

## Judicial Review of Politics: The Israeli Case

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*In the tradition of studies questioning the impact of celebrated court rulings, this article discusses the effectiveness of the judicial review of politics conducted by the Israeli Supreme Court. The Israeli Supreme Court is generally viewed as a highly influential, almost omnipotent body. During the last two decades, the Court has intervened repeatedly in the so-called political domain, thereby progressively eroding the scope of realms considered non-justiciable. It has ventured to enter domains of 'pure' political power to review the legality of political agreements, political appointments (appointments of political allies to public positions), and political allocations (government funding to organizations affiliated with its political supporters). The prevalent perception is that these developments had a significant impact on Israeli political life. The present article challenges this view and argues that, on closer scrutiny, the influence of the Court on many of the issues reviewed here is negligible. First, many of the doctrines developed by the Court in order to review political measures proved ineffective. Usually, when the Supreme Court (acting as a High Court of Justice) engages in judicial review, it lacks the evidence needed in order to decide that administrative decisions on public appointments or public funding should be abolished because they were based on political or self-serving considerations. Second, the norms mandated by the Court hardly influence politicians' decisions in everyday life, and are applied only in contested cases. The reasons for this situation are not only legal but also socio-political. Large sections of current Israeli society support interest-group politics and do not accept the values that inspire the Court.*

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## INTRODUCTION: THE IMPACT OF LAW ON POLITICS

An important aspect of the study of law and politics concentrates on the impact of law on politics. The body of research that adopts the impact perspective poses the question can courts effectively intervene in politics, rather than do they have the legitimacy to do so.<sup>1</sup> The broader context of this question is the literature dealing with the potential of court rulings to bring about social change. Lawyers are trained to think that litigation yields enforceable results. For the ideologues among them, this is the drive for cause lawyering – lawyering for social change.<sup>2</sup> This belief in the power of law, however, is challengeable.

As early as 1974, Stuart Scheingold published an influential book discussing the ‘Myth of Rights,’ that is, the ungrounded belief in the power of law to bring about unilateral social change.<sup>3</sup> Similarly, Gerald Rosenberg’s study, meaningfully entitled *The Hollow Hope*,<sup>4</sup> dealt a further blow to the belief in the transformative power of litigation. These writings not only identified the famous ‘gap’ between law and reality, a well-entrenched idea already explored in Roscoe Pound’s writings<sup>5</sup> but, more concretely, indicated the futility of trying to change reality through litigation. This view did not go uncontested. Soon after the publication of Rosenberg’s book, Malcom Feeley criticized him for addressing the gap between reality and the exaggerated expectations of activists regarding the results of litigation, and not the one between reality and the court decisions themselves, which were much less far reaching.<sup>6</sup> In a recent book, dedicated to the reform of the United States prison system, Feeley, together with Edward Rubin, contended that judicial policy-making was very successful in this context,<sup>7</sup> and even offered

- 1 For early writings in this direction, see T.L. Becker and M.M. Feeley (eds.), *The Impact of Supreme Court Decisions* (2nd edn., 1973).
- 2 See A. Sarat and S. Scheingold (eds.), *Cause Lawyering, Political Commitments and Professional Responsibilities* (1998); A. Sarat and S. Scheingold (eds.), *Cause Lawyering and the State in a Global Era* (2001).
- 3 S.A. Scheingold, *The Politics of Rights – Lawyers, Public Policy and Political Change* (1974).
- 4 G.N. Rosenberg, *The Hollow Hope – Can Courts Bring About Social Change?* (1991).
- 5 The literature addressing this theme can be traced back to Roscoe Pound’s ‘Law in Books and Law in Action’ (1910) 44 *Am. Law Rev.* 12. Later, the term ‘gap problem’ was coined by Richard Abel: see R.L. Abel, ‘Law Books and Books About Law’ (1973) 26 *Stanford Law Rev.* 175, 187. See, also, D. Nelken, ‘The “Gap Problem” in the Sociology of Law: A Theoretical Review’ (1981) 1 *Windsor Yearbook of Access to Justice* 35; D. Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157; A. Sarat, ‘Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of Research Tradition’ (1985) 9 *Legal Studies Forum* 23.
- 6 M.M. Feeley, ‘Hollow Hopes, Flypaper, and Metaphors’ (1993) 17 *Law and Society Inquiry* 745.
- 7 M.E. Feeley and E.L. Rubin, *Judicial Policy Making and the Modern State – How the Courts Reformed America’s Prisons* (1999).

explanations of the different views regarding the impact of court rulings. Feeley and Rubin's first explanation developed the theme of exaggerated expectations. They argued that:

the assumptions about the success or failure of policy making must be understood in relative terms. If we define success as the rapid and inexpensive realization of the precise effects that the policy makers envisioned, then we will not find success on this side of the bureaucratic heaven. If we define effective judicial intervention as the comprehensive transformation of government or social institutions without dislocation or delay, success will be equally uncommon.<sup>8</sup>

Secondly, they argued that the impact of judicial review may vary with relation to several factors. For example, there may be differences between the effect of celebrated 'big' decisions of the Supreme Court which attract considerable attention and political opposition and the effect of 'smaller' decisions handed down by trial courts, in a more fact-oriented way.<sup>9</sup> Scheingold and Rosenberg focused on rights-promoting litigation, which placed before the courts issues found at the core of ideological and political controversies. Feeley and Rubin researched the more mundane judicial work, that was mainly 'a jurisprudence of facts'.<sup>10</sup> These explanations are, however, tentative and call for further research.

In England, serious doubts were raised regarding the effect of judicial review on administrative decisions, but research in this area is still not conclusive. De Smith's textbook on judicial review mentions these doubts, describing the situation in this area as 'patchy'.<sup>11</sup> Evidence published by other researchers reinforces these reservations, and the conclusion that further research is required.<sup>12</sup>

This paper, based on the effectiveness approach to the study of law and politics and an acknowledgement of the gap problem, focuses on judicial review as exercised by the Israeli Supreme Court. The Israeli case study is

8 id., at pp. 317–18.

9 id., at p. 319.

10 id.

11 S. De Smith, H. Woolf, and J. Jowell, *Judicial Review of Administrative Action* (5th edn., 1995) 22: 'An evaluation of the practical impact of judicial review on the quality of government decisions is still constrained by the limited empirical research in the field. The whole picture is likely to be a patchy one'.

12 See H.F. Rawling, 'Judicial Review and the "Control of Government"' (1986) 64 *Public Administration* 135; M. Kerry, 'Administrative Law and Judicial Review – The Practical Effects of Developments Over the Last 25 Years on Administration in Central Government' (1986) 64 *Public Administration* 163; R. Cranston, 'Reviewing Judicial Review' in *Administrative Law and Government Action – The Courts and Alternative Mechanisms of Review*, eds. G. Richardson and H. Genn (1994) 45, 69–75; G. Richardson and M. Sunkin, 'Judicial Review: Questions of Impact' (1996) *Public Law* 79; C. Harlow and R. Rawlings, *Law and Administration* (2nd edn., 1997) 565–73; A. Le Sueur and M. Sunkin, *Public Law* (1997) 470–4; M. Sunkin and K. Pick, 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' (2001) *Public Law* 736.

interesting because of the the court's activist features, mainly during the 1980s and 1990s.<sup>13</sup> The so-called activist approach of the Israeli court was not confined to civil rights, as discussed by Rosenberg, but also extended to matters of legality and ethics in government. In other words, given that the Israeli Supreme Court is a singularly activist institution, and assuming that it aspires to improve public norms, the question discussed here is whether the court is also influential.

## THE NEW PUBLIC LAW OF ISRAEL: THE RULE OF LAW IN POLITICS

The starting point of this study is the growing involvement of Israel's Supreme Court in political domains that were previously considered non-justiciable.<sup>14</sup> Despite nuances of opinions on this matter,<sup>15</sup> there is a trend in Supreme Court rulings toward an embracing growth in its jurisdiction.<sup>16</sup>

The court has expanded judicial review to include political decisions concerned with the achievement of ideological ends, as well as decisions concerned with the allocation of political resources through appointments, funding, and coalition agreements. These are decisions political in a narrow, 'nitty-gritty' sense. This distinction between political decisions based on an ideology and decisions dealing with the allocation of power and political resources (henceforth, 'nitty-gritty' politics) is certainly not clear-cut. Decisions concerned with the allotting of power and resources on a political basis might serve, directly or indirectly, to attain ideological-political aims. For this discussion, however, it is important to pay attention to the singularity of political decisions specifically intended to strengthen a party apparatus or a political figure. Often, underlying these decisions there are also, but not only, distinctively personal and power-driven motives, deserving a separate discussion. Decisions of this type closely resemble one another, even when they serve different, and even contradictory ideological goals. Over the last few years, this distinction has been blurred in Israeli politics due to changes resulting from the flourishing of sectarian

13 In this context, see M. Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (1993) (Hebrew).

14 The ruling of Justice Aharon Barak on HCJ 910/86 *Ressler v. The Minister of Defence* 42(2) P.D. 441 is a prominent landmark in the course of the non-justiciability doctrine.

15 For a general survey of this issue, see A.L. Bendor, 'Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1997) 7 *Indiana International and Comparative Law Rev.* 311.

16 Nevertheless, the scope of judicial review appears to be consistently narrower concerning the security forces and state action in the occupied territories. See D. Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories* (2002).

parties. A central, if not the exclusive, dimension in the ideological platform of these parties is to improve the lot of their constituents, turning, as it were, the personal into the ideological. Thus, for instance, one could claim that the ideology of allowing access to the corridors of power to all those previously rejected translates, in practice, into political appointments. Nevertheless, even in terms of these changes, a distinction can be made between decisions improving the lot of the whole (sectarian) group, such as housing subsidies for new immigrants, and decisions favouring specific individuals that also involve exclusive personal advantages.

So far, most discussions of the expansion of judicial activism in Israel have focused on problems arising from the judicial review of ideological decisions, such as placing limitations on the import of non-kosher meat.<sup>17</sup> Recently, the court's concern with such matters has exposed it to objections voiced mainly by the ultra-Orthodox, religious, and traditionalist segments of the Israeli public.<sup>18</sup> By contrast, few discussions address the court's intervention in 'nitty-gritty' politics, namely, in decisions that do not follow from a particular world view, and concern the allocation of power positions to parties or politicians. This intervention was probably perceived as less controversial and, at least on the surface, professedly 'neutral' and within the consensus,<sup>19</sup> in the sense that it supports neither liberal nor conservative politics and only compels evenhandedness. Both the right and the left supposedly strive for decency, and the slogan 'Enough of Crooks' is almost the only one that succeeded in uniting activists from both ends of the spectrum in political demonstrations.<sup>20</sup>

The involvement of the Supreme Court in the political realm as the 'knight of fairness in government' has contributed to its image as a strong and influential court. The court has declared in recent years that political agreements are subject to the rule of the law, has invalidated appointments based on political connections rather than merits, and has declared illegal all government funding based on political considerations. The question posed in

17 See HCJ 3872/93 *Mitrael Inc. v. The Prime Minister and the Minister of Religious Affairs* 47(5) P.D. 485.

18 Critics perceive the Supreme Court as representing an elitist public, which uses the institution to further its hegemony. Generally, see R. Shamir, 'The Politics of Reasonableness: Reasonableness and Judicial Power at Israel's Supreme Court' (1994) 5 *Theory and Criticism – An Israeli Forum* 7 (Hebrew).

19 An opposition worth noting in this context is Ruth Gavison's argument that the court should not intervene in matters of public ethics and administrative norms, when these matters do not have any bearing on the protection of human rights. See R. Gavison, 'Public Involvement of the High Court of Justice: A Critical Look' in R. Gavison, M. Kremnitzer, and Y. Dotan, *Judicial Activism: For and Against – The Role of the High Court of Justice in Israeli Society* (2000) 69–164 (Hebrew).

20 This slogan was the *crie de guerre* in the initiative to shift to direct elections for the Prime Minister (included in the new Basic Law: The Government, enacted in 1992, and later abolished in the latest version of Basic Law: The Government, enacted in 2001).

this article is whether, in light of these rulings, actual changes can be detected in Israeli politics. What is the correlation between the official line about the justiciability of politics and the court's influence on the praxis of politics? In other words, is the intervening court also effective? In discussing this question, I address doctrinal developments affecting three crucial topics in the court's involvement in Israeli politics: the issue of political agreements, the issue of political appointments, and the issue of 'designated funds' (allocations from the state budget on a political basis). To establish the factual background needed for the discussion, I use data collected from the annual reports of Israel's State Comptroller over the past fifteen years.<sup>21</sup>

The argument presented below in greater detail is that petitions contesting symptoms of 'nitty-gritty,' and even corrupt, political moves, do contribute to the formulation of 'nice' rules. Usually, however, these rules do not yield operative judicial decisions that affect reality. In most cases, these petitions result only in symbolic victories in the courtroom, and life goes on as before. On the one hand, such victories may be considered as a progress even when they achieve little in reality ('better than nothing'). On the other hand, however, they contribute to a false perception of the political reality in Israel, and may eventually present the Supreme Court as irrelevant to this reality.

As I demonstrate, the limited influence of judicial rulings in the political context is largely due to two factors. First, the rhetoric of judicial rulings on political issues upholds intervention but, ultimately, the court applies this rule to the factual evidence before it in a way that leads to non-intervention. Hence, already in the rulings, the petitioners' 'victory' is chiefly rhetorical and without practical results. Second, even when the ruling does include an operative remedy supporting the petitioners' position, this remains a one-off, isolated achievement until the next petition is submitted, assuming the relevant public organizations are aware of the problem and can afford to file petitions. Politicians hostile to the rulings of the High Court of Justice do not appear to risk serious public sanction. Contrary to initial impressions, the court's intervention is not as broadly supported as it had seemed, and is even less popular among supporters of the new sectarian parties, who are anxious to capture power positions in Israeli society.

21 *State Comptroller Annual Report 37 (1986) – State Comptroller Annual Report 51 (2000)*. The State Comptroller is authorized to review all the activities of both the central and local government in Israel, including other institutions supported or administered by the government. See: Basic Law: State Comptroller and State Comptroller Law, 1958 [Consolidated Version]. Therefore, most of the examples discussed in this article are within the scope of matters reviewed in the comptroller's annual reports.

## POLITICAL AGREEMENTS

The first issue concerns the judicial review of political agreements between parties, which are usually negotiated when forming coalition governments after general elections. Such agreements are at the heart of politics and, therefore, were viewed as lying beyond the domains of law and judicial review. In the past, political understandings, and even actual coalition agreements, were considered strictly political, and their infringement was a frequent occurrence in Israeli public life. Discussion of these violations, however, remained confined to the public realm, and did not usually reach the courts.<sup>22</sup> This assumption was overturned in the new and unprecedented rulings of Justice Barak, who is now the Chief Justice. In his opinion, formulated in H CJ 669/86 *Rubin v. Berger*<sup>23</sup> and refined in H CJ 1635/90 *Zarzevsky v. The Prime Minister*,<sup>24</sup> political agreements should be considered legally binding commitments. These agreements are not subject to the regular provisions of contract law, but are still ruled by a legal regime that is no less severe, that of public law. The decisions concerning the justiciability of political agreements were not only a significant innovation, but also central symbolic representations of the new expanded domains of justiciability.

In the *Zarzevsky* case, this approach confronted a rival view represented by the then Deputy Chief Justice, Menachem Elon. Justice Elon, who had challenged the judicial activism of Justice Barak in other contexts as well, objected to the notion of justiciability with regard to political agreements, which he held should be extremely limited.<sup>25</sup> Barak dismissed Elon's objections, arguing that public judgement cannot replace public law.<sup>26</sup> In principle, this dispute is yet to be settled,<sup>27</sup> but the powerful ruling of Justice Barak has already influenced the legal arena by attracting to the High Court of Justice new petitions on political agreements.<sup>28</sup>

22 For earlier decisions on this question, see H CJ 191/64 *Elbaz v. The Minister of Religious Affairs* 18(4) P.D. 603; H CJ 313/67 *Axelrod v. The Minister of Religious Affairs* 22(1) P.D. 80 (henceforth *Axelrod*); H CJ 501/80 *Zoabi v. Abu Rabbiah* 35(2) P.D. 262.

23 41(1) P.D. 73.

24 45(1) P.D. 749 (henceforth *Zarzevsky*).

25 *id.*, at 786.

26 *id.*, at 854–5.

27 In a narrow legal sense, the court has not been called to deal with a case requiring it to choose between the different approaches. The *Zarzevsky* case dealt with the petition of a *Likud* party member against his own party, because of the commitment it had undertaken in the context of a political agreement. The case did not present a controversy between the parties to this agreement. In these circumstances, the need for a decision concerning the validity of the political agreement never arose in the first place. For the petitioner, who was a 'third party' to the agreement, a judicial ruling dealing with the legality of actions that the party had undertaken to perform under this agreement, if they ever materialized, was sufficient.

28 See: H CJ 5364/94 *Velner v. The Chairman of the Israeli Labor Party* 49(1) P.D. 758.

Justice Barak's motivation when expanding justiciability in this context was to impose decency and law on politics. The question is: was this expansion successful? A detailed study of the proposed rules raises serious doubts. According to Justice Barak, a political agreement is a legal agreement. Yet, as he proceeds further, the lack of effective remedies to protect it becomes obvious. Should the agreement be breached, no compensation can be envisioned,<sup>29</sup> while enforcement is defined as a remedy reserved for 'exceptional' cases. What, then, will be the remedy in an ordinary case? Justice Barak's answer is annulment (or a declaration of annulment), implying that the injured party can be released from its contractual obligations. In other words: a party whose political support is no longer essential to the government will not have to go on supporting the government after the latter failed to live up to its commitments toward it! But the government was ready for this result, and hence took this risk when reversing course. Obviously, the court will not enforce performance in this case.

What, then, is left? According to Justice Barak, we might envisage the development of new remedies, suitable to the specific category of political agreements, such as the remedy of apology.<sup>30</sup> But what is the actual meaning of such a remedy in Israeli politics? Alternatively, we could ask: does not this remedy actually leave the agreement mainly to public judgement? And did not Justice Barak convey reservations concerning recourse to public judgement as the only way of dealing with infringements? On precisely these grounds, Justice Barak objected to Justice Elon's approach, stating that the only remedy in a case of breach is, at best, declarative.<sup>31</sup> Based on the precedent set in the *Zarzevsky* case, public judgement may rely on the authoritative ruling of the Court concerning the improper behaviour of the breaching party. If this is the entire import of this ruling, however, it is rather limited, almost negligible by comparison with its grandiose rhetoric. The public may also construe the court's abstention from enforcing the breached political agreement as an expression of support for the party in breach, given that the court discussed the breach and still refrained from dealing with it in any practical manner. The rule in the *Zarzevsky* case thus contributes to create a semblance of justiciability, where none exists.

The new judicial review of political agreements did make one contribution, even if relatively minor relative to Justice Barak's rhetoric. I am referring to the rule set in H CJ 1890/90 *Shalit v. Peres*,<sup>32</sup> compelling the disclosure of political undertakings, such as coalition agreements. This rule,

29 This statement is compatible with another precedent, ruling out the possibility of adding a surety to guarantee the fulfillment of a political agreement. See H CJ 1523, 1540/90 *Levi v. The Prime Minister of Israel* 44(2) P.D. 312.

30 *Zarzevsky*, op. cit., n. 24, at pp. 845-6.

31 *id.*, at p. 797.

32 44(3) P.D. 353 (henceforth *Shalit*).



which was later included in legislation,<sup>33</sup> helped launch a keen public discussion on political commitments affecting society. Nevertheless, the essential difference between the rule set in the *Shalit* case and the one set in the *Zarzevsky* case is worth noting. In *Shalit*, the court acted in the service of the public, and only ensured the availability of information necessary for public discussion. The public must judge, and the court contributes by mandating disclosure. By contrast, in *Zarzevsky*, the court professed to judge politics, and annulled the provision in the political agreement that had been the subject of the petition. The provision had included a waiver of pecuniary debts, and the court declared it void because it found the possibility of buying political support unacceptable. The court also clarified it would be willing to review the legality of actions complying with provisions included in political agreements.

The theoretical discussion of this issue should be complemented by a factual assessment: Has the new rule had any effect on the fulfillment of political agreements in Israel? Are the parties to political agreements afraid of legal sanctions? The recurrent infringements of political understandings and commitments in Israel speak for themselves.<sup>34</sup>

Note also that even norms concerning the transparency of political agreements are followed partially. Formal coalition agreements are disclosed, but the more significant political bargains are still struck far away from the public eye,<sup>35</sup> and additional instances of practices openly contradicting the rules set by the court exist.<sup>36</sup>

33 See section 13b, added in 1991 to the original Basic Law: The Government, from 1965. For identical provisions see also section 17 to Basic Law: The Government, from 1992, and section 1 to the Government Law, 2001, enacted together with Basic Law: The Government, from 2001.

34 Political culture in Israel is generally described as showing low levels of compliance with political agreements. See M. Kremnitzer 'The High Court of Justice and the Broad Concept of its Role: A Defense' in Gavison, Kremnitzer, and Dotan, op. cit., n. 19, p. 165, at p. 230 (Hebrew).

35 For instance, see: *State Comptroller Annual Report 48* (1997), which criticized the Ministry of Construction and Housing for applying a policy of subsidized rent to the ultra-Orthodox population based on coalition agreements not disclosed to the public as mandated by the court (id., at pp. 133–4).

36 A provision that had been part of a coalition agreement, stating that Knesset members appointed to be deputy ministers would be granted 'ministerial rank,' was declared invalid. See: H CJ 5079/90 *Biton v. Prime Minister* 45(2) P.D. 827. And yet, the spirit of this provision is undoubtedly preserved where a deputy minister from the Ultra-Orthodox party of Agudat Israel is appointed to act in a ministry to which no minister was assigned (because of its religious views, this party does not allow its members to serve as full members in the government).

## POLITICAL APPOINTMENTS

The second issue is the line of precedents dealing with political appointments, namely, appointments to the public service based on political loyalties or affiliations. Israeli law makes such appointments illegal, barring a few exceptions mostly involving close assistants of government ministers.<sup>37</sup> As in the area of political agreements, the declared readiness of the court to intervene in this area is more apparent in recent rulings, although earlier decisions show evidence of it as well.<sup>38</sup>

The court's official doctrine on this question, as formulated in H CJ 4566/90 *Dekel v. The Minister of Finance*,<sup>39</sup> is that no appointments should be made on political grounds. The appointment must be substantively justified, namely, based on the candidate's qualifications.<sup>40</sup> This rule obviously applies to positions defined as non-political, namely, professional roles in the public service, as opposed to the elected tenure of ministers and deputy ministers.<sup>41</sup>

Yet this rule evokes genuine unease, because in practice it is almost irrelevant. Political appointments, characterized by the crucial role of the political affiliation shared by the candidate and the appointing official, have always been considered acceptable practice in Israel and show no sign of decline. Recurrent mention of such appointments in the State Comptroller's annual reports have become part of the routine of public life.<sup>42</sup> After the standard barrage of protests on the day of the report's publication, life usually returns to normal.

The ineffective nature of the judicial ban on political appointments was already evident in the central ruling that established it, the *Dekel* case. The petition on this matter concerned the appointment of Silvan Shalom, now Minister of Finance and then advisor to a minister from the *Likud* party, as chairman of the board of directors in the Israeli Electricity Company, a government-owned corporation. When considering this petition, the court reiterated its doctrine invalidating political appointments, but added there was no evidence that the case in point was a political appointment.<sup>43</sup> I am not

37 For this reason, State Service (Appointments) Law, 1959 (henceforth State Service Law) mandates a process of formal tenders for selecting candidates to most positions.

38 See *Axelrod*, op. cit., n. 22, at pp. 84–5.

39 45(1) P.D. 28 (henceforth *Dekel*).

40 *id.*, at p. 35.

41 See H CJ 3094/93 *The Movement for Quality Government in Israel v. The Government of Israel* 47(5) P.D. 404, 420; H CJ 4267/93, *Amitai-Citizens for Fairness and Honesty in Governance v. The Prime Minister of Israel* 47(5) P.D. 441, 463.

42 See *State Comptroller Annual Report* 39 (1988) 627–42; *State Comptroller Annual Report* 41 (1990) 595–615; *State Comptroller Annual Report* 43 (1992) 732–44; *State Comptroller Annual Report* 46 (1995) 257–68; *State Comptroller Annual Report* 47 (1996) 838–52; *State Comptroller Annual Report* 48 (1997) 871–918; *State Comptroller Annual Report* 49 (1998) 119–24.

43 Justice Elon explained that 'except for the "catchphrase" that seven new board members are "associated" with the ministers who appointed them, the petitioner

seeking to discount Shalom's qualifications for this post, nor can I determine the steps that preceded the decision to appoint him. Still, is it credible that he became the leading candidate for this prestigious position only because of his qualifications?<sup>44</sup>

What is the source of the wide gap between the formal conclusion reached by the court and the public understanding of these appointments? On the surface, the gap could be ascribed to problems of factual evidence. Even if the rule disqualifying political appointments is well-known, political grounds are hard to prove, unless the appointee lacks basic requirements of education or experience. In other words, the rule on the *Dekel* case might be sufficient to disqualify Caligula's horse but not another, more frequent variety of political appointments. The problem of factual evidence exposed in *Dekel* is not an isolated instance but one inherent in the rule, which a priori prevents its implementation. In another case, a Labour party activist, was disqualified for the position of Director General of the Ministry of Construction and Housing for reasons bearing on his past career in the security services,<sup>45</sup> rather than due to the political character of the appointment.<sup>46</sup> Mostly, in cases contested in court, petitioners assail the candidate's glaring unsuitability rather than the political consideration.<sup>47</sup> In other words, the appointment can be political, as long as the candidate is not a horse. The person need not be particularly talented or well suited for the job.

When was a political appointment judged invalid? On the rare occasion in which an inexperienced Minister of Interior acknowledged that the people he had nominated to represent him at appointed local councils had been chosen because of their association with his party, SHAS.<sup>48</sup> When questioned about these appointments at a press conference, the minister replied with unusual candor: 'Who would you like me to appoint, *Likud* members?'<sup>49</sup> Following the minister's admission, the court had no choice but to admonish him and

failed to raise even one objection against the qualifications of the new board members.' See *Dekel*, op. cit., n. 39, at p. 39. The implication is that an appointment will not be considered an invalid political appointment as long as the appointee's qualifications are suitable.

44 An appointment of a capable individual is still political if his political affiliation was the basic reason for it. True, political commitments should not be cause for disqualification, but in order to determine that a politically committed individual was appointed because of his or her credentials, these should be compared with the qualifications of the other candidates. Yet, in a typical political appointment, the candidacy of others is never considered, in order to pave the way for the selected political candidate.

45 Specifically, his illegal involvements in his previous position as a high-ranking official in the Israeli security service.

46 H CJ 6163, 6177/92 *Eisenberg v. The Minister of Housing and Construction* 47(2) P.D. 229.

47 See, for instance H CJ (2nd) 2751/94 '*Lishkah Aheret*' v. *The Foreign Minister* 48(5) P.D. 543.

48 H CJ 6458,8160/96 *Abu Karinnat v. The Ministry of Interior* 52(2) P.D. 132.

49 *id.*, at p. 140.

declare the appointments invalid. Justice Joseph Goldberg even chose to reiterate the court's view, stating that political appointments are invalid because they violate the perception of the government as the 'public's trustee': 'The position of the government as the public's trustee entails an obligation to refrain from appointments whose sole justification is the candidate's political affiliation.'<sup>50</sup> But how will such declarations help in the next case, when a more experienced and less candid minister chooses to praise the expertise of his new employees?

The ban on political appointments could be enforced more successfully, but only by implementing a general norm requiring tenders for most positions. Since the statutory tender requirement is not universal,<sup>51</sup> and since the court has not added further requirements through judicial legislation,<sup>52</sup> the ban on political appointments remains largely futile. The effectiveness of the tender requirement in reducing the incidence of political appointments was demonstrated recently, when the High Court of Justice revoked a political appointment that had circumvented the terms of this requirement, as set in the State Service Law.<sup>53</sup> This ruling provided the court further opportunity to expound its doctrine regarding the illegitimacy of political appointments.<sup>54</sup> Yet, the limitations imposed on the future uses of the rule set in this case are worth noting. The task of the court was simple, since the government admitted that the appointment to this position, related to building and settlement in the Occupied Territories, was indeed political, because it required ideological commitment.<sup>55</sup> Formally, the court revoked the appointment because the government had breached the statutory tender requirement when deciding on it. Without such a tender requirement, and without the defendants' explicit admission regarding the appointment's political character, the situation would have been different. The government appointee also failed to meet the requirement of an academic degree that had

50 *id.*

51 s. 19 of the State Service Law states the principle of appointments by tender. This rule, however, does not apply to positions exempted from the tender requirement according to the procedure stipulated in s. 21 of the law, in addition to positions that had been exempted from tender in the law itself, in ss. 5, 6, and 12. It must be emphasized that this law does not establish a general principle of a tender requirement for appointments in public bodies; rather, it is a specific law applying only to the civil service. A similar arrangement applies in the realm of local government. See, for instance, s. 170 to the Cities Ordinance (New Version). No tender requirement applies in other contexts, for instance, in appointments to government companies. See, below, text accompanying nn. 56–62.

52 In other contexts, the court developed a principle of equal opportunity even in the absence of a formal tender requirement. See, for instance, HCJ 5025/91, HCJ (request) 5409,5438/91 *Poraz v. The Ministry of Housing and Construction* 46(20) P.D. 793, 801.

53 HCJ 154/98 *The New General Federation of Labor v. The State of Israel* 52(5) P.D. 111.

54 See, mainly, *id.*, at p. 122.

55 *id.*, at p. 118.

been set by the State Service Commissioner as a threshold demand for submitting applications to this post. Currently, when academic degrees are more common, political candidates for state office will easily be able to comply with similar demands. Their appointment will not stand out as exceptional, but will still be as political as those of their predecessors.

The 1993 amendment<sup>56</sup> to the Government Companies Law 1975<sup>57</sup> led to some progress in the control of political appointments. At present, the law defines minimal qualifications for executive positions in government companies.<sup>58</sup> The law also prescribes the establishment of an appointments committee, charged with examining whether the candidates meet these requirements and have 'no personal, business, or political associations with any government minister'.<sup>59</sup> Some reservations concerning this reform, however, deserve mention. Statutory qualifications do not truly prevent political appointments. As noted, elementary requirements such as an academic degree or professional experience are not insurmountable hurdles; they simply make it possible to weed out obviously unsuitable candidates. Nor does the law compel open competition for office. The appointments committee deals only with the candidates that are brought before it. The committee's crucial advantage over the rule set by the court is its authority to oppose appointments tied to a 'political association' without having to prove a political 'motive,' thus sparing it the need to consider hidden intentions. The main lesson from this is that the ban on political appointments becomes meaningful only when extended to include statutory backing, as well as an administration charged with its implementation. Judicial review is, in fact, the less significant element in this context. On the other hand, the type of control exerted by the Government Companies Law is of limited effect. The appointments committee is not always successful in identifying 'political associations'. Furthermore, the law itself enables the legitimization of a political appointment when the candidate 'possesses special qualifications in the company's area of activity, or when another type of special training is a consideration'.<sup>60</sup> In other words, the appointment of a talented candidate with political connections is legitimate, even if (seemingly) favoured over others who were also endowed with 'special qualifications'. Recently, the law again proved that it sets a rather low hurdle. In H CJ 932/99 *The Movement for Quality Government in Israel v. The Chairman of the*

56 Government Companies (Amendment No. 6) (Appointments) Law, 1993 (henceforth: Appointments Amendment to Government Companies Law).

57 Henceforth: Government Companies Law.

58 Some of these requirements have been defined somewhat more flexibly due to another amendment, Government Companies (Amendment No. 8) Law, 1994.

59 See sections 18b–18c of Government Companies Law, as amended by section 6 of the Appointments Amendment to Government Companies Law.

60 See section 18c in the Law of Government Companies, as amended by section 6 of the Appointments Amendment to Government Companies (Amendment No. 6) (Appointments).

*Appointments Committee*,<sup>61</sup> Likud activist Morris Nissan was disqualified for the post of Director General of the Amidar Government Company, but not due to the political nature of his appointment. The reason was that, several years previously, Nissan had submitted a false affidavit to the court declaring him unfit for any type of work due to an accident. The ruling shows that, despite the candidate's political associations, he probably could have been eligible as he possessed 'special qualifications'.<sup>62</sup>

The problems affecting the ban on political appointments are not only a consequence of the legal arrangement's inner limitations. A fundamental difficulty is their high level of legitimacy within the Israeli public, along the lines of '*così fan tutte*' and 'these are the rules of the game,' although this perception does not usually extend to professional positions, such as that of the Attorney General.<sup>63</sup>

People discharged for political reasons at best enjoy public empathy, and even then not always. Some of those dismissed had access to the benefits of a political appointment. Others, particularly those in high positions, prefer to avoid the degradation involved in a struggle to keep their posts,<sup>64</sup> and a 'golden parachute' sometimes helps. Political motives for removing someone from office are hard to prove. Recently, the Supreme Court ruled that a general manager of a statutory corporation deciding on the renewal of appointments involving high ranking officers may consider the minister's views. In the circumstances of the case, the court decided that no evidence indicated that the minister's resistance to the renewal of an appointment was political.<sup>65</sup>

61 53(3) P.D. 769.

62 Justice Orr wrote that, under the circumstances, the candidate in the case in point had apparently complied with the requirements of the law 'given his professional experience as chief engineer in planning and building companies, as a general manager of companies, and as a building entrepreneur', as well as several other public positions in his record (id., at p. 781). The result is that a political activist par excellence, who received an offer for office largely because of his political contacts, can be considered a candidate with 'special qualifications' because of a professional and public record that does not single him out as better than any of the others.

63 The attempt to appoint a party man to this position was one of the elements in the 'Bar-On affair.' For more details, see A.L. Bendor, 'Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law' (2000) 54 *University of Miami Law Rev.* 193.

64 An example we could quote is HCJ 4446/96 *The Movement for Quality Government in Israel v. The Government of Israel* 50(3) P.D. 705, in which the petition concerned the (allegedly) political dismissal of Civil Service Commissioner Galnoor after the change of government. The petition was eventually withdrawn, after the parties agreed that the Commissioner would continue in office until the end of his term, several months hence.

65 HCJ 6673/01 *The Movement for Quality Government in Israel v. Minister of Transportation* 56(1) P.D. 799, 812.

## POLITICAL ALLOCATIONS

The third line of precedents evaluated here concerns decisions addressing the practice of government allocations to institutions politically close to the officials in charge. In other words, government power is used for political aims, by directing financial resources to institutions characterized by a party, or even a personal association with the public figure charged with the distribution of this budget. One could argue that the use of public funds to attain political goals is not necessarily objectionable. A government is elected to realize political goals, and this might require allocating funds to bodies working to promote them. Still, public funds are intended to achieve goals rather than promote specific party frameworks. A distinction should be drawn between an ideological decision concerning budgetary priorities, and a decision concerning the identity of the budget's beneficiaries, which is not supposed to be based on political considerations of a personal or party nature.<sup>66</sup>

Nevertheless, and for many years, the allocation of public resources has also, or even mainly, included a personal dimension, without criteria. Monies distributed in this fashion, known as 'designated funds,' have become notorious in Israeli public life mainly in connection with religious institutions. These arrangements are viewed as part of the bargaining process that usually precedes the establishment of coalition governments. In many ways, this is a complementary practice to that of political appointments, since it opens additional venues for helping political allies or supporting political activity.<sup>67</sup> I am not referring to cases of personal corruption, manifest in the use of public money for private purposes, although this can be one of its side-effects. Rather, the issue is the preferential treatment of institutions operating in the public sphere – a youth movement, a religious institution, or a cultural centre – by granting them bigger budgets than those allocated to similar, non-preferred counterparts.

From the 1980s, parallel to the developments reviewed above, the Supreme Court began to intervene in the issue of designated funds. A close link is evident between judicial intervention in political agreements and the ban on designated funds, since arbitrary allocations are often a result of

66 In *Zarzevsky*, op. cit., n. 24, Justice Barak says as follows on this issue, at p. 851: 'The dividing line between permitted and forbidden is sometimes blurred. We said that making support of the government contingent on benefits to an individual or a faction supporting the government is forbidden. By contrast, making support of the government contingent on financial support for endeavors benefiting a wide public, is permitted. Between these two, intermediate borderline situations might develop.'

67 For instances of allocations to associations with clear affiliation to political parties, see *State Comptroller Annual Report 39* (1988) 306–12. In another case, the report indicated that an association financed by the state granted a loan during election time to the political party (SHAS) with which it was affiliated. See *State Comptroller Annual Report 40* (1989) 297.

political agreements. The basic precedent set on this question, H CJ 730/83 *Yeshivat Tomkhei Temimim Merkazit v. The State of Israel*,<sup>68</sup> also tied the two together, stating that ‘no designated funds should be allocated to religious and specific institutions on the basis of the coalition agreement, without clear, relevant, and egalitarian criteria’.

Generally, the rule set in this decision bans the distribution of funds on a personal basis, and demands that allocations be based on open and egalitarian criteria.<sup>69</sup> This norm was adopted in the legislation,<sup>70</sup> and does not appear to be problematic. It leaves the government wide discretion in decisions concerning the use of public funds, and confines itself to a demand for fair and egalitarian procedures. Yet, reality proved that politics is more powerful than the law. Designated funds have disappeared only formally. Funding is indeed distributed according to criteria but, every so often, the criteria are exposed as merely a cover for continuing to allocate monies according to party and vested interests. The problem, again, is not the absence of criteria, but the criteria themselves and their implementation. Some of the criteria are ‘tailored’ or ‘semi-tailored’, namely, a priori fitted to the needs of the bodies the government wishes to support.<sup>71</sup> The practice of setting retroactive criteria, adduced in some of the petitions, eases the questionable adaptation of these criteria to the bodies intended as beneficiaries.<sup>72</sup> The court’s limited understanding of these benefits hampers even further the identification of tailored criteria.<sup>73</sup> For instance, in the *Yekutieli* case, the petitioners had trouble proving that criteria for allocating funds to bodies examining Jewish youths on very specific halachic practices, actually fitting the activity of one sole organization, were indeed tailored. In this light, Justice Mishael Heshin’s approach in his minority decision, seeking to disqualify retroactive criteria because they are a priori suspected to be ‘tailored’,<sup>74</sup> is a significant judicial strategy, precisely because it acknowledges the court’s inability to identify ‘tailored’ criteria by considering only the case in point. Not all problems, however, can be solved by applying this strategy.

The other side of the ‘tailored’ criteria coin are the criteria ‘without criteria’, which leave the government almost unlimited discretion concerning

68 Unpublished.

69 See, also, H CJ 59/88 *Tsaban v. The Minister of Finance* 42(4) P.D. 705, 706.

70 s. 3a of the Basis of Budget Law 1985, as amended by s. 1 of the Regulation of State Economy (Legislative Amendments) Law 1992.

71 For examples, see A. De Hartog, ‘State Support for Public Institutions – The Emergence of Special Allocations’ (1998) 29 *Mishpatim* 75, 89–93 (Hebrew).

72 H CJ 6634/94, H CJ (requests) 1017/95 *Yekutieli v. The Minister of Religious Affairs* 49(5) P.D. 45 (henceforth *Yekutieli*); H CJ 5290/97 *Ezra – National Haredi Youth Movement in the Land of Israel v. the Minister of Religious Affairs* 51(5) P.D. 410 (henceforth *Ezra*).

73 A comparison between H CJ decisions and the findings of the State Comptroller on the same issues points to evidence of this problem. See De Hartog, *op. cit.*, n. 71, at p. 103.

74 See *Yekutieli*, *op. cit.*, n. 72, at p. 51.



rules of allocation and result in general and meaningless standards.<sup>75</sup> In other cases, criteria are simply not applied.<sup>76</sup> I need only cite Justice Heshin, who attests: ‘All we can say about the picture laid bare before us is: emptiness, and void, and waste.’<sup>77</sup>

Questions about the source of the gap between law and reality surface anew. Unlike the rule on political appointments, arbitrariness in the allocation of funds can usually be appraised objectively, without needing to contend with the tricky question of judging ‘motive.’ The problem here is different: effective monitoring of these allocations is not, for many reasons, a task for the court. In principle, this is a long-term, ongoing task, that should be carried out by a professional, expert team.<sup>78</sup> The government, however, has no incentive to set up such a team.<sup>79</sup> The result is that, at present, when control is random, a court dealing with a petition against one or another criterion cannot grasp the overall political picture of the benefits ‘roulette’. This problem is less pressing only in those rare cases when several petitions on closely related subjects enable the court to delve into the mysteries of allocations in one specific area,<sup>80</sup> or when the allocations discussed are confined to a limited area, so that understanding the overall picture requires no special knowledge or expertise.<sup>81</sup>

75 See HCJ 3792/95 *National Youth Theatre v. the Minister of Science and Arts*, 51(4) P.D. 259; HCJ 5437/92, 6947/93 *Young Habad Association – Center – Registered Society v. the Minister of Religious Affairs* 51(1) P.D. 467 (henceforth *Young Habad Association*).

76 For example, see HCJ 7142/97 *National Council of Youth Movements v. the Minister of Education, Culture and Sport* 52(3) P.D. 433 (henceforth *National Council of Youth Movements*). Many cases of practices that disregard criteria, or at least some of them, appear in the reports of the State Comptroller. See *State Comptroller Annual Report 37* (1986) 386–400; *State Comptroller Annual Report 41* (1989) 421–2; *State Comptroller Annual Report 43* (1992) 225–33; *State Comptroller Annual Report 44* (1993) 142–8, 344–61; *State Comptroller Annual Report 45* (1994) 236–69; *State Comptroller Annual Report 46* (1995) 397–414; *State Comptroller Annual Report 48* (1997) 243–57, 602–10; *State Comptroller Annual Report 49* (1998) 236–9; *State Comptroller Annual Report 50B* (1999) 313–30; *State Comptroller Annual Report 51B* (2000) 482–93, 601–11.

77 *National Council of Youth Movements*, id., at p. 458.

78 In the *Young Habad Association* case, op. cit., n. 75, Justice Heshin joined the decision to reject the petition, but added strong words concerning the court’s inability to contend with the factual and professional aspects of petitions dealing with government allocations (at p. 480).

79 According to De Hartog’s testimony: ‘Over the last few years, one employee at the Ministry of Justice, in the name of the Attorney General, reviewed almost all the means tests used to determine government funding of public institutions: I did.’ De Hartog, op. cit., n. 71, at p. 100, note 46.

80 For instance, the funding that youth movements receive from the Ministry of Religious Affairs, which was first discussed in *Ezra*, op. cit., n. 72, and soon after in *National Council of Youth Movements*, op. cit., n. 77.

81 As was the case in HCJ 1,114/98 *Kabbel v. The Prime Minister of Israel* 53(2) P.D. 241, which accepted a petition challenging the designation of the entire budget for subsidized housing in the Ministry of Housing and Construction to build rental housing

Note that the court deals only with prominent cases, in which ‘professional’ and suitable petitioners were able to expose the government’s shady dealings. In most cases, no such petitioners can be found, due to the problems of accessing the relevant information required for filing an effective suit,<sup>82</sup> and mainly, due to the obvious concern of interested parties. Thus, for instance, youth movements probably do not want to cut off the branch of allocations to them and, therefore, will ‘rush’ to file petitions only in extreme cases.<sup>83</sup>

At a deeper level, as was also true of political appointments, the extent of social consensus on the abolition of designated funds is not obvious. The secular public, for instance, strongly opposes the allocation of funds to religious institutions without proper criteria. At the same time, however, Israelis are tired of the over-bureaucratization of government, as represented by actions that ‘comply with procedure’. Together with their objection to designated funds directed to religious institutions, veteran Labour supporters, for example, will probably not contest ‘discretionary’ support for the kibbutz movement. Today, when wider solidarity bonds are collapsing in Israeli society, we see increasing sympathy for activities meant to serve sectarian interests, again claiming ‘*così fan tutte*’. Furthermore, given the clear overlap between voters for sectarian parties and the members of the public they seek to benefit, deciding whether resources allocated to benefit this public are part of a policy or payment for political support may not be easy.<sup>84</sup>

## THE NEW PUBLIC LAW IN ISRAEL: TESTING A MYTH

The emerging picture points to an increasing gap between utopian descriptions of legal theory and Israeli political reality. According to the ‘law in the books’, the Supreme Court shows great willingness to intervene in political life, carrying it to heights of ‘fairness’, ‘impartiality’, and ‘public trust’. In practice, or from the perspective of ‘law in action’, Israeli politics runs its course almost unaffected by symbolic victories in the Supreme Court. The new rules leave a mark on politics, but their traces are shallow. Largely, then, the narrative describing the powerful judicial review of

for *yeshiva* students, while renouncing, only in this context, a condition stating that subsidy recipients must have ‘exhausted their earning possibilities’ (a policy earlier criticized also in the *State Comptroller Annual Report 48* (1997) 132–40).

82 Information required in order to submit petitions on budgetary issues is usually highly professional and specific, and is also related to the nature of the activities performed by the recipient bodies.

83 For example, the petitioner in the *Ezra* case probably felt he had no choice but to go to court given the significant (and retroactive) injury to the support he had been promised.

84 Some of the benefits are prominently sectarian, even after the adoption of criteria. Thus, for instance, in H CJ 4346/92 *Ma’aleh: The Center for Religious Zionism v. The Ministry of Education and Culture* 46(5) P.D. 590, the court dealt with a petition concerning fund allocation to ‘ultra-Orthodox cultural institutions’.

politics in Israel is a myth. In Scheingold's terminology,<sup>85</sup> this could be a 'myth of judicial power'.

Formal political agreements are now public, and this is an important development. Nevertheless, these agreements are but the first layer of political negotiation while others, no less significant, are decided in secret midnight meetings. Moreover, these formal agreements are not binding, in the sense that they are not enforceable. Political developments are dictated by the balance of power in the Knesset. Rules concerning political agreements are no more than a type of utopia touching on 'the ought'.

Should we be despondent because these quasi-utopian rules are not actually enforced? Not necessarily. It is questionable whether the court should deal with political agreements in the first place. We do not even know whether complying with a political agreement is better than breaching it. The court, in any event, is not the appropriate institution for discussing and settling this question.

Maybe there is room for despondence, however, concerning the relative failure of the struggle against unrestrained political appointments and the plunder of public coffers involving benefits going to vested interests. The justification for judicial intervention in political appointments and political allocations is that these issues affect the management of public resources and the taxpayers' money. The problem is that legal rules in these contexts fail to achieve their goals, for both legal and public reasons. In the legal realm, because of procedural rules, exposing the political character of the appointment or the budget allocation is unfeasible, except for crude and extreme cases. In the public realm, the consensus supporting judicial rules does not appear to be sufficiently broad. Many believe that the point of a government 'takeover' is to redistribute government benefits, both in personal and sectarian terms. In other words, the court is limited in its ability to intervene in these contexts, not only on grounds of institutional inappropriateness.

Are we doomed to the continuance of a spoils system? Perhaps not. At the narrow legal level, suitable doctrinal principles can be developed for enforcing norms that have so far left no mark. Thus, for instance, political appointments will continue as long as the only question asked regarding the appointment of political activists is: 'Is that person fit for the job?' This question is a priori designed to exclude only the most unlikely candidates, who lack aptitude for the post, and does not come close to the declared aim of disqualifying individuals who were only considered for the post because of their political activity or affiliation. The appointed officer could be mediocre, or worse, and still be apparently fit because of holding an academic degree attesting to relevant qualifications. Only a broad system of tenders extending to most positions will prevent appointments that are essentially political, and even then only partially. As long as this system is not adopted, the rule limiting political appointments will remain ineffective.

85 See the text accompanying n. 3 above.

Political appointments will be permitted in practice, as long as they are not openly proclaimed. The same applies to political allocations. The system of political budgeting will remain in place as long as suitable norms of distribution, guided by criteria, are not enforced by an independent and professional monitoring system. The random audits of the State Comptroller are not an effective system for monitoring the variety of designated funds nor, most certainly, are the procedures of judicial review. Enforcing norms of fairness in public life requires suitable administrative mechanisms, able to turn abstract norms into concrete standards, such as tenders for the staffing of professional positions, and independent auditing mechanisms of ministerial budgets.

The problem, however, is not only legal. As solidarity bonds have eroded in Israel,<sup>86</sup> the public legitimacy of activities that plunder public funds has increased. In these circumstances, the Supreme Court cannot be the only institution to step into the breach. As noted, the state ideology preached by the court is not always acceptable to all segments of the public. More specifically, this ideology is unacceptable to most sectarian parties, whose support is necessary for any coalition government in Israel. These parties are indeed very different from one another regarding their constituencies – ultra-Orthodox, new immigrants, or minorities – but they are similar in their challenge to the unity of Israel as a state, which was often attained at the expense of constituencies rejected by the Zionist ethos. They demand their share of appointments and budgets, and their demands will continue to be heeded in the present political reality. Their combined pressure is stronger than the word of the court. The court has repeatedly stated that it has neither purse nor sword, and relies on public trust. But in a war against political appointments and political budgeting, trust in the judges is insufficient: Israeli society must go back to trust itself.

Is the court aware of the negligible influence of its grandiose rulings on political reality? Obviously, no categorical answer is possible. I believe that the judges are aware of the gaps I have pointed out between lofty norms and the small number of petitions they ultimately accept. I suppose they assume that the court's declarations concerning the binding norm act as a deterring and guiding element, even when not applied to the case in point. In other words, the assumption is that, even if the court only 'threatens' to intervene, its warnings will affect behaviour. In this sense, the 'myth of judicial power' serves goals similar to the 'myth of rights'. It may affect popular thought and mobilize change. This is a plausible argument, but its validity depends on the width of the gap between rhetoric and reality. Some imbalance will invariably prevail, but rhetoric loses its power when this gap is too wide, and the court's credibility could ultimately be impaired. In practice, the gap

86 Israeli society is no longer described as a 'melting pot', but as a multicultural society. See, for instance, M. Mautner et al. (eds.), *Multiculturalism in a Democratic and Jewish State* (1998) (Hebrew).

concerning political appointments is currently far too wide. Regarding political budgeting, the court does what it can, although it would be proper not to let it fight this battle alone by strengthening the monitoring mechanisms controlling the use of budgetary funds. In contrast, regarding appointments, the court chose a course that was doomed to fail *ab initio*. Disqualifying appointments only when their political character has been explicitly acknowledged, or only when a candidate is thoroughly unfit for the job, is almost implying that political appointments are acceptable. The gap between the rhetoric and its consequences is also troublesome on other counts: the court pays a relatively high price for its intervention in politics, when compelled to face the hostile criticism of politicians who challenge the legitimacy of ‘judicial activism’. Discovering that the court pays the price of intervention in the erosion of its judicial legitimacy while largely failing to attain the goals this intervention seeks to attain, is most disappointing.

What conclusions can we draw from the experience of judicial review of politics in Israel? As I noted, the Israeli Supreme Court should have been more aware of its power limitations, but political activists may also learn an important lesson from the Israeli case-study. The easiest way to challenge political decisions is to bring them to court. Duncan Kennedy has indicated that fractions tend to litigate issues they cannot successfully challenge in the ordinary political process.<sup>87</sup> This easy route, however, leads to relatively superficial changes. In order to transform prevalent norms, such as the norms concerning appointments and budgets in the Israeli case, legal activity in the courts will not suffice, unless accompanied by grassroots efforts to mobilize broad public support for this struggle.<sup>88</sup> Michael McCann’s study of the effect of litigation in the area of wage discrimination shows that, although the impact of litigation may appear limited, its importance lies in its function as a source of inspiration and empowerment for activists. I would like to place emphasis on the reverse side of that coin: litigation needs the support of extensive political activity in order for its impact to have any significance.

87 D. Kennedy, *A Critique of Adjudication (fin de siecle)* (1997) 226: ‘Many things that particular fractions want are “just not politically feasible” in the existing legislative process. A fraction may be able to achieve some of these things through the courts.’

88 Compare M. Mautner, ‘The Law Hidden from the Eye’ (1998) 16 *Alpayim – A Multidisciplinary Publication for Contemporary Thought and Literature* 45, 66 (Hebrew). It is worth noting the enormous growth in legal litigation initiated by petitioners who were not directly affected by the government decision at hand but rather opposed it on ideological and political grounds. This growth originates in the new policy of the Supreme Court to relax its doctrine concerning standing, and the increasing tendency of Israeli NGOs to pursue their goals through litigation. One instance illustrating this trend concerns the Association for Civil Rights in Israel (ACRI). According to ACRI’s annual reports, the association, which was founded in 1972, hired an in-house attorney for the first time only in the year 1984–1985. In the year 2000–2001, the association’s legal department employed a staff of seventeen: eleven lawyers, three interns, and three office workers.