations 1945.
[101] HC 146/79 Sa'ar v. The Minister of Interior and Police 34(2) PD 169.

procession or assembly of more than 50 people in an open place. In this case the police refused to issue a demonstration permit, as requested by an organization of young couples, because in previous demonstrations of this organization violence had erupted and various public building were trespassed; it agreed only for an assembly in front of the Knesset and not a procession through the streets of Jerusalem. Justice Barak ruled that the authority of the police to refuse a license can rest only on the grounds of danger to the public safety, that the disruption of traffic and police manpower shortage cannot be independent grounds for the police decision, and that the police has the burden of proof to show near certain danger to the public.

The same principles were reinforced in the 1983 case of Levi. The police refused to grant a demonstration license to the Committee Against the War in Lebanon, claiming that there was a probable serious danger to the demonstrators' own safety, as a month earlier a hand grenade assault on a demonstration of the same group resulted with one fatality. The Court overturned the decision, holding that the near certainty test ought to be applied only after the police adopted all the possible measures to eliminate the danger.[102]

The American First Amendment discourse was imported by the Supreme Court of Israel also with regard to the interpretation of libel. Following the 1964 American Supreme Court ruling in New York Times vs. Sullivan,[103] the Court ruled in 1977 in favor of Haaretz newspaper in a liable case launched against it by the Israeli Electricity Company. The majority (Justice Shamgar)

[102] HCJ 153/83 Levi v. the Southern District Police Commandor [1984] IsrSC 38(2) 393
[103] 376 US 254 (1964)

preferred freedom of speech and press on the right for a good name.[104] The dissenting opinion of President Landau represents more the Continental or German approach according to which freedom of expression is subordinated to human dignity. Landau, criticizing the American precedent, wrote that freedom of expression does not enjoy a superior status against other rights and the right to a good name ought to surpass the freedom of expression.[105]

Justice Dorner extended in 1994 freedom of expression protection to commercial expressions quashing a decision of the Israeli Broadcasting authority to ban broadcasting of a rude advertisement.[106] A series of judgments in last decade dealt with the status of freedom of expression within criminal law and especially in context of the crimes of incitement to racism and support of a terror organization[107] A major debate emerged among the Supreme Court judges with regard to incorporation of the near certainty test through judicial legislation into the required elements of the offence definition. In most cases the pro freedom of expression camp was in the majority, but there were other voices in the Court who adopted the Continental view which places greater limits on freedom of expression. Justice Heshin who retired from the Court in 2005 was the best representative of the restrictive view. He wrote a dissenting opinion in the cases involving commercial expression, liable and in the criminal cases. In his dissenting

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[104] FH 9/77 The Electricity Company v. Haaretz [1978] IsrSC 32(3) 337

[105] A similar debate occurred in the 1995 liable case of FCA 7325/95 Yediot Ahronot Newspaper v. Kraus [1998] IsrSC 62(3) 1. A majority of five judges preferred freedom of expression to the right to good name in dismissing a civil law suit against the newspaper. Two Justices dissented

[106] HCJ 606/93 Kidum v. IBA [1994] IsrSC 48(2) 1, The precedent was applied in 2000 again by Justice Dorner in HCJ 4644/00 Yafora v. The Second Broadcasting Authority for Television and Radio [2000] IsrSC 54(4) 178

[107] See for example: Cr.F.H. 1789/98 The State of Israel v. Kahanae [2000] IsrSC 54(5) 145 ; Cr.F.H. 8613/96 Jabrin v. The State of Israel [2000] IsrSC 54(5) 193; HCJ 547/98 Noam Federman v. The Israeli Government [1999] IsrSC 53(5) 520.

opinion in the matter of the Empire of the Senses film he wrote: "It can be argued that not the freedom of expression but the human being is on center stage. Freedom of expression is meant to serve human beings… The human is the purpose and freedom of publication is but a mean to improve the human condition (my translation – E.S)".[108]

Despite the dissenting voices, there is no doubt that judicial activism of both types – jurisprudential and political science points of view – can characterize the legacy of the Israeli Supreme Court in creating a freedom of speech jurisprudence against a background of lack of any constitutional provision in this regard.[109] Similar path was taken by the Court with regard to other fundamental rights, on which I cannot elaborate in this framework.[110]

3.4.2 Judicial Activism in Matters of Security and Defense

Israel has been occupied with security threats and concerns since its establishment. At times these concerns where perceived by the government and public as existential. Despite the unpopularity of judicial intervention in this area, perceived as damaging the ability of the state to defend itself and its

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[108] HCJ 4804/94 Station Film Company Ltd v. Council of Reviewing Movies and Plays [1997] IsrSC 50(5) 661, 720.

[109] See Eli Salzberger and Fania Oz-Salzberger The Legacy of Freedom of Expression in Israel, in Michael Birnhak (ed.) *Be Quiet, Someone is Speaking – The Legal Culture of Freedom of Speech in Israel* (Te Aviv 2006) 27-70.

[110] Freedom of occupation: HCJ 1/49 Bejarno v. Minister of Police[1949] IsrSC 2(1) 80 ; HCJ 144/50 Sheib v. Minister of Def. [1951] IsrSC 5 399 ; freedom of conscience: HCJ. 292/83, The Temple Mount Faithful v The Jerusalem Police Commander, 38(2) PD 449; freedom of religion: HCJ 262/62 Perez v. Kfar Shmaryahu Local Council IsrSC 16 2101

citizens against security threats, the Supreme Court, from the very beginning of its operation, has not heisted to employ judicial review.

The major legal framework and tool dealing with security issues is the Defense (Emergency) Regulations 1939 and 1945 enacted by the British High Commissioner in the wake of WWII and the emerging tensions between Jews and Arabs in Mandatory Palestine. These regulations were incorporated into Israeli law as other Mandatory legislation and they are valid also in the Occupied Territories, since Egypt and Jordan adopted, similarly to Israel, the Mandatory law existing in 1948, and like Israel they have never repealed the Emergency Regulations. In fact, along the years the Knesset abolished some of the Regulations and replaced others with its own legislation (i.e. administrative detentions), but no other significant laws were enacted to enable emergency powers, even in the wake of the last decade surge in world terrorism, in contrast to many other countries.

The Regulations include wide discretionary powers to employ various administrative measures, as well as a penal code dealing with security-related offences to be adjudicated by military courts. In the original Regulations there was no right to appeal the decision of the military court, but this had been changed in 1963 by the Knesset, which established a Military Court of Appeal. However, this amendment was not part of the legal framework in the territories occupied by Israel in 1967 (as Jordan and Egypt have not introduced a similar amendment). In the last 30 years the Regulations are hardly used in Israel proper, where security-related offender are indicted according to the general penal code and trialed by the general courts system. This is not the case in the Occupied Territories.

In 1985 the Association for Civil Rights in Israel petitioned the High Court of Justice asking to order the Military Commander to establish an appeal instance in the Territories, arguing that the right of appeal is a basic human right. Although the Court failed short of issuing an order against the Military Commander, it fiercely criticized the existing situation and recommended that it be changed.[111] The Government followed the Court's advice and in 1989 such an appeal instance was established.

The more problematic part of the Regulations is the one dealing with administrative measure such as detention, deportation and house demolition. Already in 1949 the Supreme Court ruled that measures taken on the bases of the Emergency Regulations powers are subject to judicial review, and it ordered to free a man who was detained according to regulation 111 because the military authorities have not followed the procedure set by the regulation.[112] However, the Supreme Court has been reluctant to exercise broad judicial review on the operation of these powers, limiting its review to examine questions of authority, integrity and due process.[113] This policy was changed in the last 30 years and the Supreme Court broadened the scope of review to examine also the reasonableness of the discretion of the Military Commander. In the 1981 case of Baransa, for example, the Court was asked to review a restricting order issued against a person who was suspected in involvement with a terrorist organization (the order according to Regulation 110 restricted the movement of the petitioner to its home town). Deputy President Shamgar held that the use of such a measure is valid only as a

[111] HC 87/85 Argum v The Military Commander in Judea and Samaria [1985] IsrSC 42(1) 353.
[112] HCJ 7/49 Alkarbutli v. The Minister of Defance [1949] IsrSC 1 85.
[113] E.g. HC 46/50 Al-Ayubee v The Minister of Defence IsrSC 4 222

preventive measure and not as a punishment or a substitute to criminal proceedings, and that the Court should be convinced that the evidence presented to it is sufficient to substantiate, according to an objective test, a danger to the security of the State.[114]

The most significant decision of the Court with regard to administrative detentions in recent years was in the case of the Lebanese "bargaining chips". In 1986 an Israeli plane navigator was captured by Islamic militia in Lebanon and later was handed over to of Iranian elements, from which time and until this very day there was no information on him. Within the Israeli efforts to obtain information about his fate and that of other missing and captured Israeli soldiers, several Lebanese citizens belonging to enemy organizations who had been involved in armed attacks against IDF forces were taken from Lebanon to Israel and detained. Among them was Sheikh Abd Al-Karim Obeid – a Lebanese citizen who was a member of the leadership of *Hizbullah*, and who had advocated and was also allegedly actively involved in the planning of the terrorist activities of that organization against the IDF.

Israel never pursued a criminal prosecution against the those Lebanese, but rather held them under administrative detention – in the beginning because state security grounds required them to be held, as essential bargaining chips in negotiations for information and the release of Israel's captured and missing, and later on the ground that holding them was necessary in view of the direct danger. which each of them would pose to state security, where they to be released.

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[114] HC 554/81 Baransa v. The Commander of the Central Command IsrSC 36(4) 247

In a further hearing of the Supreme Court in a petition by the kidnapped Lebanese, delivered in April 2000, the Court ruled by a majority of six judges to three, that the prevailing laws of administrative detention in Israel did not permit the administrative detention of persons who were not themselves a danger to state security and where the purpose of their detention was to use the detainees as "bargaining chips" – hostages – in negotiations for the release of captured and missing soldiers.[115] Inevitably, as a result of this judgment, Israel released the petitioners as well as five other persons taken from Lebanon who too had been held in administrative detention for a similar purpose.

One of the harsh administrative measures specified by Regulation 119 empowers the military commander to order the demolition of any house that was connected to a person who, to the commander satisfaction, committed an offence according to the Defense Regulations. Until the late 1980s there were hardly any petitions against the use of this power, because it was taken instantly as a prompt response to terror act and the person whose house was about to be demolished did not have the chance to approach the Court. This was the cause of the 1988 petition of the Association of Civil Rights in Israel. The Court ruled that save in rare cases of operational military needs, the person against whom a demolition order is being issues should be given the right to appeal against the order to the Military Commander himself and subsequently to the High Court of Justice.[116] The decision was reasoned on

[115] F.H.Cr. 7048/97, Plonim v. Minister of Defence, P.D. 54 (1), 721

[116] HC 358/88 The Association for Civil Rights in Israel v. The Commander of the Central Command IsrSC 43(2) 529.

the bases of Israeli principles of administrative law, which according to the Court applies to any Israeli official, including his operation outside the state territory.

This approach of the Court, combined with the institutional structure according to which every petition can be brought directly to the Supreme Court, brought to an unprecedented involvement of the Israeli Supreme Court with various military measures in real time. To my best of my knowledge, there is no equivalent judicial intervention in other jurisdictions, and this path made the Israeli Supreme Court involved in real-time military decision-making. In the case of house demolitions according to Regulation 119, from the end of the first Intifada (Palestinian uprising) in 1993 and until 2001, this measure was hardly ever used, partly due the imposed legal hurdles. The government decided to resort to this measure following the eruption of the Second Intifada, but the repeated decisions of the Supreme Court adopting the Baransa precedent and the due process requirements of the Court have brought the army in 2004 to declare that it is changing its policy and it would refrain from using this measure at all. The activist approach of the Court, despite the fact that there were hardly any cases in which it quashed a demolition order, has a brought the government and army to significant changes in its military tactics.

A similar case is the harsh measure of deportation. It has been used widely as part of the Labor government defense policy between 1967 and 1974, when about 1400 people were deported, mainly after finishing to serve a jail sentence on security related offences. This measure was abolished within Israel proper in 1979 with the enactment of the Emergency Powers

(Detention) Law 1979, but it has been employed in the Occupied Territories. Court intervention was scarce because according to Regulation 112 there was a quasi-judicial advisory committee to whom a person who was issued a deportation order could have appealed. But the Supreme Court changed its policy in the aftermath of the 1976 Natshe affair. The background was a controversial 'liberal' decision of the Defense Minister, Shimon Peres, to hold elections for local authorities in the Territories. When it became apparent that some candidates holding extreme views are likely to oust moderate incumbents, a deportation order was issued against two of them.

When their hearing in front of the advisory committee ended with failure and the committee was convinced in the security threat they posed, the two petitioned the Supreme Court. When the Justice on duty wanted to issue an interim injunction the state attorney informed that the two were already deported, and that this deportation was authorized by the Attorney General, Aharon Barak, because the lawyer on the petitioners behalf negligently failed to ask the High Court for an interlocutory injunction. In an angry-toned decision Justice Etzioni criticized the authorities and instructed the Attorney General to conduct an investigation and report to the Court how the deportation was allowed to be carried out. A consequence of this case was that following the incident and until 1979 no deportation orders were issued, and the effectiveness of the measure as a quick and immediate response was eroded.

In 1980 the tension in the Territories was mounting and on May six Jews who returned from a prayer in the Machpela cave in Hebron were attacked and murdered. The response was a deportation order against the mayors of Hebron

and Halhul and the religious leader of Hebron for incitement, which allegedly led to the murder. The Military Commander decided to carry out the deportation before the appeal process took part. The deportees' lawyers petitioned the High Court of justice. The Supreme Court, by majority, rejected the petition to invalidate the deportation order, but it ruled that the deportees should be allowed back to plea their case in front of the advisory committee, rejecting the State's argument that their return could seriously endanger peace and security.[117] The Government followed the Court's order and the deportees were given the right to return and plea in front of the advisory committee, but the committee approved the deportation.

The matter came back to the Supreme Court and the same panel denied their petition, again by majority of two to one. Although the petition was dismissed President Landau recommended that the deportation would be re-examined at the Government's level, taking into account the peace-orientated declarations given by the deportees in front of the advisory committee.[118] This recommendation was widely criticized as a trespassing by the Court into the executive territory, but Prime Minister Begin promised to follow the Court's decision, including its recommendation. Menachem Begin, despite his right-wing opinions, was one of the most respectful Israeli prime ministers towards the Israeli Supreme Court and the rule of law. The practice of the Supreme Court recommending actions to the executive and legislature as an obiter dictum of its rulings became more common in the last decades, adding an additional facet of judicial activism in Israel. This specific affair brought again to a total halt of the Government in using deportations as part of its

[117] HCJ 320/80 Kawasma v. The Minister of Defense and others, IsrSC 35(3) 113.
[118] HCJ 698/80 Kawasma v The Minister of Defense and others, IsrSC 35(1) 617

security policy, which lasted five years, until Yitzhak Rabin came to the Defense Ministry.[119]

Another area connected to security and ideology which arrived to the Supreme Court's door steps are the Jewish settlements in the Occupied Territories. The first settlements were established as part of the Labor Government's security policy in 1972, in the Gaza Strip. The settlements were meant to function as a buffer zone between the Gaza Strip and Israel following numerous terror attacks launched from the Palestinian areas in the aftermath of the Six Days War. Nine Beduin Sheiks whose families lived and grazed the land designated for the settlements (but could not prove legal ownership of the land) petitioned the Supreme Court. The petition was heard but dismissed, as the Court ruled that the security necessity argued by the State was not disproved. The Court emphasized, though, that military necessity is requisite for such action.[120]

In 1977 a Likud Government came into power, promising many more settlements in the Occupied Territory. This promise represented a change of ideology according to which the Territories are not occupied but liberated and

[119] One of the lowest points of Rabin's term and a low point of the Supreme Court as well was the deportation of 415 Hamas activists in 1992, which was decided by the Government following a surge of terror attacks by this organization. The deportation was made, using Regulation 112, but was based also on an emergency decree decided by the Government and was to last for 2 years. No appeal rights were given to the deportees prior to the deportation. The Association for Civil Rights in Israel petitioned the Supreme court against this decree and the individual orders and the Court, sitting in a exceptional panel of 7 justices criticized the decree but upheld the individual orders, holding that the right to appeal to the advisory committee has to be granted, but it can be exercised also after the actual deportation is carried out (HC 5973/92 The Association for Civil Rights in Israel v The Minister of Defense and others, IsrSC 47(1) 267). The Court in this case could not face the almost general consensus within the Israeli public that this is a justified measure.

[120] HCJ 302/72 Hilu v. The Government of Israel IsrSC 27(2) 169; English summery in Zemach, The Non-Justiciability of Military Measures: the Rafah Approach Case, 9 *Israel Law Review* (1974) 128, pp. 128-138

settling Jews in the "promised land" is desirable regardless to security necessity. However, in deliberations of land confiscations in the Territories and the actual materialization of the new policy the State argued a military necessity. The Court accepted the military necessity in the 1978 case of the Anata village, reaffirming its past decision that military necessity is the sole legal reason for establishing a settlement. The pressure on the Government from the settlement movement mounted and action on the ground took place, alongside calls for a change in the law, which would prevent the Supreme Court jurisdiction on the issue.

Still in 1978, the Court issued interlocutory injunction to halt further construction in the newly established settlement of Beit El. The settlers defied the injunction and the atmosphere was electric. The State could not deny in Court that the confiscated lands were going to serve a civilian settlement and its representative, therefore, argued lack of justiciability, grounded in the fact that the issue of the Territories was to be discussed in international negotiations in Washington. The argument was rejected by the Court and the State resorted to the argument that a civilian settlement was necessary to serve security function, supported by affidavit of an army general. The justices asked the State representative what would happen to the settlement should the military necessity ceases to exist, as it the nature of military needs to be temporary and changing. The reply of the Attorney General was that the settlement is only in context of the military government and upon its termination the right of the settlers to remain there will expire. This reply paved the way for the dismissal of the petition.[121]

[121] HCJ 606/78 Ayub and others v. The Minister of Defense and others, IsrSC 33(2) 113

The reasoning in the Beit El case, holding that settlements can be constructed only for military necessity, that they are temporary and that there is an absolute ban on building permanent settlements, paved the way to the Eilon Moreh decision in 1979, in which the Court ordered the dismantling of the settlement of Eilon Moreh within 30 days, as it was not convinced of a military need in its establishment. The Court relayed on an affidavit by a former Chief of Staff, then a Labor MK, stating that the settlement will not contribute to the security of Israel. In an exceptional decision, the Court allowed the petitioners' attorneys to cross examine the current Chief of Staff on his affidavit in support of the State and it found inconsistencies which brought the five panel justices to reject the State's argument and make the order nisi absolute.[122]

Prime Minister Begin again announced that he will follow the Court ruling and refused calls to change the law with regard to the Supreme Court jurisdiction. The ruling did not put an end to the establishment of settlements in the Occupied Territories, but no more requisitions of private lands were made.

An approach similar to that taken with regard to the settlements, was taken by the Israeli Supreme Court in recent years with regard to the security fence that the Israeli Government decided in 2002 to built between the West Bank and Israel, following significant increase in deadly terror attacks launched by Palestinians in Israel during the second Intifada (uprising) erupted in 2000. The course of the fence was planned to be more or less along the 1967 border

[122] HCJ 390/79 Dwikat and othrs v. The Government of Israel and others, IsrSC 314(1) 1. English summery in 15 *Israel Law Review* (1980) 131

between Israel and Jordan, but it was not exactly along this line and in various areas it was planned to be constructed within the Occupied Territories, separating Palestinian villages and even dividing some. The plan and course of the fence prompted dozens of petitions to the Supreme Court, which did not hesitate to issue interlocutory orders to halt the construction until final decision is delivered. This was viewed by majority of Israelis as a significant obstruction to their security (as indeed in areas in which the fence was constructed the number of terror attacks decreased significantly) and prompted calls to limit the Supreme Court's jurisdiction in such matters.

In the leading final ruling of the Court on the issue in the case of Beit Sourik the Court held that in addition to international law and the Fourth Geneva Convention, the issue is subject to Israeli public law, which requires the Israeli officials to meet criteria of reasonableness and proportionality, a concept that the Court has been extensively developing since the 1992 constitutional revolution (see below). It held that constructing such a fence is legal on the bases of temporary military necessity, but this necessity has to be outweighed with humanitarian considerations and the protection of human rights. The Court found that in parts of the route of the fence determined by the Military Commander, there is no proportion between the injury to the local inhabitants and the security benefits. The route disrupts the delicate balance between the obligation of the Military Commander to preserve security and his obligation to provide for the needs of the local inhabitants. It thus allowed the petition and ordered the Government to find an alternative route.[123] The Court has not hesitate in some of the other final decisions (not all of them have been decided

[123] HCJ 2056/04 Beit Sourik Village Council and others v. The Government of Israel and others, IscSC 58(5) 807 [2005], English translation available in the High Court of Justice website: http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_case_rslt.asp?case_nbr=2056&case_year=04

yet) to hold that the route of the fence was illegal, and it even ordered in some cases where the fence was already constructed to demolish it.[124]

Another important and activist decision of the Israeli Supreme Court in the area of security related to the interrogation methods used by the Israeli General Secret Service (GSS) towards suspected terror activists. The Court was called to decide the issue following a report by a commission chaired by the former President of the Supreme Court, Justice Landau. The commission concluded that light physical pressure is allowed in extreme circumstances, such as "ticking bombs", and that the legal test that ought to apply is of the criminal law defense of necessity. It called for the enactment of legislation that will authorize the form of interrogations by the GSS. Such legislation has not been enacted.

A petition by several human rights organizations against the Commission's recommendation and the GSS practice was allowed. In the ruling handed in 1999 the Court held that "The principle of 'necessity' cannot serve as a basis of authority .... The 'necessity' defense cannot constitute the basis for the determination of rules respecting the needs of an interrogation. It cannot constitute a source of authority on which the individual investigator can rely for the purpose of applying physical means in an investigation that he is conducting…". The Court proceeded to examine the actual techniques (imported from the British security forces) used by the GSS - inclining the chair, blindfolding by a sack, playing loud music - and found them injuring

[124] See also HC 7954/04 Mara'aba and others v. The Prime Minister of Israel and others (yet unpublished), English translation available in the High Court of Justice website: http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.HTM This decision was given by a panel of 9 judges and in this lengthy decision the Court also relates and rejects the advisory decision of the International Court of Justice in the matter of the security fence.

the bodily integrity, rights and dignity of the suspect beyond what was necessary and thus illegal.

One of the judges in this case, Justice Kedmi, proposed that the effectiveness of the judgment be deferred for a year, in order to enable the State to adapt to the new state of affairs established by the Court, and out of a desire to ensure that in a genuine case of a "ticking bomb" the State would be able to cope. But the majority of judges rejected this proposal and outlawed any use of physical pressure without a specific authorization in law, which has not been enacted since.

The Court held further that, for the purpose of conducting investigations, GSS interrogators possess the same powers as police officers and enjoy no additional special powers. President Barak wrote: "… a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation… Human dignity also includes the dignity of the suspect being interrogated… These prohibitions are 'absolute'. There are no 'exceptions' to them and there is no room for balancing".[125]

One can sum-up the activist approach of the Israeli Supreme Court, especially when compared to other courts, notably the American Supreme Court in post

[125] HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel [1999] IsrSC 53(4) 817, section 23 of President Barak's judgment, English translation available in the High Court of Justice website: http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf . For further analysis and comparison to the English debate on the same interrogation techniques see E. Gross, *The Struggle of Democracy Against Terrorism: The Legal and Moral Aspects* (2006)

Nine Eleven era,[126] in President Barak's writings, much of which is taken from his judgments:

> …*first* the struggle against terror cannot be conducted "outside" the law. The struggle against terror must be waged "within" the law using the tools, which the law makes available to a democratic state. This is what distinguishes the state from the terrorists. The state operates within the boundaries of the law. The terrorists contravene the law. The struggle against terrorism is, therefore, the struggle of the law against those who rise up against it. The statement attributed to Cicero to the effect that "*in times of war the laws fall silent*" reflects neither reality nor what is desirable. *Second*, the normative framework was established on the basis that a democracy's fight against terrorism is grounded on a delicate balance between the need to preserve the safety of the state and its citizens and the need to safeguard human dignity and liberty. This balance is based on the need to find a synthesis between conflicting values and principles. This balance must be based, in the nature of things, on appropriate restrictions both on the fighting force of the democratic state and on the freedom of the individual. An appropriate balance is not maintained when state security is fully protected, as if human rights do not exist. In a democracy's fight against terrorism not every measures is permissible. Often a democracy will fight with one hand tied. An appropriate balance is not maintained when human rights are fully protected, as if

[126] For such a comparison see Amos N. Guiora and Erin M. Page, Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism, *29 Hastings Int'l & Comp. L. Rev. 51*

> terrorism does not exist. Human rights are not a platform for national destruction. *Third*, the courts are available to decide conflicts relating to a state's struggle against terrorism. When it is contended that human rights have been infringed, there is no room to close the doors of the court. When a law exists by virtue of which war is waged against terror, a court exists which will determine what is permissible and what prohibited.[127]

3.4.3 The New Constitutional Jurisprudence

I already discussed in section 3.3.1 how the Supreme Court decided that it has the powers to perform judicial review of legislation, following the enactment in 1992 of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Since this 1995 landmark decision, the constitutional jurisprudence of the Court, and indeed of lower courts in Israel, changed significantly. Thousands of judgments' pages were written on the scope of the rights protected by the new laws, on their application to every public body and norms and even on their application in private law. The Court dedicated many more pages on the limitation clause and the tests that ought to apply in balancing between the rights and with other considerations. In general the Court set three stages for the examination of constitutionality of legislation. In the first stage it examines whether the law violates a protected right; in the second stage in examines if this violation is justified according to the limitation clause, and if it does not find a justification in the third stage the Court discusses the appropriate remedy.

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[127] Baraks forward to Emanuel Gross' book, supra note 125

Section 8 of Basic Law: Human Dignity and Liberty and section 4 of Basic Law: Freedom of Occupation read: “There shall be no violation of the rights under this Basic Law except by Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required or by such law enacted with explicit authorization therein”. This is the limitation clause. The Court created a new jurisprudence of this clause. One of its key components is the principle of proportionality. In numerous decisions the Court held that a law violating a protected right has to meet three subtests in order to be proportional and thus valid. The first subtest is that the objective must be related to the means. The means that the legislature or other governmental body uses must be constructed to achieve the precise objective that the body is trying to achieve. The means used by the body must rationally lead to the realization of the objective. This is the "appropriate means" or "rational means" test.

According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means that can be used to achieve the objective, the least injurious means must be used. This is the "least injurious means" test. The third test requires that the damage caused to the individual by the means used by the legislative or administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the "proportionate means" test (or proportionality "in the narrow sense.") The test of proportionality "in the narrow sense" is commonly applied with "absolute values," by directly comparing the advantage of the legislative or administrative act with the damage that results from it. However, it is also

possible to apply the test of proportionality in the narrow sense in a "relative manner." According to this approach, the legislative or administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one.[128]

Thus, for example, in the leading ruling regarding the security fence discussed above, the Court found that the construction of the fence violates the rights to human dignity and the right to property protected by Basic Law: Human Dignity and Liberty, and that it also meets the first and second subset of the limitation clause, i.e. that the objective of the fence is justified and there is no mean which violates the rights in a lesser way. However, it found that in several places the route of the fence does not meet the narrow proportionality subtest, i.e. that the harm in the violation of rights outweighs the benefit of security.

Another example is one of the very last decisions of President Barak dealing with the constitutionality of a Civil Torts (State Liability) Law (Amendment number 7) enacted by the Knesset in 2005 which grants immunity to the State in torts cases related to damages caused by Israeli security forces in areas of armed conflicts declared by the Minister of Defense. The law was prompted by hundreds of civil suits launched by Palestinians who were damaged by Israeli security forces in the course of the second Intifada. The law provides also for set list of exceptions (e.g. damages caused in custody of the state authorities or damages caused in a car accident in which security forces were involved) and for an out of court Ministry of Defense compensation board for

[128] See HC 2056/04 Beit Sourik Village Council and others v. The Government of Israel and others, IsrSC 58(5) 807 [2005], section 41 of President Barak's judgment.

other claims. Several human rights organizations petitioned the High Court of Justice against the constitutionality of the law.

The Court in a unanimous decision of 9 Justices ruled that despite the fact that the Basic Laws as such, as other Israeli laws, do not have effect outside Israel proper, all Israeli authorities are subordinated to them and thus their conduct cannot violate the rights specified in them. Further, it ruled that exemption from torts liability violates the right to property guaranteed in Basic Law: Human Dignity and Liberty, as well as the rights to liberty, dignity and privacy. President Barak, writing the main judgment, held that the purpose of the law – to adjust the law of torts to a war zone – is legitimate, and that it meets the first subtest of the limitation clause – there is a proper connection between the purpose and the mean to achieve it. However, Barak found the law to fail the second subset – choosing the mean that constitutes the least violation of the protected right, and the third subtest of proportionality. The law was declared, therefore, unconstitutional and thus void.[129]

The constitutional "geometry" and the jurisprudence of the limitation clause enabled the Court to give a very broad interpretation to the rights specified in the laws. Thus, for example, the right for equality, which is not mentioned specifically in the basic laws, was recognized by the Court as deriving from the right to dignity. In one of the more controversial decisions of the Court in recent years, handed in 2000, it ruled (by a majority of 4 Justices against one) that a policy according to which communal villages (co-op) that are built on state land discriminate against segments of the population on the bases of

[129] HCJ 8276/05 Adalla and others v. The Minister of Defense and others (decision given on 12.12.2006, yet unpublished)

religion or ethnic or national identity, is illegal. In this decision the Court allowed a petition of an Arab couple who wanted to buy land in a new communal village and was refused due to the cooperative nature of the settlement, and was offered to buy land in a nearby urban settlement.[130]

Although in this case the Court was not asked to review legislation of the Knesset but a policy of the government, it declared: "equality is one of the founding values of the State of Israel. Every public authority, and primarily the State, has to act in equal manner towards all the individuals in the country…. Indeed, the State has to respect and protect the fundamental right of each individual for equality. Equality is the foundation of our social existence; it is the sources of all beginnings.. It is the foundation of a democratic regime. It is essential part of the social agreement which is the basis of the social structure. It is a prime constitutional principle.. (my translation – E.S)".[131]

In another decision the Court interpreted the right to dignity as encompassing the right of every individual to dignified economic existence. In this decision the Court was asked to strike down legislation which decreased social security benefits and old-age allowances. This law was part of a libertarian policy of the Likud government, which attempted to make significant cuts in the State budget in order to overcome budget deficit. The Court (one Justice dissenting) dismissed the petition, holding that the evidence presented to it are not sufficient to conclude that the reduction in the State benefits violates the right for dignified economic existence. But President Barak elaborated on the

[130] HCJ 6698/95 Kaadan v. The Israeli Land Authority and others [2000] IsrSC 54(1) 258
[131] Ibid, section 21 of the judgment of President Barak

nature of this right in the new Israeli constitutional law, holding that it encompasses both negative and positive elements, which impose a heavy duty on the State. He concluded the majority opinion with this statement: "This ruling does not shut the doors to petitions in the matter of the right to dignified living. This is a constitutional right that have to be respected in all avenues of public law".[132] In a very typical way to Barak's judicial tactics, although the petition was dismissed, the signal to the government was clear – that its social-economic policies are not immune from judicial review. This tactic itself is an expression of judicial activism.

3.4.4 Reasonableness as the Primary Administrative Law Doctrine

The traditional grounds for judicial review of the government and the administration include: operating outside the boundaries of powers conferred by law (ultra vires), deviation from the rules of natural justice, lack of good faith, arbitrariness, and unlawful or irrelevant considerations. With the years, the Israeli Supreme Court developed and extended each of these causes in a more interventionist direction. In this framework I will not be able to elaborate, although there are various examples for judicial activism performed by the Court with regard to lack of authority and deficiencies in discretion.[133] The most important contribution of the Court is the development of a whole jurisprudence of a new ground for review – unreasonableness – which is both

[132] HCJ 366/03 The Association for Peace and Social Justice and others v. The Minister of Justice and others (yet unpublished)

[133] E.g. HCJ 3267/97, Rubenstein . v. Minister of Defense [1998] IsrSC. 52 (5) 481 ; HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel [1999] IsrSC 53(4) 817 ; HCJ 2918/93, Kiryat Gat Municipality v. State of Israel and Nine Others IsrSC [1993] 47(5) 832 ; HCJ 11163/03 The High Follow-up Committee For The Arab Citizens of Israel v. The Prime Minister of Israel (not published) ; HCJ 257/81 Alter v. The Haifa Regional Rabbinical Court [1982] IsrSC 36(2) 441 ; HCJ 5182/93 Levy v. The regional rabbinical court [1994] IsrSC 48(3) 1

independent from the other causers and can be seen as including all the other causes together.

Following the 1948 English case of Wednesbury Corp,[134] until 1980 the Israeli Supreme Court was willing to quash a decision of a public authority if its discretion was carried out with extreme unreasonableness. In the 1980 case of Dapei Zahav Justice Barak held that the Court ought to quash any unreasonable administrative decision, even if it is not extremely unreasonable.[135] He added that reasonableness can be measured with objective criteria and introduced the standard of reasonableness. The Court should not replace the discretion of the authority, which can operate within a compound of reasonableness. But if it deviates from this compound or from the conduct of a reasonable authority under the same circumstances, the Court ought to intervene.

The Court has been using this test in hundreds (if not thousands) of petitions in the last 25 years, extending its review from legal reasonableness (i.e. reviewing the balance the authority conducted between legal principles and rights and other considerations) to professional reasonableness (i.e. reviewing the professional discretion of the administrative authority). It quashed appointments to senior posts in the civil service of individuals who were found, in the course of criminal proceedings, in breach of serous ethical rules,[136] it reviewed and reversed the discretion of the Attorney General in

[134] ASSOCIATED PROVINCIAL PICTURE HOUSED, LTD. V. WEDNESBURY CO. [1948]1 K.B. 223; [1947] 1 ALL E.R. 68; (1948) 177 L.T (C.A) 6
[135] HCJ 389/80 Dapei Zahav v. IBA [1980] IsrSC 35(1) 421.
[136] HCJ 6163/92 Eisenberg v. The Minister for Housing [1993] IsrSC 47(2) 229.

decisions not to launch criminal proceedings,[137] and it struck down a decision of the Israeli Antitrust Authority to approve a merger as unreasonable.[138]

With the emergence of the new constitutional jurisprudence, following the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation in 1992-4, the reasonableness was amalgamated into the new constitutional tests developed by the Court as the result of interpreting the limitation clause in the basic laws. Any violation of rights by a public authority has to be for a legitimate purpose, whereas the mean to achieve the purpose is suitable and rational, the purpose cannot be achieved by a lesser means vis-à-vis the violation of basic rights, and the mean is proportional in the narrow sense - there is a justified proportion between the public benefit and the harm to the individual.[139]

4. Judicial Activism in the Realm of Private Law

The Activist approach of the Israeli Supreme Court in the fields of private law is not less significant than its approach in public law, although it is much less visible in the public debates about judicial activism and the role of the Supreme Court, which are high on the public agenda in the last decades. As elaborated before, in 1948 Israel inherited the Common Law from the British Mandate and gradually (mainly in the 1960s and 1970s) in many fields,

[137] E.g. HCJ 223/88, Sheftel v. Attorney Gen.[1989] IsrSC 43(4) P.D. 356; HCJ 425/89 Ztifan v. Chief Military Advisor [1994] IsrSC 43(4) 718;
[138] CA 4364/06 Israel Antitrust Authority v. Alon-Dor Energy LTD (unpublished, 2006)
[139] HCJ 3477/95 Ben Atiya v. The Minister for Education and Culture [1996] IsrSC 49(5) 1

notably contract law,[140] it shifted closer to Civil Law doctrines through legislation of the Knesset and the increasing impact of Continental European jurists who became dominant in the Ministry of Justice and in the judiciary. The activist approach of the courts is apparent both with regard to judicial departure from English precedents even before the legislative changes, and in the broad interpretation the courts adopted with regard to the new private law legislation. Thus, Israel's private law has been going through a transformation from a jurisprudence of rules to a jurisprudence of reasons,[141] from the Anglo-American doctrines of private law, through the Continental doctrines of private law, to original Israeli doctrines. The fields and issues in which this activist approach is apparent are so vast and this framework allows only a few examples.

4.1 The Israeli Supreme Court Unchains Itself From English Common Law Precedents

Part of the inheritance of Mandatory law was article 46 of the Palestine Order in Council, which referred courts faced with a problem not answered by legislation to apply the Common Law and the doctrine of Equity which are in force in England. Only in 1980 did the Knesset repealed Article 46 by the Foundations of Law Act, which referred courts when faced with questions not answered by legislation, precedent or analogy to the "principles of freedom,

[140] This transformation was instigated by the legislature with the enactment of Contract Law (Remedies for Breach of Contract) 1970 and Contract Law (General Part) 1973, and subsequent legislation in the fields of contracts. These pieces of legislation shifted Israeli contract law from Common Law principles towards Continental, mostly German, principles of contract law. Thus, emphasis on contracts as promises, which are meant to be fulfilled, was given, which resulted in abandoning the consideration requirement, and, more importantly, making specific performance as the major and default remedy for breach of contracts (as a matter of right and not of equity)

[141] Frederick Schauer, "The Jurisprudence of Reasons", 85 *Mich. L. Rev* 847 (1987)

justice, equity and peace of Israel's heritage".[142] However, the departure from English Common Law and precedents by the Israeli Supreme Court took place long before.

In 1954, for example, the Israeli Supreme Court, overruled a District court decision and ruled, in contrast to a long established English precedent, that an expert who writes a negligent opinion may be liable towards a third party who relied on this opinion and suffered from a pure financial damage.[143] The House of Lords reached the same conclusion in 1963 in a decision that surprised the British legal world and was characterized as one of the most important House of Lords decisions in the 20th century.[144] In 1962 the Supreme Court departed from the unqualified English doctrine of freedom of contracts. A woman who suffered from severe diary as a result of a meal she had on board of a luxurious Israeli Boat sailing from France to Israel sued the Cook and the shipping company. The ticket she purchased included an exemption from liability clause. The Court ruled that this clause is void because it is part of a standard form contract and cannot be viewed as consented to, and that it contradicts the public order.[145] This decision paved the way to the later legislation of the Standard Form Contracts Law 1964, and more importantly, to the good faith doctrine, which became later a leading doctrine in Israeli contract law (following the legislation of a new contract law in 1973 adopting the Civil Law principles of contact law).

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[142] Foundation of Law Act, 1980, 34 L.S.I. 1981 (1979-1980), Sec. 1
[143] CA 106/54 Weinstein v. Kadima – a co-op Ltd [1954] IsrSC 8 1314
[144] Hedley Byrne v. Heller [1964] AC 465.
[145] CA 461/62 Zim Co. v. Maziar [1963] IsrSC 17(2) 1319 On the decision see Eli Salzberger and Fania Oz-Salzberger, *On Stomach Ache , the World Correction and the Representation of the Enlightened Public*, in Heshin et al. *eds) The Court – 50 Years of Adjudicationg in Israel (Jerusalem 1999). 76-78 [Hebrew]

In is noteworthy that in this decision the Court made use for the first time also of the "enlightened public" standard, as a leading interpretative principle. Justice Landau, importing to Israeli law part of the German Enlightenment discourse, held that when interpreting the law the judge ought to follow the accepted views of the enlightened public, of which he is a member.[146] His remarks were made partly in response to the opinion of another justice on the bench – Silberg – who reasoned his decision on the bases of Jewish values. This debate among the judges developed to a major debate about the interpretation of the 1980 residuary clause mentioned above (the principles of freedom, justice, equity and peace of Israel's heritage). This doctrine of the "enlightened public" was celebrated 30 years later by Justice Barak as one of the fundamental and most powerful metaphors of Israeli jurisprudence.[147]

In this early period the Supreme Court began also the development of unjust enrichment law, departing from the English law and precedents. Thus, in the 1969 case of Yefet v. Istwood, it ruled that a payment made due to a mistaken understanding of the law could be ordered back.[148] In 1975 the Court ordered, again in contrast to English law, restitution of a benefit awarded to a party as the result of a court ruling that was quashed on appeal, despite the fact that the benefit came from a third party.[149]

4.2 The broad Interpretation of the New Civil Legislation

[146] See Fania Oz-Salzberger and Eli Salzberger, *"The Hidden German Sources of the Israeli Supreme Court"*, 15 *Tel Aviv University Studies in Law* 79-121 (2000).
[147] Aharon Barak, The Enlightened Public in Barak and Mazuz (eds) 2 Landau Book, (1995) [Hebrew] , 673-693. Following a public outcry regarding the elitist undertones of this concept the judges in recent years stopped using this title, but remained faithful to the ideas lying behind it
[148] CA 292/68 Yefet v. Istwood [1969] IsrSC 23(2) 604
[149] CA280/73 Pelesport v. Gaynee [1974] IsrSC 29(1) 597

In the 1960s and mainly in the 1970s a variety of new statutes in the fields of civil law were enacted by the Knesset, moving away from the English doctrines, somewhat towards the Continental thinking, with many local innovations. Good examples are the eradication of consideration as a constitutive element of a contract, the introduction of the "good faith" principle from the negotiation phase of a contract to its actual execution (section 12 of the Contract Law (General Part) 1973 holds that during negotiations towards a contract the parties have to conduct themselves in an acceptable manner and in good faith; section 39 holds that in fulfilling an contractual obligation a party has to act in an acceptable way and in good faith, and this rule applies also to the use of a right, the source of which is a contract and, according to section 61, also on legal actions which are not a contract and on non-contractual obligations), and the introduction of specific performance, rather than compensation, as the major remedy for a breach of contract. The innovative substantive arrangements with no precedents from other legal systems or from previous decisions of the Israeli Court paved the way to creativity by the courts. In addition, the new laws are using many broad standards, which enabled the courts to take an active part in their interpretation and application. So they did.

The "good faith" doctrine became a super-principle of Israeli private law, and the courts interpreted it in such a broad way, that the whole concept of a contract was shifted from reflecting a libertarian and individualistic ideology to representation of ideology of solidarity, trust and cooperation. The courts allowed themselves unprecedented intervention in the content of contracts in order to entrench values that the courts saw as desirable. Thus, for example, in the 1977 decision of Atiya vs. Arrarat Insurance Company Ltd, the Supreme

Court ruled in favor of an insured person who had a car accident and her claim was denied by the insurance company, due to the fact the she did not meet the requirements of minimum age (24) and one year experience in driving. The Court found that the forms that the insurer filled and signed before the policy was issued and signed related to age and experience. Only subsequently, the insurance company agreed to issue the policy restricting its validity to minimum age and one year experience. But, although these restrictions were written in the policy, the insurance company failed to make an explicit notice to the insured person on these limitations, thus infringing the duty to act in good faith according to section 12 of the Contract Law (General Part).[150] In the decision, the judges elaborate on the idea of trust, which ought to be the guiding principle in the interpretation of the law of contracts.

In the 1979 case of Rot vs. Yeshupe, the Court annulled a contractual clause that exempted a constructor from any liability towards a buyer of a new house, on the grounds of lack of good faith. The clause in the contract specified that the actual acceptance of the house keys by the buyer is a final proof that the constructor fulfilled all his obligations. The Court found the constructor liable for the damages discovered by the buyer in a later stage.[151]

These new contractual principles were extended to public law and government promises. Thus in the 1975 case of Saitex the Court introduced the concept of administrative or governmental promise, ruling that a public authority has to respect its promises in good faith, and that the Court will not hesitate to enforce governmental promises, if they were given by an official, within his

[150] CA846/75 Atiya v. Arrrarart Insurance Company Ltd [1976] IsrSC 31(2) 780
[151] CA 148/77 Rot v. Yeshupe IsrSC 33(1) 617

legal authority, with an intention of having legal validity, where the authority can fulfill its promise and there are no legal justifications to modify or repeal it.[152] Some of these conditions were even relaxed later, especially following the new constitutional jurisprudence of the 1992 basic laws. The Court ruled, for example, that legitimate reliance of an individual on the fulfillment of governmental promise will be protected by the basic laws and the authority's conduct with regard to its promises will be have to pass the proportionality test.[153]

Maybe the most drastic and activist step of the Court in the field of contract law was the adoption of the principles of purpose-governed interpretation to the interpretation of contracts, in a similar way it became the leading interpretative doctrine for Knesset legislation. This revolutionary step was made by President Barak in the case of The State of Israel v. Apropim. The Early 1990s were a period of a massive immigration wave from the ex-Soviet Union to Israel. The Government wanted to encourage a swift construction of new housing, by various benefits to constructors who complete the building of new houses within a short period. The construction firm of Apropim was late in completing the projects it was contracted to build for the State and the State decided in response to cut the agreed contractual price. The contract, which was made in haste, did not include such a sanction and thus the firm sued the State and won in the District court.

Section 25(a) to the Contract Law (General Part) holds that a contract will be interpreted according to intention of the parties as it is reflected by the

[152] HCJ 321/75 Saitex v. The Minister for Industry and Commerce [1975] IsrSC 36(1) 673
[153] HCJ 5273/97 Mosinson v. The Municipality of Ashdod [1997] IsrSC 51(4) 757.

wording of the contract, and according to the contractual circumstances in case the intention is not explicit from the wording. From the enactment of the Contract Law in 1973 and until this decision, the Court adopted a two stage interpretation standard – a first stage of internal interpretation according to the contractual text, and only if this stage fails to indicate a clear mutual intent of the parties, an application of a second stage in which the external circumstances are examined. The District court in the case of Apropim followed this principle and held that since no price sanction in mentioned in the wording of the contract, the interpretative process does not have to go beyond the first stage.

The majority opinion on appeal, delivered by President Barak reversed the decision, abolishing the two stages doctrine. Bark, probably in the most activist decision in the field of contract law, held that the two stages doctrine suffers from serious deficiencies: the border between the stages is vague, the doctrine does not take seriously the state of mind of the parties, it does not correspond to the general new principles of contract law and specifically to the good faith principle. Barak adopted a new doctrine of contractual interpretation – a purpose-governed one, according to which the interpretation of a contract, in a similar way to interpretation of legislation, should be based on a combination of textual meaning and external circumstances. Since the purpose of the contract between the State and Apropim was the swift construction of housing for new immigrants, he wrote, it is right for the Court to complete the written contract by adding the sanction against delays in

performance.[154] The purpose of a contract, thus, became the main source for its interpretation.[155]

4.3 The Development of Unjust Enrichment Law by the Court

Another significant revolution in Israeli private law was carried out by the Supreme Court using the doctrine of unjust enrichment. In 1979 the Knesset legislated the Unjust Enrichment Law, which holds in its first article:

> 1. (a) Where a person obtains any property, service or other ben
> from another person without legal cause (the two persons hereinaf
> respectively referred to as "the beneficiary" and "the benefactor
> the beneficiary shall make restitution to the benefactor, and if re
> tution in kind is impossible or unreasonable shall pay him the va
> of the benefit.
>
> (b) It shall be immaterial whether the benefit was obtain
> through an act of the beneficiary or an act of the benefactor or
> any other way.

The wording of the law, although using terminology from Talmudic law, was very similar to parallel laws in Continental civil codes (notably the German BGB). However, its interpretation by the Israeli Supreme Court was much broader. Two important examples can be mentioned in this context. The 1988 decision of Adras - Building Materials Ltd. vs. Harlo and Jones G.M.B.H, involved a breach of commercial contract for the sale of iron. The seller, the German Company of Harlow and Jones, took an advantage of a sudden significant increase in the world market value of iron, and sold the iron, designated for Adras, to a third party for a significantly higher price.

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[154] CA4628/93 The State of Israel v. Apropim [1995] IsrSC 49(2) 276.

[155] In a decision given recently - FH 2405/05 The Association of vegetables farmers co-op v. The State of Israel (yet unpublished) the Supreme Court sitting in an extended bench of 9 justices approved the Apropim precedent.

The lawsuit of the buyer was launched after the price of iron cropped down back to the level agreed upon in the contract. The buyer, who declined to prove any losses from the breach of contract (as it bought the iron from another seller for a lower price), claimed the profits of the seller on the bases of unjust enrichment. The major question faced by the Court was whether Unjust Enrichment Law could be applied in the framework of contractual relations.

The Majority in a five judges bench of a further hearing, led by Justice Barak held that unjust enrichment became a leading principle in Israeli law, and that Unjust Enrichment Law is of open texture. It is not limited to protection of property rights and it may apply also to contractual parties, regardless of whether the contract was terminated or not. Contract law protects reliance interests, expectation interests, as well as unjust enrichment interests. Article 1 of the Unjust Enrichment Law orders restitution where a person received a benefit, which originates from another person and was not obtained by lawful right. There is a causal link between the breech of contract by Harlo and Jones and their enrichment, and thus all three conditions for ordering restitution, as set forth in article 1, are met.[156]

Barak, well aware of the law and economics literature on efficient breach, added that economic efficiency is not the sole goal of contract law, and that fulfillment of promises is an important basis for our life as a community, society and a nation.[157] A promise enshrined in a contract is a protected

[156] FH 20/82 Adras - Building Materials Ltd. v. Harlo and Jones G.M.B.H [1988] IsrSC 42(1) 221. The decision was translated into English and was published in [1995] Restitution Law Review 235.
[157] On the economic analysis of this decision see Niva Elkin-Koren and Eli Salzberger, "Towards an Economic Theory of Unjust Enrichment Law", 30 *Int'l Rev of L & Econ.* 551-473 (2000).

interest that strengthens commercial stability. Breach of contracts generates transaction costs, such as litigation, and uncertainty, which at times can outweigh the economic efficiency of the breach, even if it is an "inefficient contract".[158]

10 years later, again by the majority of an enlarged bench of seven judges, the Israeli Supreme Court pulled out of a hat the doctrine of unjust enrichment, this time in an intellectual property case. In this case, A.Sh.I.R v. Forum Avizarim, the Supreme Court was asked to determine whether legal protection should be accorded to an unregistered design against copying by competitors. Designs are typically protected under the Patents and Designs Ordinance 1924, a Mandatory statute that is still part of Israeli positive law. A design protects the configuration applied to an article by any industrial process, which is judged solely by the eye. The creator of any "new or original" design may apply to register the design, and such registration allows the owner to prevent any person from imitating the design for up to 15 years. In this case the inventor failed to register the design.

[158] The minority opinion of Deputy President Ben Porat and Dov Levin, J. held that Unjust Enrichment Law cannot be applicable in contractual relations. Some principles and considerations of unjust enrichment are incorporated anyhow into the Contracts Law, but they derive from the various articles of the Contract Law (General Part) and the Contract Law (Remedies for Breach of Contract) and not from the Unjust Enrichment Law. More specifically, the Israeli contract law specifies the remedy of specific performance as the main remedy for breach of contact and derivable from this remedy is the right of tracing which might include gains of the breachor, but since in this case the buyer opted for the termination of the contract rather than applying for its enforcement, he is not entitled to the profits of the seller. Moreover, in case of termination, the contract law specifies that restitution will take place, but this restitution is meant to bring the plaintiff to a position he would have been in had he didn't enter the contract in the first place. Copare to the English case of A.G v. Black [1998] 2 W.L.R. 805.

The Court held that the alleged copier made unjust enrichment by using intangible idea/design developed by another.[159] A majority of 4 against 3 Justices held that unjust enrichment could coexist with intellectual property law. Whereas intellectual property laws address property rights in intangibles, unjust enrichment addresses a different set of interests. It provides a personal (rather than property) claim regarding restitution. It should therefore provide a supplementary remedy whenever unjust enrichment is invoked. The Court granted an injunction in favor of the plaintiff, based on unjust enrichment.[160]

4.4 Judicial Activism in other areas of Private Law

New Israeli legislation did not cover all the fields of private law. In Torts, for example, the Mandatory statute has not been replaced by new Israeli legislation (save in the cases of car accidents in which a law from 1975 introduces a no fault regime for victims of car accidents, shifting the bases for liability from negligence to strict liability, side by side with a mandatory insurance). This has not prevented the Court from developing new judge-made law in this realm, mainly through the expansion of the concept of negligence. Thus, for example, in the 1985 case of The Municipality of Jerusalem vs. Gordon, The Court held the Municipality of Jerusalem liable in torts for sending a local car dealer a barrage of parking tickets for parking

[159] RCA 5768/94, 5614/95, 993/96 A.Sh.I.R Import, Manufacture and Distribution et al. v. Forum Gadgets and Consumption Goods Ltd. et al. ; herrer et al. v. shoham Machines and Mlds Ltd. el al; Atar Plastics Industries v. Shai Albums and Advertising Prodacts Factory Ltd. et al. [1998] IsrSC 52(4) 289.

[160] The minority opinion held that in most cases when intellectual property laws imply an exclusionary rule then once a work is unprotected by intellectual property a remedy should not be allowed under unjust enrichment. For an analysis of the two cases and the emerging Israeli doctrine of unjust enrichment see Niva Elkin-Koren and Eli Salzberger, "Towards an Economic Theory of Unjust Enrichment Law", 3*0 Int'l Rev of L & Econ*: 551-473 (2000).

violations made by cars he sold. Although, the dealer registered with the transportation authorities a legal change of ownership, these changes were not recorded properly at the Municipality database and the fines were addressed to the car dealer. The Court held that a State authority or a local authority, even when acting within their statutory powers, have a duty of care, and that this duty was breached, even though the damage that the plaintiff suffered was not a physical damage to body or property but mere harassment. Bureaucratic negligence, the judges wrote, ought to be assessed by the same criteria as medical or other professional negligence.[161]

In the 1997 case of Lindoren, the Court by a majority of justices overturned an old and established precedent and held that a partner of a person who died as the result of a torts wrongdoing and was financially dependent upon him is entitled to compensation, despite the fact that the statutory norm - the Torts Ordinance - mentions only the entitlement of a legal spouse. In this decision the Court adopted Barak's interpretation theory, departing from the literal meaning of the text and adopting a purposive interpretation. The majority added that this interpretation also falls in line with the constitutional principle of equality that ought to be incorporated into private law, as there are no grounds for differentiate between a legal spouse who was financially depended upon a person who died as a result of a wrongdoing and a partner who lived with the deceased and was financially dependent on him.[162]

In another far-reaching decision in the field of torts in the 2000 ruling of Etinger, the Court (Justice Rivlin) held that a plaintiff in a torts case which

[161] CA243/83 The Municipality of Jerusalem v. Gordon [1985] IsrSC 39(1) 113.
[162] CA 2000/97 Lindoren V. Karnit [1999] IsrSC 55 (1)12

brought to the death of her partner is entitled to compensation based on a calculation of the deceased potential earnings which were prevented due to his death. The Court again, using a technique of judicial law-making, overturned a long-standing and established precedent that enabled damages only for pain and suffering in such a case and introduced the concept of the "lost years", equalizing between a situation in which a person is severely incapacitated (in which the plaintiff is entitled to very high sums of compensation) and a situation in which a person dies as the result of a torts wrongdoing.[163] This decision has far-reaching financial implications on calculation of damages.

5. Concluding Remarks

Judicial activism characterizes the Israeli judiciary and especially its Supreme Court since the establishment of the State of Israel in 1948. This activism expresses itself in a broad and innovative interpretation of statutory norms and previous precedents, as well as lack of inhibitions to review the other branches of government. However, in the last 25 years we are witnessing a combination of a more explicit activist judicial rhetoric with a growing intervention of the Supreme Court in the decision-making of the other branches of government. It is the combination of these two changes that brought about a wave of criticism and calls for reforms. The attacks on the Supreme Court were launched about a decade 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 insights from the American Critical Legal Studies movement, portraying the law as part of politics, portraying the Supreme Court Justices as

[163] CA 140/2000 Etinger Estate v. The Company for the Development of the Jewish Quarter [2004] IsrSC 58(4) 486

an old elite, which tries to enforce its liberal values against "democratic" process of collective decision-making and in order to maintain its domination through the tool of law.[164]

More recently some mainstream Likud Knesset members, headed by the previous Speaker of the Knesset and the previous chair of its Constitution, Law and Legal Affairs Committee, have joined these attacks. A motion in the Knesset to establish a constitutional court, bypassing the Supreme Court, was defeated a few years 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).[165] In January 2004, though, the Knesset passed a decision expressing concerns about the Supreme Court's trespassing into the legislature's territory.[166] 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.[167]

In 2000 the mounting criticism of the Court led to the appointment of a committee to re-examine the selection procedure of judges.[168] The

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[164] See, for example, Evelyn Gordon, The Gradual Delegitimation of Freedom of Speech, 7 *Azure* 1999 ; Evelin Gordon, Judicial Activism and the Lack of Law, *Azure* 3 1998; Joshua Segev, The Changing Role of the Israeli Supreme Court and the Question of Legitimacy, 20 Temple Int'l l& Comp. l.J. (2006) 101

[165] The Knesset official Gazette no. 678 19.5.03

[166] 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.

[167] On this affair see Rubinstein, Supra Note 17, pp. 97-101.

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

committee, headed by the former Attorney General and Supreme Court Justice, Itzhak Zamir, praised the existing system.[169] It highlighted all the features added to this system since 1953, which were meant to make the selection process more transparent and procedurally just,[170] and it recommended minor 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.[171] 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.[172] 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 it 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

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[169] *The Report of the Committee for the Examination of Judicial Selection* (March 2001)
[170] These procedural requirements are mostly regulated by the *Courts Act [Consolidated Version} 1984* and accompanying regulations.
[171] 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.
[172] Chapter 8 to the Committee Recommendations, Supra Note 37.

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 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 courts, and especially of the Supreme 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.[173]

These recommendations, which are being implemented, have not prevented various politicians 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). 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.

The intensifying criticism of the Supreme Court had some effects on the Court's conduct in the last couple of years. In an increasing number of politically delicate cases, the Court chose a new tactics, avoiding a decision to the merits of the case and returning the "hot potato" to the government and the

[173] 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.

Knesset, with an explicit warning that if they do not act the Court would. This tactics was employed, for example, in yet another round of the military service exemption affair, which was brought to the Court following recommendation of a committee examining the matter, a committee which was itself formed as a response to the Court previous decisions.[174] Likewise, the Court adopted this tactics when it was asked to review a new legislation prohibiting Palestinians' familiy reunions because of security concerns.[175]

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 is both another result of the judicial activism and at the same time manifests itself by increasing judicial activism.[176] Correspondingly, we witness a de-legitimating campaign against the legal establishment. One of its symptoms is the mounting calls to change the selection process of judges. The combination of the two – the delegation and the delegitimisation - 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, even against a lack of an entrenched bill of rights. On the other

[174] HCJ 6427/02 The Movement For Quality Government in Israel v. The Knesset (unpublished).
[175] HCJ 7052/03, 8099/03 Adala The Legal Center For Arab Minority Rights in Israel v. Minister of the Interior et al (unpublished).
[176] 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).

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.