

TO CONCUR, OR NOT TO CONCUR: THAT IS THE QUESTION:
THEORETICAL AND PRACTICAL QUESTIONS REGARDING THE
JUDICIAL INDEPENDENCE OF JUDGES APPOINTED TEMPORARILY TO
THE ISRAELI SUPREME COURT

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ABSTRACT

In many democratic societies, judicial tenure is perceived to be an important safeguard for the judiciary's independence. In Israel, although judicial tenure is secured under *Basic Law: The Judiciary*, the promotion of judges from Israel's District Courts to the Supreme Court is usually preceded by a *temporary appointment*. In practice, this temporary appointment serves as a "probationary period" after which the judges are considered for the permanent position of Associate Justice. One of the important implications of this promotion system is that while serving on Israel's highest court, temporarily appointed judges continue to depend on external forces to retain their offices. Therefore, I argue that from a theoretical standpoint, temporary appointments pose a substantial threat to the judicial independence of individual judges. Because of the significant role played by Supreme Court Justices in the appointment process, I identify the threat to judicial independence as primarily originating *within* the judiciary, rather than from other branches of government.

The major objective of this study is to examine the degree to which the theoretical threat to internal judicial independence can be seen to materialize in the Israeli Supreme Court example. The study examines whether the reliance of temporarily appointed judges on the approval of their senior colleagues to gain tenure may deter them from voicing dissenting opinions or from expressing controversial views during their one-year temporary appointments.

The study employs both quantitative and qualitative methods, most of which were devised specifically for this study and which focus primarily on *individual* judges. The study surveys almost 1,000 decisions rendered between 1999 and 2005 by seven judges who were first appointed to the Supreme Court temporarily and who were subsequently appointed to Associate Justices. The quantitative study compares the decision-making *patterns* of the judges, both individually and collectively, *before* and *after* they were granted tenure. The qualitative study closely examines and compares the decisions of three of the judges *before* and *after* they were promoted, in an attempt to gauge changes in the views that they expressed on well-defined topics. In examining these changes, I offer alternative explanations for the differences both in the trends and in specific judicial decisions to better evaluate whether the changes may be attributable to tenure. Although the findings of the study are not definitive from a statistical standpoint, they offer interesting evidence pertaining to the effects of tenure on decision-making as well as valuable observations regarding the appointment process and the internal practices of the Israeli Supreme Court.

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INTRODUCTION

A common objective of democratic societies is to ensure the independence of their judicial branches. The independence of the judiciary from other branches of government and from the influences of powerful groups and individuals is perceived to be an important guarantee for an effective rule of law as well as an essential prerequisite for judicial review. Considered to be the weakest of the three branches of government, the judicial branch is provided with structural safeguards that shield it from the encroachments of its more powerful counterparts.

Judicial tenure *during good behavior* is one method that is commonly employed to secure judicial independence. Tenure ensures that, once appointed, judges are no longer dependent upon external forces to retain their offices. In England, judges have enjoyed tenure *quamdiu se bene gesserint*, or *during good behavior*, since the Act of Settlement of 1701; likewise, judicial tenure of Federal judges in the United States is protected under Article III of the Constitution; in Israel, judicial tenure is guaranteed under Article 7 of Basic Law: The Judiciary. By guaranteeing tenure during good behavior, these legal systems have rejected the idea of judges holding their offices during the *pleasure* of a power that is external to the judicial branch.

However, even when enjoying tenure *during good behavior*, there are situations in which judges are subject to outside forces that influence their professional career: lower-court judges seeking promotion are one such example. Although lower-court judges often already possess judicial tenure and serve within the judiciary during good behavior, their *promotion* depends on the *pleasure* of others. The influence of promotional considerations on the decision-making of judges is the focus of this study.

The objective of the study is to empirically examine whether the desire to be promoted affects the decision-making of judges who seek appointment to the Supreme Court of Israel. In Israel, District Court judges who are being considered for promotion to the Supreme Court are often placed on the Supreme Court bench temporarily for one year in order to enable the appointing body to evaluate their performance as potential Supreme Court Justices. The study focuses on seven such District Court judges who were

appointed temporarily to the Israeli Supreme Court between 1999 and 2005 and who were subsequently appointed Associate Justices. By comparing the decisions rendered by these judges before and after they were promoted, the study examines whether the temporary position of these judges and their aspiration for promotion had an effect on their judicial decision-making.

Before examining whether temporarily appointed judges enjoy independence in their decision-making, the study addresses a number of preliminary questions, the answers to which subsequent analysis of judicial independence must build. First, the study discusses *whose approval* candidates desiring to be promoted to the Israeli Supreme Court might seek; the answer to this question relies heavily on the institutional composition of the body that appoints the judges and its practices over the years. Therefore, Chapter I explores the theoretical legal framework for selecting judges in Israel and the practical use of temporary appointments in the selection of candidates. The chapter then analyzes the structure of the Judicial Appointment Committee to identify its most powerful players. Finally, based upon the analysis of the Israeli appointment process, the chapter restates the theoretical challenge to individual (in opposed to institutional) judicial independence that is inherent in the Israeli judicial appointment system.

Chapter II deals with the question of *how* the judicial independence of temporarily appointed judges may be evaluated, or, in other words, what indications must we seek in order to establish that a judge is acting independently? The chapter first deals with the *sources* that are available to scholars planning to study judicial independence in Israel. The chapter then addresses different methods of *analyzing* the available sources. I begin by critically examining the methodology employed in a previous empirical study that addressed the judicial independence of temporarily appointed judges. Then, in chapter III, I propose a different approach to the data that might provide more accurate results.

Chapter IV is dedicated to the quantitative analysis of almost 1,000 decisions that were rendered by seven temporarily appointed judges between the years 1999 and 2005. In this chapter, I compare the decision-making patterns of these judges before and after they were awarded a permanent position. The chapter examines the judges as a group and individually and looks at general trends and changes that occurred (or did not occur) in

the Justices' decision-making after they were promoted. The quantitative analysis also provides the foundation for selecting three of the Justices for further consideration.

Chapter V provides a closer look at the docket of three of the judges: Miriam Naor, Edmond Levi and Salim Jubran. The chapter begins by comparing the opinions of Justice Naor on specific topics before and after her permanent appointment. The chapter proceeds to critically evaluate the quantitative data regarding the decision-making patterns of Justice Levi and the possible causes for the trends that emerge. The chapter then considers changes that were expected to occur in the decision-making of Justice Jubran following his promotion, which did *not* take place. The chapter offers reasons why these changes did not occur and what the absence of change might suggest. Finally, the chapter points to questions regarding judicial decision-making in the Israeli Supreme Court that remain unanswered in this research and that require further study.

I The Theoretical Problem of Temporary Judicial Appointments

The objective of this chapter is to identify the theoretical challenges to judicial independence inherent in the temporary appointment of judges to the Israeli Supreme Court. However, before addressing these challenges, I will provide pertinent background information regarding the Israeli judicial system. The chapter begins by describing the process through which judges are appointed to the Israeli judicial system, the eligibility requirements for becoming a judge, and, more specifically, the eligibility requirements for becoming a Supreme Court Justice. The chapter then explains the “temporary appointment” of judges, specifically in the case of the Supreme Court; the legislative intention of this method of appointment and the manner in which it is applied in practice. Finally, based on an analysis of the theoretical and practical methods used in appointing judges, I consider why the temporary appointment of judges poses a threat to judicial independence.

A. *The Appointment of Judges in Israel*

1. *Who Appoints the Judges?*

Legal systems differ in the manner in which they select judges. In some systems judges are elected, whereas in others they are appointed.¹ Systems in which judges are appointed vary with regard to the appointing authority and the governmental branch to which it belongs: legislative, executive or judicial. In some instances, the appointment is done through the collaboration of numerous branches;² in others, each branch possesses the power to appoint a certain number of judges, independently of the choice made by the other branches.³

In Israel, judges at all levels of the judiciary are appointed by a committee of nine members.⁴ These members represent the three branches of government as well as the legal profession: two members of the executive branch (one of whom is the Minister of Justice, who also chairs the committee), two members of the *Knesset* (the Israeli parliament), three members of the Supreme Court (one of whom is the Chief Justice) and two members of the Israeli Bar Association.⁵ In recent years, the *Knesset* has developed a

¹ For a comparative survey of methods for judicial appointment see JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet and Jules Deschenes eds., Martinus Nijhoff Publishers 1985).

² The appointment of Federal judges in the United States is a good example of such a system: the power to nominate Federal judges is vested in the President “by and with the Advice and Consent of the Senate.” See U.S. CONST. art. II, § 2.

³ Italy and Portugal are examples of systems in which each branch appoints a number of Justices to the Constitutional Court. See CARLO GUARNIERI & PATRIZIA PEDERLOZI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF JUDGES AND DEMOCRACY 141-142 (Oxford University Press 2002).

⁴ The legal basis for membership on the committee can be found in Basic Law: the Judiciary, Article 4(b).

⁵ There are two exceptions to these rules: the appointment of judges to labor courts and to religious courts. In the appointment of labor court judges, the representatives of the Executive must be the Minister of Justice and the Minister of Labor. Other membership provisions remain the same.

With regard to the religious court, we must distinguish between different religions. Israel has four separate religious court systems: Muslim, Christian, Druze and Jewish. Judges of the Jewish religious court system (that determines matters of personal status pertaining to Jews), are appointed by a ten-member committee: the two Chief Rabbis, the Minister of Religious Affairs, another representative of the executive, two members of the *Knesset*, two members of the highest Rabbinical Court and two members of the Israeli Bar Association. *Kadis* (Muslim judges) are appointed by a different committee which consists of two *Kadis*, the Minister of Justice, another member of the executive, three members of the *Knesset* (at least two of whom must be Muslim) and two lawyers (one of whom must be Muslim).

practice in which its delegation to the Committee consists of one representative of the parties forming the coalition and one representative of the opposition parties.⁶

The Committee reaches its decision to appoint a judge by a simple majority, with seven members constituting a quorum. The Minister of Justice, the Chief Justice, or any three members of the Judicial Appointment Committee may propose a candidate for judicial office.⁷ Once a judge has been appointed, she then holds office during good behavior, until mandatory retirement at the age of 70.⁸

2. *Eligibility for Judicial Office and the Composition of the Supreme Court*

Israel's *Courts Act* specifies the minimum requirements for becoming a member of the state judiciary. In addition to obtaining a license to practice law in Israel,⁹ a candidate for judicial office must obtain practical experience for a specified minimum period of time.¹⁰ Minimum time requirements vary based on the instance to which one seeks to be appointed: e.g. to be appointed to the Magistrates' Court, Israel's lowest instance, five years of experience as a law professor or a lawyer are required.¹¹ Appointment to the District Court, which serves primarily as an appellate court, requires seven years of practice or teaching experience, or three years as a Magistrate's court judge.¹² To be appointed to the Supreme Court, one must possess ten years of experience as a lawyer or five years of experience as a District Court judge.¹³ Surprisingly, the sole exception to the requirement of prior legal practice or teaching applies to candidates for the Supreme Court: "outstanding jurists" may be considered for the position of Associate

⁶ See SHIMON SHETREET, ON ADJUDICATION: JUSTICE ON TRIAL 276 (in Hebrew, Yedioth Ahronoth Books 2004).

⁷ Courts Act [Consolidated Version] 5744-1984, Article 7(b).

⁸ *Id.* Article 13.

⁹ *Entitlement* to register as a member of the Israeli Bar Association may suffice, even if a candidate is not, in fact, registered as a member of the Bar. See *id.* Article 4.

¹⁰ The required experience may be acquired in a number of different capacities: through the private practice of law; through the instruction of law in an accredited university or college; through previous judicial roles or state service.

¹¹ *Supra*, note 7, Article 4.

¹² *Id.* Article 3.

¹³ *Id.* Article 2.

Justice without any formal legal training.¹⁴ This exception creates the possibility of appointing experts of religious law, for example, who have no formal training in Israeli secular law, to the Supreme Court.¹⁵

As the reader may notice, numerous career paths are open to those who seek appointment to the Supreme Court. Nevertheless, the history of the Court demonstrates that some channels have been more widely employed than others. Of the 55 judges appointed to the Supreme Court to date, 37 had served as District Court judges immediately prior to their appointment to the Supreme Court.¹⁶ Eight of the Justices had served in the position of Attorney General or Chief Prosecutor before being appointed to the bench. Four of the Justices had been full-time professors.¹⁷ Only four Justices worked in private practice immediately prior to their appointment. Throughout the history of the Court, only one Justice has been appointed through the “outstanding jurist” exception, possessing no formal legal education.¹⁸ Of the 14 Justices who served on the bench in March, 2005, nine served as District Court judges, four had served in high positions within the Ministry of Justice¹⁹ and only one worked as a private practitioner immediately prior to their appointment to the Supreme Court. As we can see, the vast

¹⁴ *Id.* Article 2(3). In the appointment of an outstanding jurist, a special majority of 3/4 is necessary (*id.* Article 7(c)).

¹⁵ A word of explanation is in order regarding this unusual exception. In Israel, religious law is in some cases the basis for legal decisions. For example, matters of personal status (marriage and divorce) are determined by the religious court system, which applies substantive religious law. Four such religious court systems exist in Israel: Jewish, Muslim, Christian and Druze. In addition, when a lacuna is found in statutory or case law, Jewish heritage and law may be used to fill the gap. See Legal Foundations Law 5740-1980. In both instances, familiarity with religious law is necessary. For further discussion see ELYAKIM RUBINSTEIN, *JUDGES OF THE EARTH*, 156 (in Hebrew; Schocken Publishing House 1981).

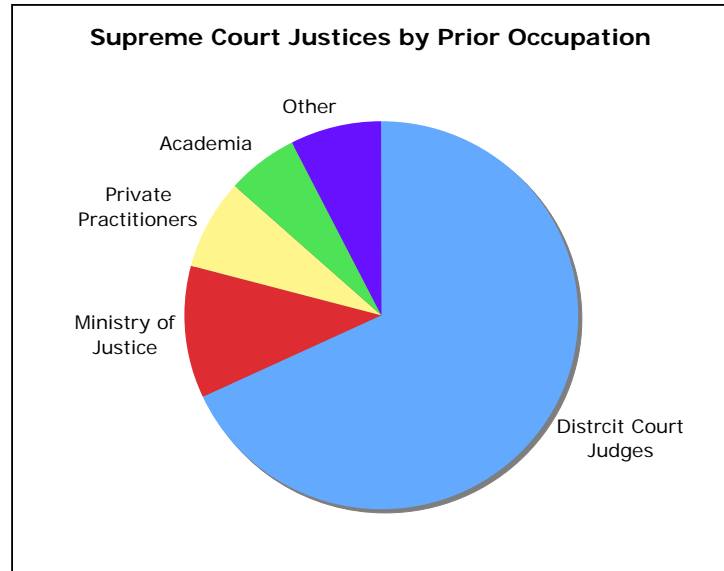
¹⁶ Source: MARTIN EDELMAN, *COURTS, POLITICS AND CULTURE IN ISRAEL* 36-37 (University of Virginia Press 1994); Eli M. Salzberger, *Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings from the Supreme Court of Israel*, 35 *Israel Law Review* 481, 511 (2001), with the necessary adjustments since his study was published in 2001. Since then Justices Grunis, Naor, Jubran and Hayut have been appointed from the District Court level and Justices Rubinstein and Arbel have been appointed from the Ministry of Justice. See Appendix B, *infra* p. 76.

¹⁷ Two of the Justices who served as full-time professors also served in the position of Attorney General: Aharon Barak and Itzhak Zamir.

¹⁸ The four lawyers appointed were Justices Smoira, Olshan and Dunkelblum, (all members of the first Court) and Mishael Cheshin who was appointed in 1992. See Edelman, *supra*, note 16. The “outstanding jurist” was Rabbi Simcha Assaf, a member of Israel’s first Supreme Court, appointed in 1948. See Appendix B, *infra* p. 76.

¹⁹ Some of the Justices have served in a number of capacities throughout the years: private practice, state service and legal academia. Therefore, it is difficult to assign them to one category or another. For current purposes they have been categorized according to their last place of employment before being appointed to the Court.

majority of Supreme Court Justices, both in the past and currently, have been appointed from among the ranks of the District Court judges.



B. The Temporary Appointment of Judges

Israeli law provides the possibility of temporarily appointing a member of the judiciary to another court for a period of up to one year.²⁰ That is, a judge may be appointed temporarily to either a higher or a lower instance than the court in which she permanently holds office. During the course of this one-year appointment, temporarily appointed judges are granted the full powers of the court in which they serve provisionally. For example, a District Court judge serving temporarily in the Supreme Court may issue injunctions against the state in cases within the exclusive jurisdiction of the Supreme Court. The power to appoint judges temporarily is vested in the Minister of Justice with the consent of the Chief Justice (and the consent of the candidate himself).²¹

²⁰ *Supra*, note 7, Article 10. The legal provision proscribes a maximum period of one year *out of every three years*.

²¹ *Id.* Article 10.

Unlike other countries, temporary appointment in Israel is only available to members of the judiciary, not to those who seek an initial judicial appointment.²²

In practice, the temporary appointment of judges, at least to the Supreme Court, serves as a probationary period, during which the aptitude of candidates is evaluated before they are promoted.²³ A special committee appointed in 2000 to examine various aspects of the judicial appointment system (the Zamir Committee²⁴) has endorsed this practice: this one-year period, according to the Zamir Report, enables the Appointment Committee to assess the judicial behavior of nominees before they are permanently appointed to the Supreme Court.²⁵ Chief Justice Barak has expressed the opinion that District Court judges *should not* be promoted to the Supreme Court before first having served there in a temporary capacity.²⁶ Promotion practices seem to be consistent with Barak's view: over the years, the vast majority (34 of 37) of District Court judges who have been promoted to the Supreme Court were first appointed to the Court temporarily.²⁷

Legislative history, however, suggests that the power to appoint a judge temporarily to another court was designed with a different objective in mind: to resolve administrative and manpower problems within the court system.²⁸ The authority given to

²² See SHETREET, *supra*, note 6, p. 228. The exception is Traffic Court judges, who can be appointed temporarily from outside the judicial branch.

²³ The nature of this assessment is not clear, neither in form nor in substance: it is unclear what "tests" these temporary judges are given and how their success is determined.

²⁴ The report is commonly known as the *Zamir Report*, named for its chairperson, former Justice Itzhak Zamir. Other members of the committee were M.K. Amnon Rubinstein, a former member of the Judicial Appointment Committee as well as a professor of Constitutional Law and a former Minister of Education, and Yoram Guy-Ron, a member of the Appointment Committee representing the Israeli Bar Association.

²⁵ See ITZHAK ZAMIR, AMNON RUBINSTEIN & YORAM GUY-RON, THE REPORT OF THE COMMITTEE REGARDING THE APPOINTMENT OF JUDGES 74 (Jerusalem 2001) [hereinafter *The Zamir Report*]. The report notes that due to the nature of the Supreme Court's work, which is different than that of the lower courts, a probationary period is an important source for evaluating candidates; even outstanding District Court judges may prove to be mediocre Supreme Court Justices.

²⁶ See Yuval Yoaz, *The Complete Guide to Supreme Court Candidates*, HAARETZ (in Hebrew), April 29, 2004.

²⁷ See Appendix B *infra* p. 76. Throughout the history of the Court, 20 judges were *not* granted tenure after being appointed temporarily. See Salzberger, *supra*, note 16, at 499.

²⁸ This underlying rationale is evident from the records of the debates that took place in the *Knesset* in 1951 and 1953, when the Judges Law 5713-1953 was framed and enacted. See DIVREI HAKNESSET (1951) 1176-1194; DIVREI HAKNESSET (1953) 423-443. The temporary appointment of judges to a higher instance was presented by then Minister of Justice, Pinchas Rosen, as part of a broader plan to relieve pressure in particularly congested courts and as a means of resolving other administrative challenges such as situations in which all of the judges on a specific court were forced to recuse themselves from a case (see the speech of the Minister of Justice, Pinchas Rosen. DIVREI HAKNESSET (1953) 442). To achieve this goal, the initial

the Minister of Justice was designed to facilitate the immediate filling of a judicial position in the event of an unusual congestion in a specific court. Such congestion may, for example, be the result of an unexpected vacancy in one of the courts. Between 1951 and 1953, three such instances of unexpected vacancies occurred on the Supreme Court: two Justices died while in office and another Justice was forced to resign due to a severe illness. These vacancies left only four permanent members on the Supreme Court, causing significant delays in the decision of cases.²⁹ Therefore, providing the executive

1951 legislative proposal provided the Minister of Justice with the authority to relocate a judge to another parallel jurisdiction, to appoint a judge temporarily to a higher or lower court and even to temporarily appoint individuals from *outside* the judiciary to provide provisional assistance to the over-worked judicial branch. However, from the law's inception, some members of the *Knesset* expressed their concern regarding the temporary appointment system and the dangers that it entailed for judicial independence: numerous members of the *Knesset* articulated their concern that the Minister of Justice might use his authority to relocate or temporarily appoint judges as a means of rewarding or punishing, thus endangering the judges' independence (see DIVREI HAKNESSET (1951), p. 1183, the comments of M.K. Nir; p. 1185, the comments of M.K. Wahrhaftig; p. 1189, the comments of M.K. Harari; p. 1191, the comments of M.K. Ben-Ami. See also DIVREI HAKNESSET (1953) p. 430, the comments of M.K. Bader; p. 433, the comments of M.K. Vilner; p. 435, the comments of M.K. Harari). Moreover, M.K. Nir of the *Mapam* party expressed his concern that through temporary appointments the Minister of Justice could completely bypass the Appointment Committee: by repeatedly appointing a judge only temporarily, the Minister of Justice could ensure a judge's absolute dependence upon the executive branch. In defending the legislation before the *Knesset*, the executive branch dismissed these concerns and emphasized the need, "*from time to time*," to adjust the allocation of judicial resources (see the comments of the Minister of Transportation Dov Yoseph, DIVREI HAKNESSET (1951) 1187). Therefore, it is clear from the *Knesset* records that the provision for temporary appointments was viewed as an *emergency* measure rather than an evaluation method that would be used routinely.

The *Knesset* record also reveals that the *opposition* to the temporary appointment system stemmed primarily from a fear of *executive* abuse. Therefore, the approved legislation included a number of safeguards against potential misuses by the *executive branch*: first, a judge could be appointed temporarily to a higher office for only *one year* out of a three-year period, thus ensuring that temporary appointments would not be used by the Minister of Justice to bypass the Judicial Appointment Committee. Second, all temporary appointments required the consent of the Chief Justice, which ensured that the authority would only be used to further the efficiency of the judicial branch and *not* in a manner that would reward or punish judges (see the speech of Minister of Justice Rosen, DIVREI HAKNESSET (1951) 1193). Furthermore, the consent of the transferred judge himself was required, to further ensure that demotions and transfers were not being used as a form of punishment for judges who did not favor the executive's views. However, what the legislatures failed to anticipate, and perhaps could not anticipate at the time, was the interest that the Chief Justice might share with the Minister of Justice regarding temporary appointments, namely, the possibility to evaluate candidates for the Supreme Court. As we shall see, utilizing the temporary appointment as a *probation period* also endangers judicial independence, albeit in a different manner than that which was anticipated by the members of the *Knesset* during the 1950's.

²⁹ Justice Dunkelblum died while in office in 1951, Chief Justice Zimora retired in 1952 due to an illness and in 1953, Justice Assaf died while still in office. The manpower shortage led to the temporary appointment of judge Landau and judge Sussman in 1952. These temporary appointments were conducted by the Minister of Justice in accordance with British legislation that remained in force after the establishment of the State of Israel in 1948. However, only in late 1953, after the new Israeli legislation was enacted, were Justice Landau and Justice Sussman appointed permanently. See RUBINSTEIN, *supra*, note 15 at 83-84. These sudden vacancies may shed light on the reality and the objectives that the framers of the law had in mind when approving the provision regarding temporary appointments.

branch with the power to make immediate adjustments (albeit temporary) within the judiciary was an important tool for ensuring the efficiency of the court system;³⁰ temporary appointments did not require the Appointment Committee to convene and consider potential nominees, a lengthy process that could result in a further backlog of cases in an already short-staffed court.³¹

There is further evidence that temporary appointments were not intended to function as probationary periods; such evidence can be found in the legal provisions and limitations regulating temporary appointments. The law provides the possibility of temporarily appointing a judge not only to a *higher* instance, but also to a *lower* one when necessary; however, demoting a judge is inconsistent with the rationale of candidate evaluation and can only be understood as a means of relieving pressure from congested courts. Furthermore, temporary appointment is available only to members of the judiciary, not to those appointed directly to the Supreme Court (or any court, for that matter) from legal academia or from private practice. Arguably, a *probationary* period is more reasonable when appointing someone who has not previously served as a judge; whereas the performance of career judges could be evaluated based on their previous judicial record, no such record is available for those who are appointed to a judicial position for the first time. Therefore, a probation period would appear to be necessary in the latter case rather than in the former.

C. Temporary Appointment and Its Threat to Judicial Independence

Readers who are familiar with the history of the American Revolution will recognize the threat posed to judicial independence when judges are not guaranteed tenure in their position. Historians regard judicial tenure as one of the “searing issues” of the debate between the American colonies and England in the years leading up to the

³⁰ See SHETREET, *supra*, note 6, at 159.

³¹ When a vacancy exists within one of the courts, the Minister of Justice invites potential candidates to submit applications. The Minister of Justice, the Chief Justice or three members of the Committee must endorse the application for the candidate to be considered by the committee. If a candidate enjoys such an endorsement, she is then summoned before a sub-committee that conducts an interview and requests references from judges who have served with the candidate or the District Office of the Bar Association. SHETREET, *supra*, note 6, at 272-273.

American Revolution.³² Whereas the judges of England from the Glorious Revolution onward were granted tenure *during good behavior*, judges in the colonies retained their offices only at the pleasure of the Crown. The dependency of these judges on the constant approval of the executive was perceived as being “dangerous to the liberty and property of the subject.”³³ After independence, most State constitutions (and later the Federal one) granted members of the judiciary tenure during good behavior to remedy this threat to judicial independence.³⁴

Nevertheless, the problems posed by the Israeli practice of appointing judges temporarily to a higher court are not identical to those in the pre-revolutionary American example. Judges appointed temporarily to a higher instance in Israel are still guaranteed tenure *within the judiciary* during good behavior; they still hold their judicial post in the lower court until retirement. However, their provisional position still places them in a compromising situation. “Clearly, a judge on probation is not independent and there is a risk that his decision may be coloured by his plans for the future.”³⁵ This observation, which refers to new judges whose *appointment* is still pending approval, is equally applicable to judges whose *promotion* to a higher instance has yet to be decided. Judges seeking promotion are likely to seek the approval of those possessing the power to grant them a permanent position in a higher instance. Therefore, to determine the nature of the

³² GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, 160-161 (2nd ed. University of North Carolina Press 1998); See also JACK N. RAKOVE, *ORIGINAL MEANINGS* 298 (Vintage Books 1996).

³³ See Wood, *id.* 160.

³⁴ It is important to note, however, that by the mid 19th century, many U.S. jurisdictions had rejected the idea of appointed judges and shifted towards an *elected* judiciary. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 279 (3rd ed., Simon & Schuster 2005). Elected judiciary branches present challenges to judicial independence that are similar to those that exist in the Israeli system of temporary appointments: here too there is a fear that a judge’s ambition to preserve his position may influence his decisions.

³⁵ See JULES DESCHENES, *MASTERS IN THEIR OWN HOUSE: A STUDY ON THE INDEPENDENT JUDICIAL ADMINISTRATION OF THE COURTS*, 105 (3rd printing, Montreal 1981). Deschenes, the Chief Justice of the Superior Court of Quebec, criticizes probationary appointments which are practiced in Nova Scotia, Newfoundland and the Yukon and calls for their abolishment:

In this way, the executive hangs a sword of Democles over the head of a new judge. A judge who accepts a one-year appointment is, in all likelihood, interested in carrying out a career in the judiciary but this career will hinge on the goodwill (sic) of the Prince. Clearly, a judge on probation is not independent and there is a risk that his decisions will be coloured by his plans for the future. Could he rule against the government from whose “pleasure” his appointment derives? And in private litigation, could he take the position that the law and his conscience dictate but that might displease the government of the day? Then too, what criteria will the government apply in deciding after one year of probation whether a judge merits a permanent appointment?

threat to judicial independence in Israel, we must first determine who possesses the greatest share of power within the Israeli appointment system.

1. *The Inter-Branch Tension Within the Appointment Committee*

A glance at the composition of the Israeli Judicial Appointment Committee does not reveal whose approval a candidate for judicial office might seek. The Committee is composed of four bodies that differ in their vision of the judiciary and the role it must play in society. The Executive's desire for a weak judicial branch, that rarely intervenes in the former's decisions and actions, often conflicts with the preferences of the Justices on the Committee; the division of the Legislative delegation between the representatives of the coalition and opposition parties makes agreement between them unlikely. Therefore, a candidate for judicial office can be viewed as the servant of four, or perhaps five, masters; it appears to be an impossible endeavor to please them all.

Therefore, inter-branch tensions within the Appointment Committee presumably mitigate the fear that a candidate's judicial decisions will be tainted by her ambition. Arguably, the impossibility of simultaneously pleasing *all* branches serves as a check; it guarantees that the candidate will rule based on her independent opinion, rather than on promotion considerations. Nevertheless, some structural characteristics of the Appointment Committee, combined with practices that have emerged over the years, create a reality in which the judiciary holds greater influence on the Committee than do other branches; therefore, a rational candidate seeking promotion might prioritize the branches whose approval he must seek, placing the judicial branch at the head of the list.

2. *The Power of the Executive Branch on the Appointment Committee*

There are a number of factors that contribute to the judiciary's dominance within the Appointment Committee. Obviously, the judiciary holds the largest number of votes – three out of nine, while all other branches hold only two votes each. Skeptics might argue that based on the Israeli political system, in which the Executive must enjoy the

confidence of the *Knesset*, the former, in fact, possesses three votes -- not two: not only does the Executive possess the votes of the two formal representatives of the Executive branch, it also enjoys the support of the coalition representative, who votes on the Committee according to the same guidelines that direct the administration. However, the guidelines are not always the same: due to Israel's multi-party system, the coalition representatives, at least in recent years, are often not members of the same party as the two ministers on the Committee. The two ministers themselves may often be members of different parties, each having a different and, in fact, competing agenda for appointing judges. For example, the coalition's representative on the Committee in 2004 was M.K. Shaul Yahalom of the National Religious Party, whose agenda included the appointment of another Orthodox Jew as a Justice of the Supreme Court.³⁶ The platform of *Shinui*, the centralist party, to which Minister of Justice Yoseph Lapid belonged, strongly supported the separation of religion and state. The other Minister on the Committee, Binyamin Elon, was a member of the extreme right-wing National Unity party.³⁷ Therefore, not only does the Executive (or the coalition) *not* possess three votes on the Committee, it often speaks in "three competing voices."

3. *The Power of the Judiciary on the Appointment Committee*

In contrast to the executive branch, the *judiciary* holds three votes and speaks in unison. Over the years, the judicial branch has developed a practice of bloc voting on the Committee.³⁸ According to newspaper reports, the Justices vote in a "winner takes all" manner, analogous to that of the Electoral College in the American Presidential election: candidates who enjoy the support of a majority within the Supreme Court receive the

³⁶ More specifically, Yahalom supported the promotion of judge Dvora Berliner of the Tel Aviv District Court. According to newspaper reports, Yahalom withdrew his opposition to the appointment of Edna Arbel provided that Berliner be appointed temporarily to the Supreme Court. For reports and analysis of the deal struck regarding Arbel's appointment see Nir Kedar, *Despite the questions regarding her character, Arbel is appointed to the Supreme Court*, HATZOFEH (in Hebrew), May 6, 2004; Yuval Yoaz, *From the Knesset to the Supreme Court*, HAARETZ (in Hebrew), May 2, 2005.

³⁷ Perhaps surprisingly, not a single member of the Committee was a member of Prime Minister Ariel Sharon's *Likud* party.

³⁸ Mordechai Haller, *The Appointment of Judges -- The Solution to the Supreme Court Crisis* (in Hebrew) 8 AZURE 62 (1999).

endorsement of all three Justices on the Committee.³⁹ This practice has generated considerable opposition among other branches of government. In 2004, this opposition resulted in legislation obligating all members of the Committee to vote according to their conscience, rather than as representatives of an institution or branch.⁴⁰ This legislation was clearly targeted at the *judiciary's* voting patterns. However, it is difficult to see how the law can be enforced, since such a judicial convergence of views would be difficult to prove; the Justices conduct their deliberations on future appointments behind closed doors, far from the public's eyes and ears. It remains to be seen whether the legislation will succeed in changing such voting practices.

The following anecdotes may demonstrate the consequences of the Justices' bloc voting: in April, 2004, Justice Turkel, a member of the Appointment Committee, disagreed with the position taken by his colleagues regarding the appointment of new judges to the Tel Aviv District Court. In a rare occurrence, Turkel voted contrary to the official position of the Court, thus undermining the promotion of the candidate endorsed by the Supreme Court and leading to the promotion of another judge.⁴¹ Even though it was "only" the appointment of a District Court judge that was being decided, rather than a Justice of the Supreme Court, Turkel's "rebellion" was reported to have resulted in outrage among his colleagues.⁴² The legal columns of Israeli newspapers reported that Turkel had been "ostracized."⁴³ It is important to note that no such dissent has been reported since, despite the abovementioned legislation that prohibits bloc voting.

Another important anecdote involves the appointment of a Supreme Court Justice. Dorit Beinisch, the chief state prosecutor, was first nominated to the Supreme Court in 1993. Despite having the support of all four politicians on the Committee, her

³⁹ Haller, *id.*

⁴⁰ *Supra*, note 7, Article 6A (2004 Amendment). Even without the *Knesset* legislating on the matter, bloc voting stands contrary to legal precedent which determines that all members of the Committee must make their decisions independently: see H CJ 9/82 Virshuvski v. The Minister of Justice [1982] IsrSC 36(1), 645, the opinion of Justice Kahan, section 5; the opinion of Justice Bejski, section 2. See also Moshe Gorali, *I Wonder if the Justices' Behavior Would Pass the 'Bagatz' Test*, HAARETZ (in Hebrew), April 8, 2003. ('Bagatz' being a reference to the Israeli Supreme Court, and the "Bagatz test" being the shorthand term for the Court's standard of scrutiny when reviewing administrative actions).

⁴¹ See Yoav Yitzhak, *Is Sarah Frisch Behind Turkel's Vote?* GLOBES (in Hebrew), April 21, 2004.

⁴² For further discussion regarding this incident, as well as the difference between the voting procedure in the appointment of Supreme Court Justices and judges in other instances, see Hadas Magen, *Nothing is Certain*, GLOBES (in Hebrew), April 13, 2004.

⁴³ See Hadas Magen, *People*, GLOBES (in Hebrew), May 6, 2004.

appointment was defeated 5-4, with all three Justices and both members of the Bar Association voting against her. According to the report in *Haaretz* (one of Israel's leading newspapers), the three Justices took a united stand in voting against Beinisch, despite grave differences of opinion among them on the matter.⁴⁴ In 1995, only two years later, the Committee unanimously voted to appoint Beinisch. In the interim very little had changed with respect to Beinisch's qualifications: she remained the chief prosecutor during the entire period. The Justices, however, went from full opposition to a complete endorsement of Beinisch in a relatively short period, with at least one Justice voting in both instances – in a contrary manner each time. One change that had occurred over this period was within the Supreme Court, namely, the retirement of Chief Justice Shamgar and his replacement by Justice Barak.

The two conflicting votes over Beinisch's appointment raise a number of possible concerns regarding the Committee's conduct. First, the votes raise questions regarding the influence of the Chief Justice on the Court's position, and more broadly, on the appointment procedure.⁴⁵ Second, the voting raises concerns regarding the influence of the Supreme Court Justices on the representatives of the Bar Association. Some scholars have pointed to the hierarchal inferiority of the members of the Bar Association in relation to the Justices.⁴⁶ Bar members may be reluctant to take a stand contrary to that of the Supreme Court, giving the Court an even larger influence on judicial appointments.

Beinisch's appointment emphasizes another important point: bloc voting awards the Supreme Court Justices an *actual* elective power that amounts to more than the 33% that they formally possess. Given the membership of the Committee, one can see how

⁴⁴ Haller, *supra*, note 38, at 62. Similar divergence of opinion within the Supreme Court (which received great public attention) emerged regarding the candidacy of Professor Nili Cohen of Tel Aviv University Law School. Eventually the judicial branch voted unanimously to oppose her appointment, despite Chief Justice Barak's support of Cohen's nomination. See Shetreet, *supra*, note 6 at 279.

⁴⁵ For further discussion of the strong influence of Chief Justice Barak on the appointment of Supreme Court Justices, see Nomi Levitsky, *He is Not Worthy, But Barak Requested*, HAARETZ (in Hebrew) May 6, 2004. In this article Levitsky, a biographer of Chief Justice Barak, criticizes the 2004 appointment of Former Attorney General Elyakim Rubinstein to the Supreme Court. She addresses the role played by Barak in confirming this appointment, despite the strong reservations expressed in the past by most members of the Committee (not only the Justices) concerning Rubinstein's suitability to serve as a Supreme Court Justice. Nevertheless, as the case of Professor Nili Cohen suggests, the Chief Justice's opinion does not necessarily determine the Court's position. See Shetreet *supra*, note 45.

⁴⁶ This is the position of Professor Mordechai Kremnitzer, a professor of Criminal and Constitutional Law at the Hebrew University. See Esther Livni, *Legal Aspects of the Uniform Voting of Supreme Court Justices in the Judicial Appointment Committee: an Interview with Professor Mordechai Kremnitzer*, 37 ORECH HADIN (in Hebrew) 36 (2003). See also Haller, *supra* note 38, at 62.

difficult it is to raise a majority of five, the majority needed for the appointment of a new judge, against the will of the Justices. An appointment against the will of the Justices is possible in only one of two scenarios: (1) an agreement between all the politicians on the committee (a difficult endeavor) with the addition of one member of the Bar Association, or (2) an agreement between three of the politicians and both members of the Bar. Even assuming that the Justices possess no influence over the representatives of the Bar Association, a coalition of five is difficult to achieve. According to a recent article in *Haaretz*, a game-theory analysis of the Appointment Committee shows that the Justices possess an actual voting power of 42.8%, even though, in theory, they possess only one-third of the votes.⁴⁷

4. *Proposals for Reforming the Judicial Appointment Committee's Composition*

In recent years, the judiciary's strong influence on the appointment of judges has been subjected to criticism; proposals have been made by both politicians and legal academics to amend the structure of the Appointment Committee in order to decrease the judicial influence on the process.⁴⁸ Some politicians have proposed an equal representation of the three branches of government and the Bar Association, with three members each;⁴⁹ M.K Michael Eitan of the *Likud* party has gone a step further, proposing that the Legislative branch receive four votes, while each of the other branches receive three.⁵⁰ Some legal academics have proposed adding prominent members of legal academia to the Committee, such as the deans of the leading law schools, to

⁴⁷ See Itai Brezis, *Game Theory in the Supreme Court*, HAARETZ (in Hebrew), December 12, 2005. Brezis employs game theory analysis to discover the *Shapley value*, which he finds to be 42.8% based on the Justice's bloc voting. The Shapley value, named after mathematician Lloyd S. Shapley, computes the proportional power of coalitions and veto holders in voting processes. For further reading see <http://www.britannica.com/eb/article-22629>.

⁴⁸ For criticism and reform proposals made by academics see for example: Kremnitzer, *supra*, note 44; A. Shavit, *The Head of the Opposition Speaks*, HAARETZ (in Hebrew), November 21, 1999 (an interview with Professor Ruth Gavison of the Hebrew University). Regarding the criticism voiced by politicians, see for example Oded Arbel, *Playing Defense*, HAARETZ (in Hebrew), December 18, 2005; Avaraham Fechter, *The Judge Appointment Committee – A Cartel of the 'Brethren'*, (in Hebrew) http://www.israelbar.org.il/article_inner.asp?pgId=30048&catId=287

⁴⁹ See Arbel, *id.*

⁵⁰ See Fechter, *supra*, note 48.

counterbalance the influence of the judiciary, yet at the same time retaining the current balance between the three branches of government.⁵¹ Still another proposal has been to grant the two Chief Rabbis of Israel membership on the Committee.⁵²

In contrast, Supreme Court Justices have warned that amending the composition of the Committee in a manner that would provide the Executive and Legislative branches with a more dominant role will unduly politicize the selection process;⁵³ the appointment process will then revolve around the *political* views of the candidates, rather than focusing on their legal expertise. Justices have repeatedly emphasized the importance of maintaining the judiciary's supremacy in the appointment of its members. Former Chief Justice Agranat is reputed to have described the Israeli appointment system as "the best in the world" because of the important role played by the judges themselves.⁵⁴ Chief Justice Barak has repeated this view on a number of occasions.⁵⁵ Justices who have criticized the appointment system have argued that there are too *few* judges on the Committee: former Chief Justice Shamgar thought that the Judiciary should receive a larger representation,⁵⁶ while Former Justice Englard recently articulated that in an ideal society judges are appointed solely by their colleagues.⁵⁷

Although judges and politicians may differ in their view of an ideal system for appointing judges, they agree on one point: under current Israeli law, Supreme Court Justices influence the appointment and promotion of judges more than any other branch.⁵⁸

⁵¹ See Livni, *supra*, note 46. Interestingly, a similar proposal was made during the first years of statehood, when the structure of the Judicial Appointment Committee was first discussed. In the original 1951 proposal, which received the initial approval of the *Knesset* and was passed on to a subcommittee for drafting, the Committee included two members from each of the three branches of government, the Attorney General, a member of the Bar and the dean of one of the law schools. This proposal was defeated in 1953, after a new *Knesset* was appointed. See Shetreet, *supra*, note 6 at 91.

⁵² See Arbel, *supra*, note 46.

⁵³ In 1996 Chief Justice Barak said: "May the Lord protect us from the politicization of the structure and appointment process of our supreme judicial authority. This is not how constitutional law ought to be created. It will be a tragedy to the State of Israel if the Justices of its Supreme Court are appointed politically," Haller, *supra*, note 38, footnote 37 (citing HAARTEZ, October 23 1996).

⁵⁴ See Haller, *supra*, note 38, footnote 39.

⁵⁵ See Shlomi Weinberg, Ilan Yonas and Ronen Poliack, *An Interview with Chief Justice Barak*, 8 ELYON (2003). http://www.skira.co.il/Online/students_Article.asp?ArticleId=164)

⁵⁶ See Haller, *supra*, note 38, at 65.

⁵⁷ Arbel, *supra*, note 48.

⁵⁸ One may wonder whether the involvement of the Court in appointments does not politicize the Court *more* than if the process had been exclusively in the hands of politicians: the current system subjects the Supreme Court to public criticism regarding its choices of candidates and raises speculation regarding the

5. *The Theoretical Problem Restated*

Understanding the role of Supreme Court Justices in the appointment of new judges, it is now possible to estimate whose approval a judge aspiring to promotion to the Supreme Court might seek: in order to gain the support of their peers, temporarily appointed judges may sense pressure to rule in accordance with the views of the majority already serving on the Supreme Court. During their one-year appointment, temporarily appointed judges might compromise their own legal views, substituting the judgment of their fellow Justices for their own. Rather than voicing opinions that contradict the opinion of the Court, they may attempt to avoid controversy during their *probationary* period.

The primary concern that the temporary appointment system raises is the threat it poses to independence *within* the judiciary. The influence of Justices on the appointment of their colleagues, along with the one-year probationary period to which temporarily appointed judges are subjected, present threats to internal judicial independence. Therefore, internal independence is the focus of this study. The objective of this research is to examine whether the theoretical threat to judicial independence that has been presented in this chapter in fact materializes during the course of the one-year temporary appointment of District Court judges to the Supreme Court.

political background of these choices as well as the personal connections involved. Furthermore, since the Committee is composed of a number of politicians, the Justices often find themselves involved in political “deals” regarding the appointments. One example is the alleged 1997 deal between Chief Justice Barak, Minister Levi and M.K. Rubinstein, whereby the two politicians agreed to support the appointment of Itzhak Englard in return for Barak’s assistance in the appointment of an Arab Justice and another Orthodox Justice (See Haller, *supra* note 38 at 75, footnote 25). Another example is the agreement reached between the committee members and M.K. Yahalom regarding Berliner’s temporary appointment: Yahalom agreed to vote in favor of Edna Arbel’s appointment even though he opposed it, in return for a promise that an Orthodox woman would be appointed to the bench temporarily (see *supra*, note 36). As the reader may recall, the Chief Justice must concur in all temporary appointments, making him a part of the agreement. Still another example is the understanding reached between Minister of Justice Meir Shitrit and Chief Justice Barak in 2001 regarding the appointments of Justices Procaccia and Levi. Whereas Barak supported Procaccia’s candidacy and Shitrit supported Levi’s, the two agreed to endorse each other’s candidates in return for support of their own favorite. See SHETREET, *supra*, note 6, at 278.

II Measuring Judicial Independence and a Critique of Previous Studies on the Subject

This chapter deals with methodological approaches to examining judicial independence. The chapter begins by explaining why Supreme Court decisions are the only available source for evaluating judicial independence of judges appointed temporarily to the Israeli Supreme Court. It proceeds to explore and critically assess the research conducted by Professor Eli Salzberger regarding the decision-making of temporarily appointed judges.⁵⁹ Thus far, Salzberger's study represents the most comprehensive effort to evaluate the decision-making of temporarily appointed judges. Therefore, familiarity with Salzberger's findings, analysis and the limitations of his study is crucial to understanding the objectives and methodology used in the current study, the objective of which is to address the weaknesses of Salzberger's work.

A. How to Measure Independence Within the Judiciary

How is it possible to determine the level of independence of temporarily appointed judges? How may we uncover the factors that lead judges to render the decisions that they make? One of the primary concerns is what *sources* may be utilized to track the thought process of judges and the extra-legal considerations that they take into account when rendering a decision.

One possible method of evaluating judicial independence and decision-making is to interview temporarily appointed judges (both those who were and those who were not granted tenure), and inquiring directly whether their temporary position made them *feel* less independent. However, the subjectivity and biases inherent in such an approach are clear: judges who were later promoted to the Supreme Court are unlikely to admit that their temporary position affected their decisions. Such an admission would raise questions of professional integrity and undermine the legitimacy of their decisions during the one-year appointment. In contrast, judges who were *not* appointed to the Supreme

⁵⁹ Eli M. Salzberger, *Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings from the Supreme Court of Israel*, 35 ISRAEL LAW REVIEW 481 (2001).

Court might be eager to overstate the pressures placed on them during their one-year appointment. They may unjustifiably attribute the decision not to promote them to their independent opinions. Therefore, interviews would appear to be a problematic tool in evaluating the independence of temporarily appointed judges.

Furthermore, limitations imposed by the Israeli Court Administration present additional challenges to conducting interviews or distributing questionnaires among temporarily appointed judges. Only on rare occasions does the Israeli Court Administration allow interviews with judges. Academic research of judicial decision-making has been rejected as grounds for allowing judges to respond to questionnaires, even when the questionnaires were administered anonymously.

For example, in a 2002 decision, the Supreme Court addressed the question of distributing questionnaires among judges for the purpose of academic research: a doctoral student of Criminology at the Hebrew University requested permission to distribute anonymous questionnaires among judges who handle criminal cases.⁶⁰ His research addressed the approach of Israeli judges to the objectives of criminal punishment and its relation to the judges' moral and religious views on the matter. The Supreme Court unanimously rejected his request. The Justices ruled that judicial office in Israel is "based on professional expertise and not on political and personal views." Therefore, it demands "objectivity, independence and neutrality." The Court further states that "when a judge applies the law, he detaches himself from his own private-subjective views" and implements the shared values that unite Israeli society. Therefore, the judges' personal moral and religious views are believed to be irrelevant to their judicial decisions. Furthermore, the Supreme Court perceived the research to be a threat to the judicial system; it might undermine the public's confidence in the courts' neutrality.⁶¹ As a result, to determine the judges' views on moral issues, the petitioner was referred to the public records of decisions rendered by the courts, from which the researcher might derive his observations.

The reasons for denying interviews with judges in the Criminology study are equally relevant to this study. Therefore, there is no alternative to deducing the decision-

⁶⁰ HCJ 2491/02 Mordechai Ben Ari v. Dan Arbel [2002] (unpublished).

⁶¹ *Id.* section 6 of the decision.

making process of temporary appointed judges from their judicial opinions alone. The first method is a quantitative comparison of the rate at which temporarily appointed judges dissent from the opinion of the Court during their one-year appointment and during their first year of tenure. The other method is qualitative: it compares opinions rendered by individual judges during their one-year appointment and later in their judicial career on specific matters, by examining whether any changes had occurred in their views. It is believed that if the temporary status of judges exerts any effect on their decision-making, it will manifest itself in one of the two studies. However, before explaining this methodology further, let us first consider the methodology employed in previous studies regarding the judicial independence of temporarily appointed judges.

B. *Salzberger's Study*

The most comprehensive study to date regarding judicial decision-making in the Israeli Supreme Court was conducted by Professor Eli Salzberger of Haifa University. Not only is it the most comprehensive research, but Salzberger's study is the *only* empirical analysis focusing on the judicial independence of temporarily appointed judges. Salzberger relied on a database of 47,782 cases between 1948 and 2000, constituting approximately one-third of the Supreme Court's docket during that period. Rather than selecting a random sample of cases over the 52 years, Salzberger examined all decisions rendered during specific years, while completely ignoring other years; within each decade, Salzberger selected three or four years to represent the period.⁶² For each of the decisions examined, four observations were made: the judges' position in petitions brought against the state or its agencies; the rate of lower-court decision reversals; the identity of the judges writing dissenting opinions, in cases in which such opinions were rendered; the judges who wrote concurring, yet separate, opinions. Each parameter was presumed to measure a different aspect of independence and judicial decision-making: e.g. independence with respect to other branches of government;⁶³ the level of

⁶² Salzberger's ultimate objective is to include all cases in the database; he is engaged in an ongoing project to do so.

⁶³ As explained in Chapter I, the legislative and executive branches possess four of the nine votes within the Judicial Appointment Committee. Therefore, Salzberger was concerned not only with the influence of

intervention in lower court decisions; independence within the judiciary; the quality of judicial decisions. The comparisons and analyses of the findings were based on dividing the judges into four categories: the Chief Justices and the Deputy Chief Justices, the Associate Justices, temporary judges who were granted tenure and temporary judges who were not granted tenure. For the purposes of *this* study, the data collected by Salzberger regarding petitions against the State and the rate of dissent are of the greatest interest; both directly address the question of judicial independence.

In High Court petitions⁶⁴ Salzberger found that temporary judges who were subsequently promoted to the Supreme Court were the most “pro-petitioner,” delivering opinions against the government in 12.4% of the petitions. In contrast, the judges who were *not* promoted accepted only 9% of such petitions. Permanently appointed Justices were found to accept 10.75% of the petitions (10.9% of those heard by Associate Justices and 10.1% of those heard by the Chief Justices and Deputy Chief Justices). These findings suggest that temporary judges who were ultimately appointed were not affected by the government’s positions.⁶⁵ In fact, the contrary seems to be the case: e.g. the more a judge tended to rule *against* the government, the more likely he was to be granted a permanent position. Therefore, Salzberger concludes that judicial independence vis-à-vis the executive and legislative branches does not seem to be compromised by the temporary appointment of judges. Stated differently, it is not with the politicians on the committee that the untenured judges seek to align themselves.⁶⁶

Regarding the independence *within* the judicial branch, Salzberger experienced difficulty in drawing clear conclusions from the data. Whereas temporarily appointed judges who were ultimately appointed permanently dissented from the opinion of the

Supreme Court Justices on the temporarily appointed judges, but also with examining the positions taken by untenured judges when the government is involved in the litigation.

⁶⁴ High Court petitions include all petitions against the government, its agencies or an agency given statutory power to provide a public service (burial services, for example, have been recognized to fall under such a definition). Such procedures are known in Hebrew as *Bagatz*, the Hebrew abbreviation for the term High Court of Justice.

⁶⁵ Salzberger does not state whether the differences in the rate of accepting petitions is statistically significant. However, he does indicate this difference as a “significant figure” in the study. See Salzberger, *supra*, note 59 at 502.

⁶⁶ Though Salzberger measured the rate of accepting appeals in criminal cases, he did not divide them according to the winning party - defendant or government. A measurement of judges’ decisions in Criminal cases could have contributed further to the understanding of the judges’ standing in relation to the government’s positions.

court in 0.7% of the cases, those who were not promoted dissented in 0.8%. This finding seems at first to indicate a negative correlation between dissent and the likelihood of receiving tenure. Compared to a dissent rate of 0.6% among all tenured Justices, the data seem to imply that temporarily appointed judges are even more independent than tenured Justices. However, with the rate of dissent being less than 1% and the differences being but a fraction of a percent, the differences between the various groups are statistically insignificant.

C. *A Critique of Salzberger's Study*

Despite the comprehensiveness of Salzberger's research, some of the conclusions drawn in the study seem to suffer from analytical flaws. Let us begin by considering the sample on which the study was based. Scientifically and intuitively, large samples promise a more precise approximation of reality; they lower the likelihood that a randomly drawn sample will provide an inaccurate depiction of the population. However, large samples are not fool-proof guarantees of accuracy, as Salzberger's study demonstrates. Perhaps surprisingly, the large number of decisions examined by Salzberger distorts the analysis of judicial independence; the sample may misrepresent some important features of judicial decision-making in the Israeli context. To understand how such distortion might occur, one must be familiar with the caseload of the Israeli Supreme Court.

During the course of 2004, three-judge panels of the Israeli Supreme Court decided approximately 4,500 cases.⁶⁷ Most of these cases did not require *certiorari* from the Court and belonged to two categories: petitions submitted against state authorities, in which the Supreme Court usually possesses exclusive jurisdiction;⁶⁸ appeals (as a matter of right) of decisions in which the District Courts hold original jurisdiction (criminal

⁶⁷ See the official website of the Israeli Supreme Court: www.court.gov.il

⁶⁸ Under legislation from 2000, Israeli District Courts are competent to decide administrative law cases in certain enumerated matters, such as municipal tax disputes and freedom of information petitions. The residual authority in cases that are not enumerated, however, continues to reside in the Supreme Court. See Administrative Courts Act 5760-2000. However, even in instances in which the Supreme Court does not have original jurisdiction it still maintains appellate jurisdiction, as a matter of right, which means that many of these cases are still heard by the Supreme Court.

offenses punishable by more than seven years of imprisonment and civil cases that involve a sum higher than 2.5 million Shekels⁶⁹).

Due to the structure of Israel's judicial branch, the Supreme Court is often obliged to decide cases that possess no precedent value. Many of these cases have a clear-cut legal outcome; a large percentage of them are decided in the courtroom, immediately following oral arguments, in a concise, 1-2 page decision. Therefore, in evaluating the rate of dissent within the Court, this factor must be taken into consideration. In cases in which the legal outcome is quite clear, it is not surprising to find no dissent among temporarily appointed judges. If the hearing of cases were based on *certiorari* (as is the case in the United States), it is possible that a higher percentage of dissent would emerge, since all cases decided by the Supreme Court would, in fact, have a bearing on complex or "charged" legal issues. Therefore, to better understand the actual rate of dissent, it is crucial to distinguish between cases based on their complexity. General statistics regarding the low rate of dissent among both tenured and untenured judges tell us little about the judicial independence of the latter; such an extensive study presents dissent within all classes of judges as a fraction of a percent. Displaying the data in this way causes differences between the groups to appear to be statistically insignificant, when, in fact, they may be noteworthy. Salzberger acknowledges this shortcoming of his study, namely, that it awards equal weight to all cases.⁷⁰

A second criticism concerns Salzberger's division of the non-tenured judges, namely, between those who were ultimately appointed to the Supreme Court and those who were not. This distinction seems ill-suited for the evaluation of both inter-branch judicial independence as well as independence *within* the judiciary. The study assumed, *a-priori*, that all temporarily appointed judges were interested in acquiring tenure.⁷¹ Therefore, in evaluating their independence, the study should have adopted the contemporaneous perspective of an untenured judge during his one-year appointment. Adopting such a perspective would have necessitated a view of untenured judges as one group, not two. Salzberger, however, divided and analyzed these judicial decisions based

⁶⁹ Approximately \$530,000.

⁷⁰ See Salzberger, *supra*, note 59, at 498-499.

⁷¹ This is not meant to suggest that all judges pursue this objective in the same way. They may differ from one another in the way in which they pursue this goal.

on subsequent developments--the Committee's decision whether to appoint the judges to the Supreme Court or not. By distinguishing between the groups, Salzberger measured the decision-making process of the Committee, rather than evaluating the independence of the judges; that is, he examined whether dissent or anti-government decisions decreased a judge's likelihood of receiving tenure. Rather than examining the influence that the Committee and its composition had on the judges, he examined how the judges' behavior affected the decision-making of the Committee.

Salzberger's general division of the judges into four categories further distorts the data collected in his study. In examining Salzberger's data regarding High Court petitions, for example, dividing the judges into only two categories (temporary and permanent), we find that on average, untenured judges (those who were subsequently appointed and those who were not) accept 10.64% of the petitions against the government. This percentage is only slightly lower than the 10.75% rate among tenured judges. Therefore, based on Salzberger's data, we find no significant difference in inter-branch independence between temporary and tenured judges.

More importantly, when we examine Salzberger's findings regarding *dissent*, the numbers seem to tell a completely different story than that suggested by Salzberger. When viewing the two categories of temporary judges jointly and comparing them to the permanent Justices (Chief Justices and Associate Justices), interesting, and perhaps surprising, findings emerge. As presented in Table 1, in all categories of cases (civil, criminal and administrative /constitutional), the percentage of dissenting opinions among untenured judges is higher than that of tenured judges. In High Court petitions it is more than double. Considering these percentages and bearing the criticism regarding the sample in mind (the cases it includes and the sample's unsuitability for measuring the actual rate of dissent), it is unclear whether the differences are as insignificant as Salzberger suggests.

Table 1

	Tenured	Untenured
High Court	0.3%	0.85%
Civil	0.85%	1.6%
Criminal	0.375%	0.53%
Total	0.53%	0.875%

Table 1 suggests rather strongly that the lack of tenure has no impact on independence within the judiciary, at least insofar as dissent may serve as an indicator of such independence. Taken alone, it appears that there is no evidence to suggest that untenured judges are reluctant to voice dissenting opinions. It seems that temporary judges are actually *more likely* to express dissent than are their permanently appointed counterparts.

Nevertheless, the apparent negative correlation between temporary appointment and concurrence rates leads us to consider a third limitation of Salzberger's study--its cross-sectional, rather than longitudinal, approach: Salzberger's choice to conduct only a *group* comparison between the rates of dissent of tenured and untenured judges, instead of examining judges individually, overlooks an important aspect of tenure's possible impact. Rather than comparing the judges' *own* decisions before and after they are awarded tenure, Salzberger compares the rate of dissent among the entire group of temporarily appointed judges to the general rate of dissent among tenured judges. Although group comparison is common in the analysis of dissent and its causes (such as gender,⁷² race,⁷³ former career experience⁷⁴ and religion⁷⁵), it is not necessarily the best way to study the effect of *tenure* on dissent. Group comparison is used because most of

⁷² Michael Dan Birnhak and David Gussarsky, *Minority Judges, Dissenting Opinions and Judicial Pluralism* (in Hebrew), 22 IYUNEI MISHPAT 505, 542 (1999).

⁷³ *Id.*

⁷⁴ David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, 37 (Peter H. Russell and David M. O'Brien eds., University Press of Virginia 2001). The authors discuss the propensity of academics appointed to the judiciary in Japan to express dissenting opinions in comparison with career judges appointed to the Supreme Court of Japan. See also Orley Ashenfelter, Theodore Eisenberger, Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J. Legal Studies* 257 (especially p. 262 and footnote 12) (1995).

⁷⁵ See Ashenfelter (et al.), *Ibid.*

the characteristics that are assumed to affect the rate of dissent tend *not* to vary over time. Therefore, evaluating the impact of a particular feature on a judge's rate of dissent is only possible by comparing a group of judges, who share the attribute under examination (race, gender, ethnicity, prior career experience), to another group who do not. However, group comparison studies pose a difficulty in controlling for other variables and in isolating the attribute that most strongly contributed to the rate of dissent.

However, the study of tenure impact enables us to examine the same individual, with all her attributes, before and after her change in status, namely, before and after her permanent appointment. The highly individual nature of dissent, the fact that some judges are serial dissenters, whereas others dissent only rarely, make the use of an individual as his own "control group" a more precise method of measuring whether tenure had any bearing on their decisions. While we cannot compare the decisions that an individual judge rendered as a male and those she rendered as a female (or the decisions that a Justice rendered as a career judge promoted from within the judiciary as opposed to those he rendered as a university professor appointed to the Supreme Court), we *can* compare the behavior of an individual judge with and without tenure. The tenure impact study offers the possibility of looking at the *same individual*, with all her unique characteristics, to eventually arrive at a more accurate evaluation of whether tenure had any impact on their judicial decision-making. This is an important possibility which Salzberger does not consider.

Fourth, Salzberger's analysis lacks a historical perspective regarding the composition and jurisprudence of the Supreme Court. It treats a period of over 50 years as a monolithic unit. The study ignores the possibility that different group dynamics within the court may have influenced the way in which untenured judges perceived their position during their one-year appointment. As a result, it ignores the possibility that the persona of the Chief Justice or his deputy, and their respective weight within the Appointment Committee, affected the rate of dissent among untenured judges.

Furthermore, Salzberger's non-historical approach assumes that the temporary appointment of judges has borne the same meaning and served the same goals over the years; as we have seen, legislative history suggests otherwise.⁷⁶ Whereas the original

⁷⁶ See *supra*, p. 7.

intent behind the temporary appointment of judges was to relieve caseload pressure in the event of a sudden vacancy within the court, it later became a probationary mechanism for evaluating potential candidates for the position of Associate Justice. This transformation in the objective of temporary appointments may have resulted in a change in the impact that the lack of tenure has had on judges: the hope of being appointed may have been accompanied by greater incentives to concur; a temporary appointment without such hope may have created incentives to produce memorable decisions while the opportunity existed.

Moreover, the dynamic between judges and politicians on the appointment committee may have changed over time, thus changing the identity of the most influential branch in the judicial appointment process. As explained in Chapter I, the practice of allowing the opposition party to determine the identity of one member of the Committee is a fairly recent development.⁷⁷ Until 1990, it was the coalition parties alone that determined the identity of both representatives of the parliament through their command of the *Knesset* majority. Throughout most of that period, Israeli politics were dominated by one party; the Labor Party held power consecutively from the establishment of the state until 1977. It is possible that temporarily appointed judges gave greater weight to the Executive's position when a strong coalition determined the identity of *four* Committee members. The government's influence may have given way to judicial influence when Israeli parties became smaller and more numerous and the political representation on the Committee became more fragmented.

Finally, Salzberger's study is quantitative whereas it seems that qualitative analysis should be equally, if not especially, important in evaluating the changes that might occur in judicial decision-making following the permanent appointment of judges. It appears that more precise evidence regarding judicial independence can be obtained through a qualitative study, comparing the substantive positions of judges on specific issues before and after their permanent appointment. Therefore, although "statistics can tell a story of its own, which can indeed contribute to the overall assessment of the work of the Supreme Court and its judges,"⁷⁸ there are other "stories" to be told. Comparing

⁷⁷ See SHETREET, *supra*, note 6, at 276.

⁷⁸ Salzberger, *supra*, note 59, at 499.

the rates of dissent of tenured and untenured judges and showing statistical differences between them does not necessarily imply that judges have changed their position on any substantive issues. Proving a change in substantive opinions can only be achieved through a qualitative analysis, comparing decisions of the same judge on similar issues before and after his permanent appointment.

III The Methodology Employed in this Study

This chapter is dedicated to explaining the methodology of the current study. The methodology of this study aims at providing a different perspective than that which Salzberger offered in his research, to contribute to the further understanding of the decisions rendered by temporarily appointed judges. Considering the strengths and weaknesses of Salzberger's research, this chapter discusses certain methodological choices that were made in the current study. The chapter compares the methods employed here to those used by Salzberger and addresses this study's comparative advantages and limitations.

This study focuses on the decision-making of seven Justices who currently serve on the Israeli Supreme Court: Eliezer Rivlin, Ayala Procaccia, Edmond Levi, Asher Grunis, Miriam Naor, Salim Jubran and Esther Hayut. All of these Justices were appointed after having served temporarily on the Court for up to one year. All of the judges were appointed between 1999-2005. The short time interval examined controls, to some extent, for a number of factors: first, it controls for shifts that occurred in the objective of the temporary appointment, namely, the shift from a device for addressing manpower shortages to a probationary mechanism. Second, although some personnel changes had taken place within the court over these four years, a high degree of similarity in group dynamics was maintained. The Chief Justice, Aharon Barak, remained the same throughout the entire period. Furthermore, seven other members of the Court served on the bench throughout the entire period.⁷⁹

⁷⁹ Other than Chief Justice Barak, Justices Or, Mazza, Cheshin, Dorner, Turkel and Beinisch served throughout the entire period, until Justices Or and Dorner were replaced by Justices Jubran and Hayut.

Let us now consider the cases on which this study draws. The study is based on 977 decisions of the Court, between 1999 and 2005. The pool of cases on which the study relies is limited compared to that which was used in Salzberger's analysis; it does not include the entire docket of the Supreme Court during the period examined, for reasons that have been explained in detail in Chapter II. Instead, to avoid awarding equal weight to *all* cases, the study relies on cases in which the decision of the Court discloses a certain level of legal complexity (factual or legal) and of deliberation in reaching the final outcome. The *length of the decision* has been chosen as an indicator of the panel's deliberation in reaching a decision. Therefore, the study focuses on decisions that exceed three pages in length.

We believe that there is a strong justification for discarding cases of less than three pages in the analysis of judicial independence. Decisions of three pages or less are usually decided in the courtroom immediately following oral arguments or based only on written arguments. These short decisions usually display no legal deliberation: explaining the factual background of a case, even generally, and determining the outcome necessitate at least three pages (bearing in mind that half a page or more in each decision is dedicated to listing the docket number, the names of the justices, the parties, etc). Court decisions of three pages or less were found to contain no substantive discussion of the facts or legal arguments that were raised by the parties. The assumption on which the selection rests is as follows: in dismissing a case without in-depth discussion, the panel, in essence, voices an opinion that the case did not evoke any complex questions that would justify dedicating judicial time and energy to writing a detailed decision. Therefore, in such cases, it should not appear surprising that the temporarily appointed judges did not express a different opinion.

In choosing the length of the decision as an indicator, other possibilities have been rejected. An alternative method that I dismissed was relying only on cases that were later published in the *Israeli Law Reports*, the primary publication of Supreme Court decisions. Some past studies on dissent have indeed relied solely on the *Law Reports* as a

basis for their analysis.⁸⁰ In doing so, scholars have claimed that the publication includes only important precedents and decisions of great public interest. Although I do not dispute this point, I find it problematic as an argument for relying *only* on the *Law Reports*: although all cases included in the *Law Reports* are notable, it does not follow that all cases of interest for a study on dissent have been published in this series. Indeed, Israeli lawyers and judges rely heavily on alternative databases of Supreme Court decisions, precisely because the *Law Reports* are not a sufficiently comprehensive resource. Therefore, relying solely on the *Law Reports* carries with it a great danger of selection bias, which may also result in distortions in the rate of dissent. A study of the *Law Reports* may disclose a higher percentage of dissenting opinion than a broader study; yet at the same time it also omits dissenting opinions that did not create legal precedents, a fact that has been observed in the current study. As the reader will note, many of the decisions cited in this study were *not* published in the *Law Reports* series.⁸¹

Nevertheless, choosing three-page decisions as a cut-off point is not without its difficulties: since judges differ in their writing style and in the level of detail with which they address cases, some judges may render decisions that *exceed* three pages even when dealing with trivial and inconsequential matters. As a result, the three-page point is not a perfect filter. However, despite the shortcomings of this selection method, we find it to have a key advantage in comparison to other measurements: it concentrates on the weight attached to the decision by the judges themselves in their allocation of time and energy, rather than on an outside authority, such as the editors of the *Law Reports*.

For each of the judges examined, the study explores the full range of decisions rendered during the year of temporary appointment as well as the first year of full tenure. It then examines and compares a number of characteristics that emerge from this database, the primary focus being the rate of dissent and the rate of separate (yet concurring) opinions before and after attaining permanent status. Examining the first year of tenure, rather than subsequent years, controls, to some extent, for another possible

⁸⁰ See for example, Yoram Shachar, Meron Gross and Ron Harris, *An Anatomy of Discourse and Dissent in the Supreme Court – A Quantitative Analysis*, 20 IYUNEI MISHPAT, 749 (1997); Birnhak and Gussarsky, *supra*, note 72.

⁸¹ One of the factors that was noted in the current study was whether the opinion was published or not. The study shows that a large number of dissenting opinions were never published in the *Law Reports* series. For example, all four dissenting opinions rendered by Justice Procaccia during her temporary appointment were not published.

influence on the rate of dissent: the confidence that judges might gain in their position over time; experience might lend judges the confidence to dissent more often.

Finally, the study compared opinions expressed by temporarily appointed judges on specific issues with opinions that they voiced later, after being appointed permanently. Although changes of opinion may naturally occur over time, regardless of judicial independence, the shift in a judge's opinion is seen to be an important indicator of the influence of tenure; although it cannot be treated as a sole indication, it is an additional piece in a broader puzzle regarding the influences of temporary status on decision-making.

IV Quantitative Aspects of Judicial Decision-Making

After discussing in detail the methods for selecting the cases, let us now turn to the analysis of the data. As discussed above, the study consists of 977 decisions rendered by 7 judges of the Israeli Supreme Court between 1999 and 2005.⁸² For each of the judges, I examined all decisions longer than three pages both during the course of their temporary appointment period, as well as during their first year of service as fully tenured Associate Justices.⁸³

For each of the cases studied, the following observations were noted: the names of the Justices constituting the panel; the identity of the judge writing the first opinion; the length of the opinion; whether the opinion was published or not. The cases were divided into three categories: civil,⁸⁴ criminal⁸⁵ and constitutional⁸⁶ and the general topic was

⁸² 122 of the 977 cases included more than one temporary judge, or included a temporary judge and an Associate Justice during her first year of tenure. Therefore, the study includes 1099 *observations* that were collected from 977 cases.

⁸³ The data was collected from two separate databases in order to control for errors that may exist in one of the databases and in order to ensure that all available cases would be examined. The primary database used was that of the Israeli Supreme Court, which includes decisions rendered since 1997 (and a sporadic collection of cases before 1997). In addition, the study is based on the *Lawdata* database, a commercial database that is used by the Israeli Ministry of Justice (comparable to *West Law*).

⁸⁴ The category of civil cases included civil appeals as a matter of right, civil appeals by certiorari and family court appeals.

⁸⁵ The category of criminal cases included criminal appeals as a matter of right, criminal appeals by certiorari and appeals of disciplinary proceedings of the Israeli Bar Association. The inclusion of the appeals concerning the Bar Association within the category of criminal appeals is based on the categories used by the Supreme Court itself.

noted briefly. Finally, and most importantly for the sake of this study, I noted any separate or dissenting opinions rendered and the identity of the judge who wrote the opinion.

A. *General Observations Regarding the Data*

A number of interesting observations emerge from the data. First, we find significant differences in the number of cases (over three pages) that were decided by each of the judges: for example, whereas Justice Procaccia rendered only 53 decisions during her first year of tenure, Justice Hayut rendered 122 decisions during her first year of tenure. Because of these significant differences in the contribution of each of the judges to the general pool of cases, the overall percentages of dissenting and separate opinions has been calculated in two ways: both as a proportion within the grand total of cases, as well as an average percentage which awards equal weight to the contribution of each judge.⁸⁷

According to the study, there are also significant differences in the volume of cases according to subject matter: whereas other studies suggest that the decisions rendered by the Supreme Court are similarly distributed among civil, criminal and constitutional cases,⁸⁸ the docket of the judges examined was different. Decisions in civil cases comprised 43.5%, decisions in criminal cases comprised 32% and decisions in constitutional cases comprised only 24.5% (see Table 1). Interestingly, however, the percentage of dissenting opinions (of the combined decisions of temporary and

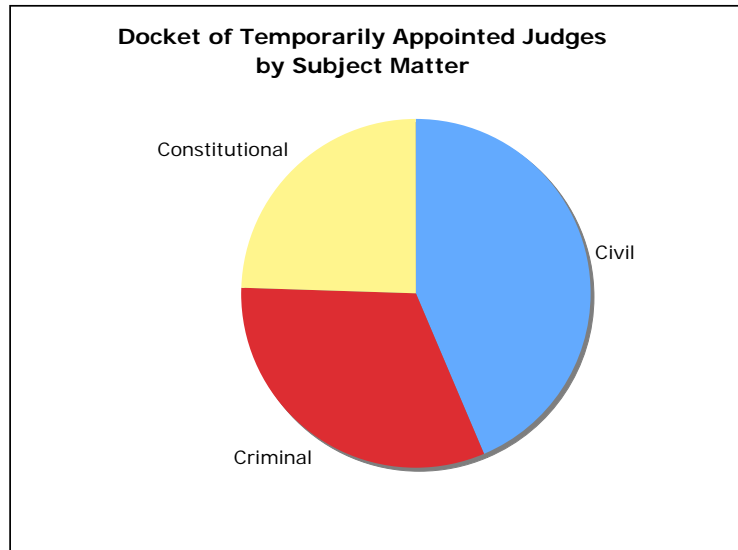
⁸⁶ The category of constitutional cases includes High Court petitions, the various categories of administrative cases as well as prisoner petitions, which despite their criminal characteristics, are regarded by the Supreme Court itself as administrative cases. The reason why the Court includes prisoner petitions within the administrative/constitutional category is because these are appeals regarding decisions of the Israel Prison Authority (*Shavas*), which is an administrative agency. Therefore, in reviewing these cases the Supreme Court exercises the deferential treatment that it applies in administrative cases, which presumes that the agency is acting legitimately, unless proven otherwise based on the administrative law causes of action (*ultra vires*, unreasonableness).

⁸⁷ For example, if Justice Procaccia decided 50 cases and dissented in 5 opinions, and Justice Hayut wrote 100 opinions and dissented in 20 cases, the percentage of dissent was calculated in two ways: 25 dissents of 150 cases (16.67%) and the average between 10% (5 dissents of 50 decisions) and 20% (20 dissents of 100 decisions), meaning 15%.

⁸⁸ See Salzberger, *supra*, note 59. According to Salzberger's study, decisions in constitutional cases constituted 33%, civil cases constituted 31% and criminal cases constituted 36%.

permanent judges) in the cases studied was *similar* in all three categories: 6.25% in constitutional cases, 6.35% in civil cases and 6.47% in criminal cases.

Table 1



There are a number of possible explanations for the differences in the proportion between criminal, constitutional and civil cases: either (1) constitutional and criminal cases are dismissed in short decisions more often than are civil cases, or (2) temporarily appointed judges are assigned fewer constitutional cases than civil and criminal cases. It is also possible that both factors contribute jointly to the differences in numbers.⁸⁹

In any event, the study provides proof that prior to 2003, cases were not assigned among the temporarily appointed judges at random.⁹⁰ During the 1999-2002 period, the study uncovered substantial differences in the proportion of civil, criminal and constitutional cases within the docket of each of the Justices (See Tables 2 and 3). For

⁸⁹ Insofar as explaining the low percentage of constitutional cases, I would like to suggest why the first factor mentioned may be significant: since petitions against any government agency can be submitted directly for the consideration of the Supreme Court as a first instance, a relatively larger proportion of these cases may be dismissed in short decisions compared to criminal and civil cases: criminal and civil cases must go through at least one judicial instance before reaching the Supreme Court, with the lower courts serving as a filtering system for frivolous cases.

⁹⁰ Furthermore, it appears that the *panels* were not randomly assigned either. Although this question was not part of my study, I discovered that during the two years examined, Justice Procaccia sat on a panel with Justice Cheshin in only two instances. This finding is significant because it may verify the rumors regarding animosity between the two judges and Cheshin's alleged opposition to Procaccia's appointment.

example, Justice Levi decided only 4 constitutional cases during the year of his temporary appointment (7.5% of his docket), whereas Justice Hayut decided 41 constitutional cases (36% of her docket). These differences in proportion suggest that judges were deliberately assigned different kinds of cases.⁹¹ Nevertheless, considering the comparable *general* rate of dissent in each of the fields, there is no reason to assume, *a-priori*, that the distribution of cases by subject matter may have affected the study of individual rates of dissent.

In attempting to account for the non-random assignment of cases, one possible explanation is that the cases were allotted based on the judges' fields of expertise; this seems to have been the case at least during the earlier years that were studied (1999-2002). For example, 30 of the 54 decisions rendered by Justice Levi (55.6%) were in criminal cases, which was Levi's field of expertise in the Tel Aviv District Court where he served as a criminal judge on a severe-crime panel. Of the 56 decisions rendered by Justice Rivlin during his temporary appointment, 35 were in civil cases (62.50%).⁹² Furthermore, 8 of the cases on Rivlin's docket pertained to motorist insurance, a subject on which Justice Rivlin has authored one of the leading books in Israel.⁹³

However, after 2003, the study suggests that cases were randomly assigned. The two most recent appointments, Jubran and Hayut (May 2004), were assigned similar numbers of civil, criminal and constitutional cases; their docket is divided quite equally into approximately one-third in each field. Justice Naor's docket during her first year of tenure (May 2003- May 2004) is also distributed relatively evenly among the three fields.

⁹¹ This finding is consistent with studies regarding the assignment of cases within the Court which focused on other periods,. See Birnhak and Gussarsky, *supra*, note 72, at 531.

⁹² I refer here to the *assignment* of cases, not the assignment of authorship between the judges.

⁹³ See ELIEZER RIVLIN, TRAFFIC ACCIDENTS: PROCEDURE AND CALCULATION OF DAMAGES (3rd ed. 1999).

Table 2

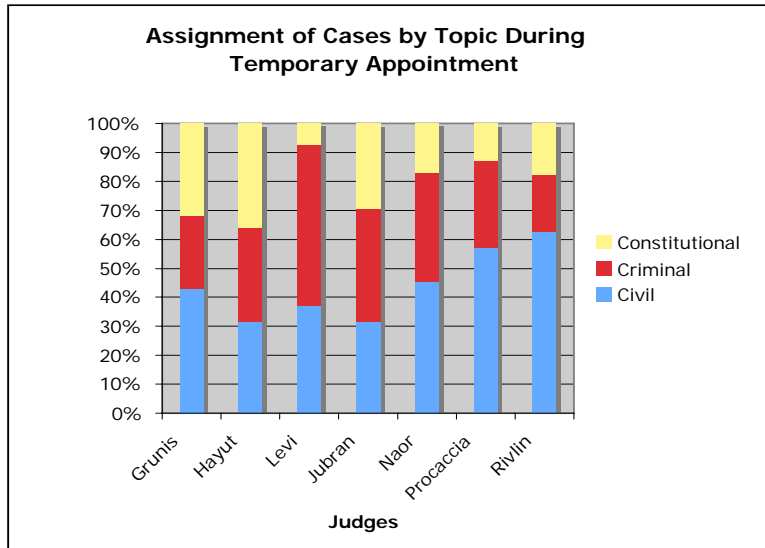
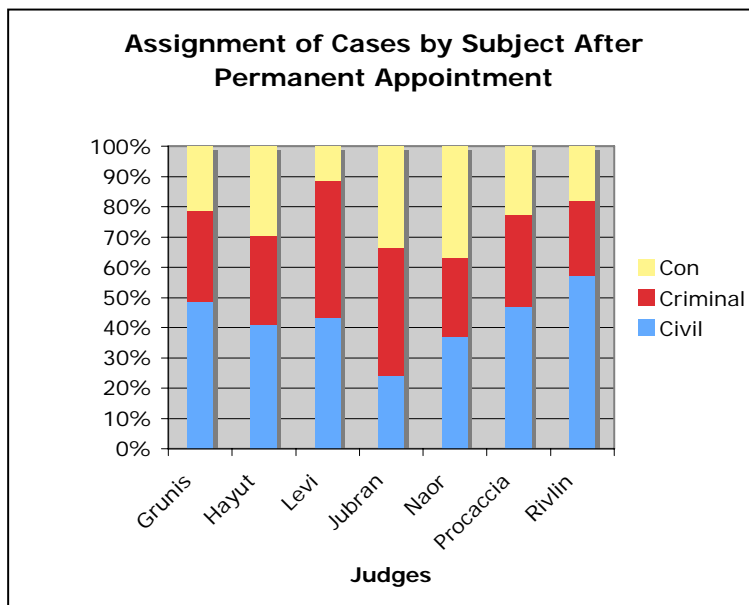


Table 3



B. General Trends Regarding Dissenting and Separate Opinions

One of the most significant findings of the study, which informed much of the subsequent analysis, was the infrequency of dissent within the Israeli Supreme Court. The number of dissenting opinions rendered by seven judges over the course of two years was

surprisingly only 26 of 977 (2.66%). Furthermore, some judges did not contribute any dissenting opinions whatsoever throughout an entire year. With such a low rate of dissent, it has been difficult to draw any definitive conclusions regarding the effects of tenure on dissent. However, the low percentage of dissenting opinions is in itself an interesting finding that may be interpreted in several ways.⁹⁴ One possible inference is that the outcome of most cases, even those that result in decisions longer than three pages, is quite clear to all of the Justices. Another possible interpretation is that the Court is predominantly comprised of like-minded judges who share similar values and ideas regarding the questions brought before the Court. A third interpretation is that there is a strong norm within the Court against writing dissenting opinions.⁹⁵

Nevertheless, the overall rate of dissent increased after the judges were awarded tenure. Whereas Salzberger's study suggested a negative correlation between tenure and dissent, this study demonstrates that the overall rate of dissent increased following the granting of tenure. However, here too, the difference was not found to be statistically significant: whereas during their temporary appointment the judges dissented in only 10 of 516 cases (1.94%), after receiving their permanent position this number increased to 16 of 583 (2.74%) (See Table 3).⁹⁶ When calculating the *average* rate of dissent (awarding each of the judges an equal contribution to the overall percentage, taking the difference in the number of cases decided by each judge into account), the increase becomes slightly less significant: the rate increased from 2.13% to 2.80%.⁹⁷ Nevertheless, this finding is significant if only in rejecting Salzberger's finding that as a group, tenured judges dissent *less* than temporarily appointed judges.

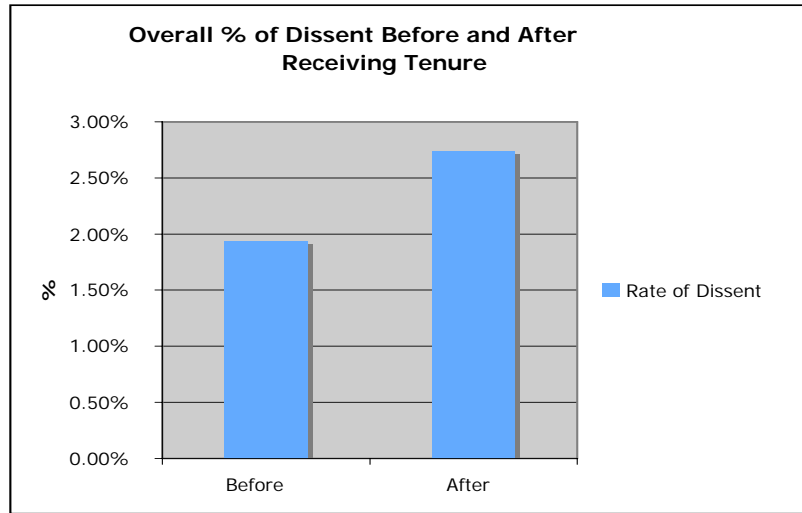
⁹⁴ See Shachar (et al), *supra*, note 80, at 759. The authors of that article also noted a low rate of dissent in the decisions published in the *Law Reports*, but had difficulty in accounting for the low rate due to the fact that the working procedures of the Court are unknown to the public.

⁹⁵ Such a norm existed on the Marshall Court, in which dissenting opinions were rare. See William J. Brennan Jr., *In Defense of Dissent*, 50 HASTINGS L.J. 671, 677 (1999); FRIEDMAN, *supra*, note 34, 286.

⁹⁶ A comparison of the two percentages using a two-sample z-test indicates that the results fall within one standard deviation from one another. Therefore, based on these results, we cannot reject the null hypothesis that the increase in the rate of dissent is the result of chance and not due to the influence of tenure.

⁹⁷ A comparison of these two percentages based on the one-tailed two-sample paired t-test indicated that there is a 25% probability that the difference is the result of chance, meaning that the difference between the percentages is not sufficiently significant to reject the null hypothesis.

Table 4



The rate at which judges wrote *separate*, yet concurring, opinions also rose after judges were awarded a permanent position. However, here too, the rise was not statistically significant.⁹⁸ As discussed above, separate opinions are an additional indication of judicial independence (albeit weaker than dissent): they signal the departure of a judge from the opinion of the court regarding an issue, which (at least in the eyes of the author of the opinion) was seen as fundamental. Whereas the overall rate of separate opinions *before* the Justices were appointed permanently was 4.26% (an average rate of 4.13%), it rose to 5.49% (an average rate of 5.61%) *after* the Justices were appointed. Once again, we witness an increase; however, it would be unsound to draw any conclusions regarding a causal relationship between tenure and the writing of separate opinions based on the differences observed.

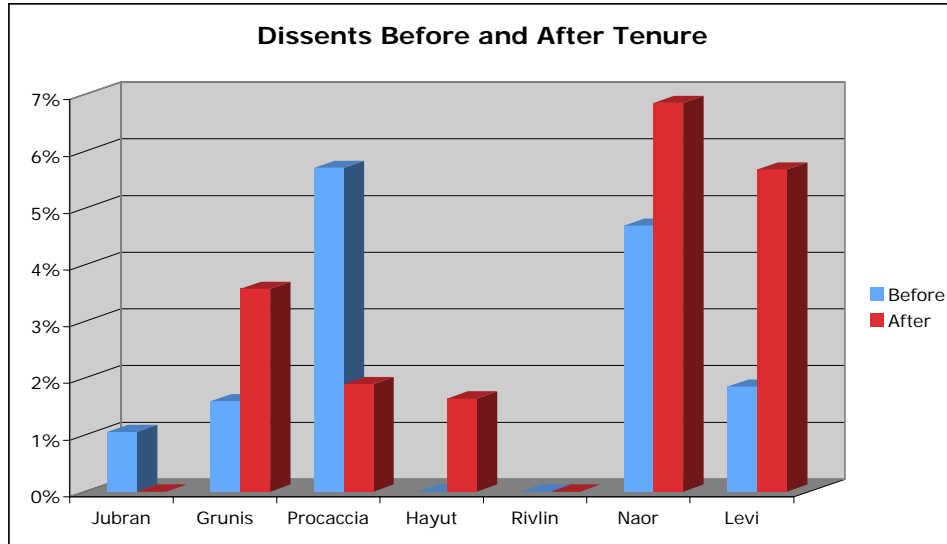
C. Trends in the Decisions Rendered by Individual Judges

One of the primary objectives of this study was to detect trends in *individual* decision-making, as opposed to merely examining the judges as a group. As argued in Chapter II, in order to truly evaluate the influence of tenure on the decision making of

⁹⁸ A comparison of the percentages using a one-tailed two-sample paired t-test reveals that there is a 22% chance that the difference is the result of chance. Therefore, here too, the null hypothesis cannot be rejected.

judges, we must look at the judges as individuals, comparing their particular rates of dissent before and after they achieved tenure. The results of the study are presented in Table 4.

Table 5



The data suggest that in most cases, tenure did not affect the rate of dissent. Although in four of the cases (Justices Hayut, Grunis, Naor and Levi) the rate of dissent increased following the judges' permanent appointment, in three out of the four cases the increase was statistically insignificant. In two of the cases (Jubran and Procaccia) the trend was exactly the opposite: the rate of dissent *decreased* following the awarding of tenure. In one of the cases, that of Justice Rivlin, the rate of dissent remained uniform (0%).

The exception to these observations is Justice Levi: whereas Levi dissented in only *one* case of 54 during his period of temporary appointment (1.85%), following his permanent appointment, his dissent increased to five cases of 88 (5.68%). This difference *is* statistically significant and will, therefore, be discussed in greater detail below.⁹⁹

⁹⁹ Levi is the only judge for whom a binomial test indicated that his low rate of dissent during his temporary appointment is *not* likely to have been the result of chance. Assuming that Levi's general rate of dissent was 5.68%, (his rate following his permanent appointment) in a sample of 54 cases there was only a 4.25% chance that Levi would dissent only once.

With regard to the writing of separate, yet concurring opinions, Table 6 suggests that six of the Justices (Grunis, Hayut, Levi, Procaccia, Rivlin and Jubran) wrote a higher percentage of separate opinions after achieving tenure. Justices Rivlin and Levi demonstrated a considerable rise in the number of separate opinions;¹⁰⁰ the other four judges, however, did not demonstrate such an increase. In only one of the cases did the rate actually decrease after permanent appointment: Justice Naor wrote more separate opinions *before* achieving tenure than she did afterwards, suggesting that her temporary position did not affect her willingness to express an opinion different than that of the Court.

Table 6

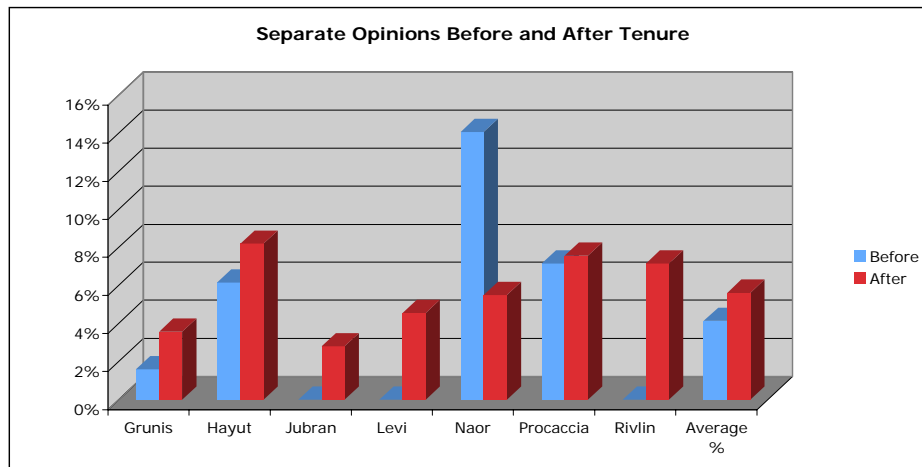
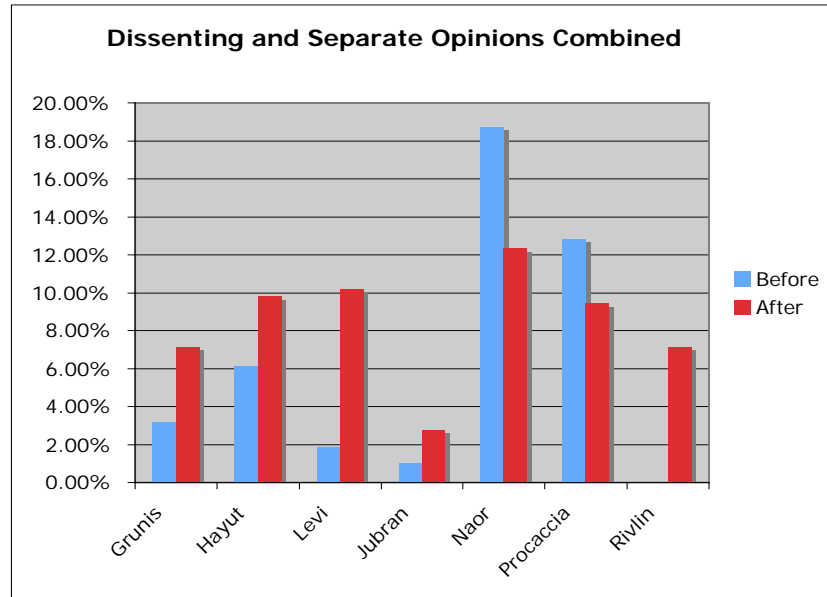


Table 7, a combined figure of dissenting and separate opinions, accentuates some of the earlier findings: the data show that Justices Procaccia and Naor do not seem to have been affected by their lack of tenure in rendering separate and dissenting opinions; the combined rate decreased in both cases following tenure. With regard to three of the other Justices, Grunis, Jubran and Hayut, even though there was an increase in the combined rate, it was insignificant. The study of the combined rate strengthened the

¹⁰⁰ Using a binomial distribution, and assuming that the rate of separate opinions during the second year was representative of their decision in subsequent years, there was only a 1.5% probability that chance could account for Rivlin's lack of a separate opinion during his first year. For Justice Levi the probability was 8.11%.

impression that tenure affected the decision-making of Justice Levi.¹⁰¹ With regard to Justice Rivlin, since no dissenting opinions were noted over the course of the two years studied, the comparison was identical to the study of separate opinions.

Table 6



In conclusion, a quantitative analysis of the data revealed that despite an overall increase in the rate of dissenting opinions following the awarding of tenure, it was not statistically significant. Furthermore, a study of the Justices individually indicated that most judges did not demonstrate a significant increase in their percentage of dissenting opinions after being appointed permanently; in fact, some demonstrated a decrease. An important observation was the generally low rate of dissent, which is especially noteworthy since the study examined only decisions longer than three pages. This low percentage of dissent made it difficult to discover significant changes in the rate of dissent after the judges were permanently appointed.

The quantitative analysis of the data suggests that in most cases, the lack of tenure did not affect the decision-making of temporarily appointed judges insofar as dissenting

¹⁰¹ A binomial test showed that there is only a 2.1% probability that chance can account for Levi dissenting or contributing a separate opinion only once in 54 cases during his temporary appointment (since Levi wrote such opinions in more than 10% of his decisions after he was awarded tenure).

and separate opinions reflect such an influence. The exceptions to these observations were Justice Rivlin, who demonstrated a notable rise in the number of separate opinions but no change in the number of dissents, and Justice Levi, who demonstrated a relatively substantial increase in both categories.

This low percentage of dissenting opinions will inform our analysis in the next chapter. The infrequency of dissent in the decisions of the Israeli Supreme Court emphasizes the importance of closely examining the few dissenting opinions that were discovered. The scarcity of dissent suggests that it is reserved for instances in which a judge differs from the Court on a highly consequential point that he finds worthy of articulating, despite the fact that it will not change the outcome of the case. Therefore, if we are attempting to discover the changes that occurred after tenure was awarded it is important to read these dissenting opinions with special attention to details. A careful analysis of such dissenting opinions will be the subject of chapter V.

V *Beyond the Statistics*

In this section, I investigate more closely the decisions rendered by three of the seven judges who were chosen for this study. The objective of this detailed examination is to provide a more accurate account of the increase or stability in the rate of dissent that these judges demonstrated before and after they were awarded tenure. To do so, I examine the opinions expressed by the judges regarding specific issues on their docket. In some of instances, we have the fortune of being able to compare decisions in identical cases, before and after the judge was awarded tenure; in others, we compare decisions in closely-related fields during the judges' temporary appointment and after they were promoted to Associate Justice.

The chapter focuses on the decisions rendered by three judges: Justice Edmond Levi (appointed in August, 2001), Justice Miriam Naor (appointed in May, 2003) and Justice Salim Jubran (appointed in May, 2004). Each of the judges was selected for more detailed evaluation for a different reason: Justice Naor was selected due to her high rate of dissenting opinions during her temporary appointment, which was an indication that

tenure did not affect her decision-making; Justice Levi was selected because of the significant increase in his dissenting opinions after being awarded tenure, suggesting that Levi's lack of tenure may have affected his decisions; Justice Jubran was selected because of predictions made in the media that as an Arab judge seeking permanent appointment, he might experience difficulty in expressing opinions favorable to the Arab minority in Israel, since such opinions might jeopardize his permanent appointment. Some argued that only with tenure might Jubran become sufficiently independent to express his views. A detailed analysis of each of the judges reveals interesting and surprising findings.

A. *Justice Naor*

Justice Miriam Naor was chosen as a focus of the study because of her distinctive rate of dissent and separate opinions during the studied period. Naor's relatively high rate of dissent before she was granted tenure suggests that the lack of tenure had little or no effect on her decision-making.

During the two years studied, Justice Naor was one of the Court's most frequent dissenters, with a total of eight dissenting opinions in 137 opinions (5.84%). Although Naor's rate of dissent increased after she was awarded tenure,¹⁰² the difference was not found to be statistically significant. However, Naor's relatively high number and percentage of dissenting opinions during her temporary appointment identified Naor as a potentially interesting focus of this research; it appeared that the lack of tenure had no deterrent effect on judge Naor. On the contrary: in examining the dissenting opinions that Naor contributed during her temporary appointment, she appeared to dissent even in controversial cases that received close public attention as well as legal interest.¹⁰³ In

¹⁰² Naor's rate of dissent before receiving tenure was 4.69%, second only to that of Justice Procaccia. During her first year of tenure, the rate went up to 6.85%.

¹⁰³ Let us briefly discuss two of Naor's three dissents (the third is discussed in the main body of this paper). Criminal Appeal (Cert Granted) 2976/01 Assaf v. The State of Israel [2002] IsrSC 56(3) 418

Under Israeli Law, the court has the authority to determine that a defendant committed an offense, without convicting him of a crime. The ramification of "non-conviction" is that the offense does not appear on the defendant's criminal record. The option of not convicting is usually reserved for misdemeanors committed by first-time offenders, primarily when dealing with juveniles. The rationale behind the statutory provision is not to affect the defendant's future by staining it with a criminal conviction.

addition to contributing three dissenting opinions, Naor rendered eight separate opinions during her temporary appointment.¹⁰⁴

Nevertheless, a closer analysis and comparison of Justice Naor's decisions during her one-year appointment with subsequent decisions *on the same cases* suggests that Naor's temporary position *did* perhaps impact her decision-making in important ways. Naor's decisions after receiving tenure show both a change in the opinions that she expressed regarding substantive legal questions as well as a change in her tone and rhetoric.

Before turning to the analysis, an explanation is needed regarding the instances in which the Israeli Supreme Court may decide the same case twice. Under Israeli law, the

In cases in which the court decides not to convict, it is limited in the kind penalties it may impose: the court may only impose community service or parole. The question that came before the Supreme Court was whether a judge who has decided not to convict may award compensation to the victim, even though the law does not specify such a possibility. The question is a conceptual as well as a practical one: is the compensation awarded by the court in a criminal proceeding a *penalty*, or does it bear greater resemblance to a civil compensation? In her dissenting opinion, Justice Naor argued that the dominant nature of the compensation is penal, and therefore must be authorized by explicit legislation.

Administrative Appeal 5042/01 Zayid v. Hurfish [2002] IsrSC 56(3) 865

The legal question that arose in this case was the validity and ramifications of a rotation agreement within a local council. Among other matters, the case touched on broader questions of justiciability and the Supreme Court's willingness to decide a case pertaining to political agreements.

In 1998 the town of Hurfish held local elections. Four parties were elected to the city council. The four parties agreed that the position of vice president of the council would rotate from one party to another after two and a half years. The council affirmed the decision by a majority vote. When the time came to implement the decision, some council members challenged the validity of the agreement, arguing that in order for the rotation to take place, the council must vote separately on the election of a new deputy; an advanced affirmation of the rotation agreement, so they claimed, was insufficient. The new councilmen argued that under law, the only way to elect a new deputy was through a vote, after the former deputy had died, resigned or been removed.

The underlying controversy for the challenging of the rotation agreement was that six councilmen had been replaced between the affirmation of the agreement and its implementation. The new majority opposed the designated deputy, but could not remove him without the support of the council president. Therefore, the new council members challenged the validity of the agreement.

The Supreme Court, by a majority of 2-1, upheld the rotation agreement. The majority held that the agreement was legal. Furthermore, it held that the agreement was justiciable and could be *enforced* by the courts. Justice Naor, again interpreting the statute narrowly, ruled that the law limits the methods for appointing a deputy mayor. Naor criticized the possibility of appointing public officials in advance, before their position had been vacated. In her dissent, Naor warned that the system approved by the Court may serve an existing majority within the council in binding the judgment of future majorities. The implications of the case were, therefore, broader than the local elections in Hurfish. The reader should note that Naor agreed with the majority that the question was justiciable, a fact that should not be taken for granted.

¹⁰⁴ For example, in a case regarding the obligation of a doctor to warn a patient of the possible ramifications of surgery, Naor added that there is a more significant obligation in elective surgeries than in non-elective procedures: in elective procedures the doctor must inform the patient of even remote possibilities for complications. Furthermore, she adds a distinction between private and public institutions, arguing that private doctors are in a conflict of interest since they gain from conducting additional procedures and are, therefore, less likely not to inform patients of potential risks.

Supreme Court may decide to hear a case again if the first decision rendered by the court “stands in contradiction to an earlier precedent of the Supreme Court itself, or because of the importance, difficulty or innovation” inherent within the first opinion, which justifies a broader panel re-addressing the issue. The second hearing is known as a “Diyun Nosaf,” or *Additional Hearing*. Typically, the second hearing includes the three judges who rendered the original opinion with the addition of an even number of judges.¹⁰⁵

1. *The Sheves Case*

The *Sheves* case presents an interesting change of opinion by Justice Naor between the initial and second hearing. The *Sheves* case dealt with criminal charges against Shimon Sheves, the former Director General of the Prime Minister’s Office under Itzhak Rabin. Sheves was charged with *breach of trust* by a public official (two counts), bribery and obstruction of justice. Without addressing the details of the case, I present a brief description of the main facts and events that pertain to understanding Naor’s change of opinion.

According to the indictment, while serving as Director General, Sheves abused his public position on two separate occasions to promote the business interests of his close friends. In the first count, Sheves attempted to arrange the official visit of a foreign head of state to Israel¹⁰⁶ to advance an arms deal in which a close friend of his was involved. In addition, Sheves met abroad with representatives of that foreign country. In return for his political involvement in facilitating the deal, Sheves was promised a portion of the profits. Sheves acted to advance the official visit despite warnings of the Foreign Ministry and the *Mossad* that the recognition of the foreign country through a formal invitation of its head of state might unduly jeopardize Israel’s diplomatic ties with other nations. Furthermore, Sheves acted without providing full disclosure to Prime Minister Rabin regarding his personal interest in securing the deal. When the scandal broke out, Sheves attempted to dissuade one of the witnesses from sharing information with the police, even though Sheves had been warned by the police not to contact the witness.

¹⁰⁵ See Courts Act [Consolidated Version] 5742- 1982, Article 30.

¹⁰⁶ The court decision leaves the identity of the foreign country mysteriously vague.

Sheves was charged with obstruction of justice for this behavior, which was the second count of his indictment. The third count indicted Sheves for assisting a friend in obtaining construction permits for a real estate development project. Sheves allegedly used his high position and connections to contact the relevant authorities in an attempt to expedite the licensing process.

The Tel Aviv District Court (future Justice Edmond Levi) acquitted Sheves of all but the first count; the court found him guilty of an *attempt* to accept a bribe and a breach of confidence by a public official. Both Sheves and the State appealed the decision. Judge Naor belonged to the Supreme Court panel of three assigned to the case. The Supreme Court acquitted Sheves of all three counts.¹⁰⁷ Regarding the first count, the Court decided unanimously that P.M. Rabin knew of Sheves's conflict of interest, yet allowed him to be involved in arranging the visit of the foreign head of state. As a result, Rabin's prior knowledge exempted Sheves from criminal responsibility.

The Court split regarding the third count.¹⁰⁸ According to the majority, although Sheves's deeds may have been grounds for disciplinary action against him, they did not constitute a criminal offense. Naor, in the minority, found that the third count *did* constitute a criminal offense. Naor explained that due to Sheves's high position of influence, even a seemingly minor abuse of authority (such as a phone call to the municipal planner) could be sufficient grounds for criminal responsibility. In her opinion, Naor also addressed the first count: in acquitting Sheves of the first count, Naor, like her colleagues, relied heavily on the finding that Sheves acted with the knowledge of Prime Minister Rabin, who was aware of Sheves's relationship with the interested parties.

After conducting a second hearing before a broader panel of nine, the Court reversed its decision.¹⁰⁹ However, Naor was the only judge of the original panel who subsequently reversed her opinion. Chief Justice Barak, who delivered the opinion of the court, convicted Sheves on the first and third counts. Regarding the first count (the arms deal with the foreign country), the court ruled that even if Sheves had acted with the knowledge of Prime Minister Rabin, since he consciously acted in a conflict of interest –

¹⁰⁷ CrimA 347/01 Sheves v. The State of Israel; CrimA 332/01 The State of Israel v. Sheves [2003] IsrSC 57(2) 496.

¹⁰⁸ Sheves's acquittal on the *second* count was not appealed.

¹⁰⁹ DNP 1397/03 The State of Israel v. Sheves [2004] (not yet published).

he must still be held criminally accountable for his actions. In analyzing the offense, the court determined that the public's confidence in the government is one of the most important values protected within the breach of trust offense. Therefore, the court went on to state that when a high-ranking official, such as Sheves, acts in a conflict of interest which results in a severe loss of the public's confidence in the government, he must be held criminally accountable for his behavior. Justice Naor concurred in the opinion of the court. Naor stated in an eight-line decision that she was convinced by Chief Justice Barak's opinion that Prime Minister Rabin's knowledge of the matter did not diminish Sheves's responsibility. In this opinion, Naor reversed the foundations on which her original opinion was based.¹¹⁰

The reader at this point may question the *significance* of Naor's change of heart in the *Sheves* case. After all, Supreme Court Justices, even those who are tenured and senior, have on occasion changed their minds, even with regard to fundamental legal issues. Furthermore, over two years had elapsed between the two *Sheves* decisions, which may further explain Naor's change of heart. Those familiar with the Israeli Supreme Court's decisions might argue that even Israel's Chief Justice has, in a high stakes case, changed his opinion between the original hearing and the Additional Hearing. However, there is an important difference between Naor's change of opinion in the *Sheves* case and that of Barak in the "bargaining chip" case;¹¹¹ whereas Barak explained what led him to

¹¹⁰ The text of Naor's decision reads as follows:

1. I concur in the decision of my colleague Chief Justice Barak.
2. In the original decision I believed that Sheves should only be found guilty in the third court. However, after reading the opinion of the Chief Justice I join in his decision regarding the first count. I have been convinced that the Prime Minister's knowledge was insufficient [grounds] for absolving Sheves of his ethical wrongdoing and its criminal implications. The Prime Minister's knowledge, or even approval, does not negate the wrongdoing, all as explained by the Chief Justice. Sheves should have withdrawn altogether from handling the matter mentioned in the first count.

¹¹¹ I am referring to the case that came to be known as the "bargaining chips" case, in which Chief Justice Barak ruled in a completely opposite fashion during the *Additional Hearing*. The decision dealt with the use of administrative arrests as means for holding individuals who were designated as "bargaining chips" for negotiating the release of Israeli prisoners that were being held hostage in hostile countries. The intention of the government was to negotiate the release of 21 Lebanese prisoners in return for the release of an Israeli pilot who fell hostage in Lebanon in 1985. Chief Justice Barak ruled in the first hearing that holding the prisoners was legitimate, leading a 2-1 majority in favor of the State's position. In the second hearing, Barak reversed his opinion, leading a majority of 6-3 in favor of the Lebanese hostages' release. See Dangatz 7048/97 Doe v. The Minister of Defense, [2000] IsrSC 54(1) 721. Some believe that extra-legal consideration led Barak to change his opinion in the second hearing: the way in which the initial decision was received in the United States and in Europe may have led Barak to reconsider his position. See NOMI LEVITSKY, *YOUR HONOR* 285 (Keter Publishing House, 2001).

change his mind in a 14-page long decision, Naor did so in a laconic, eight-line decision. Assuming that Naor indeed changed her mind, one would have expected a more elaborate explanation for the change of opinion after the second hearing. Instead, Naor simply refers to the opinion of Chief Justice Barak and says that she no longer believes that Rabin's knowledge regarding a conflict of interest is material to Sheves's criminal responsibility.

I would like to suggest a different interpretation of Naor's change of opinion. It is quite possible that Naor did not change her mind between the hearings; rather, she may have supported the conviction of Sheves (on both counts) all along. However, Naor would have found it difficult to convict Sheves *on both counts* when both of her colleagues had decided on an *absolute acquittal*: departing so drastically from the opinion of two senior judges, especially in such a high-profile case, would have been difficult for a judge fighting for promotion. Indeed, it would have been hard even for a new judge *with tenure*.

2. *The Kostin Case*

Unlike the Sheves case, my interest in the *Kostin* case is not due to a change in the outcome that Naor reached, but rather because of a change in her argumentation and rhetorical tone. This case demonstrates how sometimes separate opinions may disclose almost as much tension between judges as an opinion of dissent.

The question in the *Kostin* case was whether the Israeli Bar Association could refuse admission to a lawyer who had been convicted of a crime, even after the conviction had been expunged from the lawyer's criminal record by a presidential pardon. Under Israeli law, the Bar may refuse admission to candidates who have been convicted of a felony. Kostin, the appellant, had been a member of the Bar when he was convicted of fraud and falsification of documents in 1985. The disciplinary tribunal of the Bar Association sentenced Kostin to a lifetime ban from legal practice. Kostin applied ten years later for reinstatement but was refused, at which point he turned to the President and requested a pardon. However, the Bar persisted in its refusal to admit Kostin, even after his criminal record had been expunged.

On appeal, the Israeli Supreme Court found that the Bar Association was wrong in refusing readmission after the offense was expunged from Kostin's record.¹¹² Justice Dorner delivered the opinion of the Court. Beyond analyzing the "black letter law" ramifications of expunging an offense from an individual's record, Dorner emphasized the *policy* aspects of the case: the importance of rehabilitation within the Israeli penal system and the "freedom of occupation" which is protected under Israel's basic laws.

Although judge Naor concurred in the opinion of the Court, she nevertheless expressed her sympathy for the position taken by the Bar; she "sensed the Bar's discomfort" in readmitting a convicted felon. Nevertheless, in a highly formalistic opinion, Naor stated that based on the legal provision, an expunged criminal past cannot be taken into consideration.

The decision in the *Kostin* case was rendered on December 24, 2001, while Naor was a temporarily appointed judge. Justice Dorner, who delivered the opinion of the Court on the *Kostin* case, was at the time a member of the Judicial Appointment Committee, along with Justice Turkel and Chief Justice Barak.¹¹³

In November 2004, the same case was brought before a panel of nine Justices for further consideration.¹¹⁴ However, by 2004 Naor had received tenure and Justice Dorner had retired. Although Justice Naor arrived at the same legal outcome as she had in the initial hearing, we find a number of interesting points and comments that were absent in Naor's original analysis. First, rather than simply stating that the black letter law leads to the conclusion that the petitioner must be readmitted, Naor takes a less formalistic approach to the question; she addresses, at some length, the underlying policy question which she ignored in her original analysis. In the first opinion, her disagreement with the legal regime was only insinuated. However, in the second decision Naor states clearly that she is opposed to, not merely uneasy about, admitting lawyers with prior convictions to the Bar.¹¹⁵ Naor argues that expunging a felony by means of a presidential pardon should not suffice when dealing with admission to the legal profession, even if it may be

¹¹² Bar Appeal 3761/00 Alexander Kostin v. The Israeli Bar Association [2001] IsrSC 56(2) 227.

¹¹³ See Hadas Magen, *The Committee has Appointed Miriam Naor and Asher Grunis to the Supreme Court*, GLOBES, May 22, 2003. In the article, Magen mentions the fact that Justice Dorner was one of the members of the committee.

¹¹⁴ DNP 600/02 The Israeli Bar Association v. Alexander Kostin [2004] (unpublished).

¹¹⁵ *Id.* section 17 of Justice Naor's decision.

acceptable in other professions. Naor writes that the legal provision is “disharmonious” and inconsistent with the high respect and regard that Israeli law accords the legal profession. Furthermore, Naor writes, it appears that the legislature did not anticipate such usage of the Rehabilitation Law, namely, a case in which a *lawyer* would seek admission to the Bar following a pardon. Therefore, Naor openly *recommends* that the legislative branch consider revising the law.

Naor’s policy recommendation is not the only difference between her first and second opinions. In her 2004 opinion, Naor includes a rhetorical element that was absent in her original decision. Naor directly attacks the position of Justice Dorner regarding rehabilitation, in a dismissive, and perhaps even degrading, manner. After quoting a section of her own opinion in the first hearing, Naor states:

That was my opinion then and it continues to be my opinion now. However, insofar as readmission of convicted felons to the Bar is concerned, *I do not share in the song of praise for the principles of rehabilitation that was expressed by my [former] colleague, Justice Dorner.* My position, like that of Justice Beinisch, is that the legislature must consider whether the general rule [regarding expunged offenses] should apply to reinstatement of individuals to the legal profession. (Emphasis added)

Let us analyze this shift from temporary judge Naor to Justice Naor. Considering Naor’s temporary position in 2001, it would have been problematic for Naor to voice her 2004 opinion: Justice Dorner expressed her great admiration for the position taken by the Israeli legislature regarding rehabilitation. Naor, on the other hand, saw no justification for the “rehabilitation” of lawyers with a criminal record. However, openly voicing such an opinion by criticizing rehabilitation would have placed Naor in direct confrontation with Justice Dorner, on whom Naor depended for her permanent position. Since Naor’s opinion would have led to the same outcome in this particular case, she may have felt less compelled to confront a senior member of the Court. Therefore, Naor curbed her opposition, only insinuating her discomfort; in the first opinion we do not witness a full-fledged policy attack on Justice Dorner’s position. However, when the opportunity for Naor to express her opinion presented itself in 2004, she did not hesitate to express her true sentiments regarding the rehabilitation of lawyers and regarding Justice Dorner’s opinions.

The abovementioned analysis of Justice Naor's two opinions is but one possible interpretation of the changes that occurred between the first and second hearing of the *Sheves* and *Kostin* cases. Some may see in the changes an indication of Naor's lack of judicial independence during her temporary appointment: although Naor displayed the confidence to depart from the opinion of the Court quite often even during her temporary appointment, perhaps she would have expressed even stronger opinions had she been tenured. On the other hand, this analysis may appear to overstate the differences between Naor's two decisions. Even those who recognize the importance of the difference in Naor's opinions may wish to attribute the change to Naor's gain in confidence after serving on the bench for a two-year period, rather than only attributing the difference to tenure.

Although the differences in opinion may not be sufficient grounds for drawing bold conclusions regarding the influence of tenure on judicial independence, nevertheless they draw the attention of the reader to a number of important observations: first, the *possibility* that Naor's changes in opinion may be attributable to her gaining a permanent position within the Court. Second, the analysis identifies changes in judicial opinions between the first and second hearings as a possible method of examining the effects of tenure and other factors on judicial decision-making. This method has not yet been employed by Israeli scholars and may present a promising avenue for future study in the cases for which it is available. Third, the analysis draws attention to the fact that changes in tone and rhetoric, not only in the ultimate outcome of a decision, are important details for scholars to examine in analyzing changes in judicial opinions.

B. Justice Levi

Justice Levi was chosen as a focus of this study primarily because his decisions demonstrate the most significant increase in the percentage of minority decisions (both dissenting and separate opinions) between the untenured and tenured period. Levi dissented only once during his temporary appointment (1.85%); however, he wrote 5 dissenting opinions (5.68%) during the year that followed his permanent appointment (August 2001- August 2002). Furthermore, conducting a binomial test of Levi's decisions indicates that there is less than a 5% probability that the increase in Levi's dissenting opinions after achieving tenure occurred by chance.¹¹⁶ These characteristics gave us reason to believe that a closer look at Levi's decisions may reveal further insights.

Let us begin by considering Justice Levi's biography, which may shed some light on the analysis of his judicial decisions.¹¹⁷ Edmond Levi was born in Iraq in 1941 and immigrated to Israel in 1951. Upon their arrival in Israel, the Levi family, like many other immigrants at that time, lived in a *Ma'abara*, a temporary housing project constructed for immigrants - especially those of Middle Eastern and North African origin-¹¹⁸ who arrived after the establishment of the state in 1948 and experienced financial difficulties.¹¹⁹ Step-by-step the Levi family established itself in Israel: Aharon Salem-Levi, Edmond Levi's father, became a member of the *Herut* (Liberty) party, which later became the *Likud*.¹²⁰ In 1970, Aharon Salem-Levi was elected to be the mayor of Ramle,

¹¹⁶ Levi is the only judge for whom this percentage was lower than 10%. Assuming that Levi's general rate of dissent was 5.68%, (the percentage of dissenting opinions immediately following his permanent appointment) in a sample of 54 cases, there was only a 4.25% chance that Levi would dissent only once.

¹¹⁷ For further biographical details on Justice Levi, see the official website of the Israeli Supreme Court and Nava Zuriel, *The Ma'abara Judge*, NRG, June 26, 2005; Yuval Yoaz, *Justice Levi: Fighting Alone for the Expansion of the Right to a Dignified Existence*, HAARETZ (in Hebrew), April 28, 2006.

¹¹⁸ Although immigration from Europe and the Middle East was relatively equal during the first years of statehood, 80% of the *Ma'abara* inhabitants were of Middle Eastern and North African origin. This disparity gave rise to claims of discrimination against North African and Middle Eastern Jews – claims that persist to this day. See SHLOMO SEVIRSKI, NOT UNDERPRIVILEGED, RATHER DENIED THE PRIVILEGE: MIZRAHI AND ASHKENAZI IN ISRAEL- SOCIOLOGICAL ANALYSIS AND TALKS WITH ACTIVISTS 21 (in Hebrew) (Jerusalem, 1981).

¹¹⁹ The *ma'abarot* were tin or cloth temporary structures. Some attribute Levi's sensitivity in cases regarding social issues to these formative years which he spent in a *ma'abara*; Levi has been nicknamed "the *ma'abara* judge." See Zuriel, *supra*, note 117.

¹²⁰ *Herut* was established by former Prime Minister Menachem Begin and other members of the *Etzel* underground movement in 1948. In 1965, *Herut* joined forces with the *Liberal Party* and created the *Herut-Liberal Front* that ran on a united ticket. In 1973, the *Likud* was established as a united party consisting of

a town near Tel Aviv. He occupied the position for only one year before dying of a sudden heart attack.

In 1974, following in the footsteps of his father, Edmond Levi entered local politics by running for mayor of Ramle on the *Herut* ticket. *Herut* and the *National Religious* party came to a “rotation” agreement, whereby Levi was appointed as Deputy Mayor responsible for education within the municipality. The agreement provided that Levi would assume the position of mayor in 1977. However, the *National Religious* party did not honor the agreement; Levi and *Herut* resigned in protest. Levi, who was already a lawyer, then left political life and joined the military judicial system. However, he remained in uniform for only a short time; Levi left the army in 1979 when he was appointed to the Ramle Magistrates’ Court. Levi served on the Magistrates’ Court until he was promoted in 1984 to the Tel Aviv District Court. In September, 2000, Levi was appointed temporarily to the Israeli Supreme Court. His permanent appointment was confirmed in August, 2001. Levi is the only current member of the Court with an active political past.

According to the press, political considerations played a central role in Levi’s appointment to the Supreme Court: Levi’s permanent appointment to the Court was reportedly part of an understanding between Chief Justice Barak and Minister of Justice Meir Shitrit of the *Likud* party.¹²¹ According to the account in Israeli newspapers, Barak agreed to support Levi, who was Shitrit’s chosen candidate, in return for Shitrit’s support of Ayala Procaccia, Barak’s preferred candidate.¹²²

Regardless of the alleged agreement between Barak and Shitrit, Levi’s appointment can be viewed as a strategic move that would lend the Court public credibility. In 2001 the Zamir Committee Report called for greater reflection¹²³ of Israeli

the *Herut* and *Liberal* Party, along with a number of smaller right wing parties. Since its establishment in 1973 until the 2006 election, the *Likud* has been Israel’s largest right wing party

¹²¹ See SHETREET, *supra*, note 6, at 278.

¹²² *Id.* See also Yoav Yitzhak, *Deal Between Chief Justice Barak and Minister Shitrit: Procaccia and Levi will be appointed to the Supreme Court*, NFC (in Hebrew) June 14, 2001. However, some have argued that the talk of a “deal” between Barak and Shitrit is nothing but an unfounded rumor. See Ze’ev Segal, *Ten Think So; Levi Thinks Otherwise*, HAARETZ (in Hebrew), June 16, 2005.

¹²³The Zamir Report explains the choice of the term “reflection” rather than *representation*: the choice of words was meant to emphasize the importance of professional qualifications of a candidate for the position of Supreme Court Justice, thus rejecting the notion that the judiciary should be representative of Israeli society. See ZAMIR REPORT, *supra*, note 25, at 26.

society within the court system.¹²⁴ Levi represented a number of sectors that were considered to be under-represented on the Supreme Court. The Court was, and continues to be, regarded as a group of well-off, Ashkenazi, secular Jews with left-wing leanings.¹²⁵ Levi represented the opposite: he comes from humble beginnings; he is an Orthodox Jew of Middle Eastern origin, and in the past, he had been politically active within the Israeli right-wing.¹²⁶ Therefore, appointing Levi to the Court would appear to be an implementation of the Zamir Committee Report's recommendation, the 2001 release of which coincided with the year Levi was up for permanent appointment.

1. Justice Levi: "Serial Dissenter"

Before closely considering Levi's low rate of dissent during his *temporary* appointment, it is important to note that his low rate during his probationary year stands out when compared to the remainder of his career. Indeed, the high rate of dissents during Levi's first *tenured* year (2001- 2002) is far more consistent with the rest of his career to date. Beginning with his first tenured year and continuing in subsequent years, Levi has been a loud dissenting voice within the Court, especially in cases regarding political issues and constitutional law.

In 2005, Levi remained in the minority (1 of 9), ruling that the *Knesset* legislation authorizing the disengagement from Gaza was unconstitutional and must, therefore, be struck down.¹²⁷ In another case regarding the disengagement, Levi remained in the

¹²⁴ See ZAMIR REPORT, *supra*, note 25, at 26, 28.

¹²⁵ See Birnhak and Gussarsky, *supra*, note 72. For a discussion of the historical under-representation of non-Ashkenazi and Orthodox judges on the Supreme Court bench see RUBINSTEIN, *supra*, note 15, at 147.

¹²⁶ For a discussion of how these factors may have played a role in Levi's appointment see Levitsky, *supra*, note 111 at 374.

¹²⁷ HCJ 1661/05 Gaza Coast Regional Council v. The Knesset [2005] (not yet published). The decision of the Court is over 300 pages long. Interestingly, the opinion of the Court does not disclose its author; it is not written in the usual manner in which Israeli court decisions appear, namely, a leading opinion and the other Justices stating "I concur." By writing the opinion in this manner, Levi appears as even more of an "outcast," since he is the only one who has distinguished himself from "the Court."

Levi justifies the striking down of the law on a number of premises: first, the Jewish people's right, as a matter of constitutional as well as international law, to inhabit all territories west of the Jordan river. Second, Levi ruled that in supporting the disengagement, the *Likud* departed drastically from the platform on which it was elected, thus breaching its fiduciary duty to the public in a way that enables the Court to intervene (although Levi acknowledges that such intervention is rare and only justified in extreme cases). Third, the disengagement plan infringes on individuals' right to property. In this particular case, the monetary value of the property is only one aspect; the property being taken is a deep expression of the

minority (2-1) in opposing the government's decision to demolish synagogues within the Gaza Strip in preparation for the withdrawal, ruling that the government had not exhausted other alternatives (i.e. negotiating with international humanitarian organizations that might continue to maintain and protect the religious sites).¹²⁸

Levi has also expressed minority opinions regarding the approval of political candidates and parties for the Israeli general elections. In 2003, Levi (once again in a minority of 1 of 9) ruled that Moshe Feiglin, a member of an extreme right-wing faction of the *Likud* party, should be allowed to run for parliament.¹²⁹ Levi ruled that Feiglin had the right to run for public office despite his prior conviction for sedition only a few years prior to the elections.¹³⁰ In contrast, Levi joined a minority of 4 of 11 Justices who disqualified the Arab party *Ballad* from participating in the 2003 elections, due to the party's platform that Levi found contradicted the premises on which the State of Israel was founded.¹³¹ Levi (et al.) argued that *Ballad's* leaders (as well as the official party platform) denied the Jewish people's right to self-determination (denying that Jews constitute a "nation" at all). Furthermore, *Ballad's* leaders condoned and encouraged violent resistance against the State of Israel (both within its borders and from abroad) and were in contact with countries that were hostile towards Israel. Levi (along with three other Justices) found these to be sufficient grounds to deny *Ballad* the right to participate in the Israeli general elections.

With regard to the relationship between religion and the state, Levi has also expressed minority views. Levi was part of the minority of 4 of 11 in a high-profile case

settlers personality and ideals. In taking away their homes, the government has also taken their occupation, their community and their life as they knew it. Indeed, according to Levi, the breach of the right to property is so grave in this case that it constitutes an infringement upon the settlers' human dignity.

Levi ends his decision by making the following observation:

In my opinion, the executive decision of June 2004 and the Disengagement Law are flawed in the following respects...

c. They will lead to hard times and undermine the right of the Jewish people to settle the land of Israel. In speaking of the right to settle that is undermined by this decision, I refer not only to the disputed territories, but also to territories that are currently within a public consensus regarding our right to retain them in any future agreement.

¹²⁸ HCJ 7710/05 Bar Chen v. the Prime Minister [2005] (not yet published).

¹²⁹ HCJ 11243/02 Feiglin v. Cheshin [2003] IsrSC 57(4) 145.

¹³⁰ Under Israeli law, a convicted felon cannot run for public office until seven years have passed since his conviction. The exception to this rule is in cases where the Elections Committee determines that the offense did not involve "disgrace." Levi argues in the Feiglin case that sedition is not an offense involving disgrace.

¹³¹ See Elections Appeal 11280/02 The Election Committee v. Tibi [2003] IsrSC 57(4) 1.

that addressed recognition of conversions to Judaism that were conducted abroad.¹³² The Court determined that Israeli authorities must recognize the conversions. Levi, in the minority, held that the Supreme Court was not competent to determine the validity of conversions. The recognition of conversion by Israeli authorities is not merely a matter of conscience; it also bears secular, legal implications. Under Israeli law, Jews enjoy a preferred status in immigrating to Israel, which was the context in which the question presented itself in the petitions. The opinion of Levi and the other judges of the minority expressed the concern that Israeli immigration law will be abused through fictitious conversions that are conducted abroad.¹³³ The underlying debate that was implied in the decision was the recognition of *non-Orthodox* conversions by Israeli authorities, which is a topic of ongoing debate in Israeli politics. Currently, conversions conducted *in Israel* are recognized only when performed by an Orthodox tribunal. The petitioners lived in Israel while maintaining a non-immigrant status prior to their conversions. However, most of them did not wish to undergo an Orthodox conversion and, therefore, briefly traveled abroad to conduct a conversion ceremony after which they immediately returned to Israel.¹³⁴

Finally, Levi has also expressed minority opinions in cases regarding Israel's social welfare policy. Following cutbacks in social welfare entitlements in 2003, petitions were submitted to the Supreme Court regarding the constitutionality of the government's new economic plan. Levi, again as a minority of 1 of 7, deemed parts of the new legislation unconstitutional, since they did not ensure that those who relied on social security received the minimal funds necessary to support a "dignified existence."¹³⁵

Justice Levi has distinguished himself over the years as what may be referred to as a "serial dissenter." Levi's dissents particularly stand out in considering the generally

¹³² H CJ 2597/99 Tuschbeim v. The Minister of the Interior [2005] (not yet published).

¹³³ To address this concern, Levi suggested that the government construct an expert tribunal that will list the congregations outside of Israel whose conversions are recognized by Israeli authorities. Conversions conducted by unauthorized congregations would then be subjected to further scrutiny of the Israeli authorities. This, according to Levi, would avoid the granting of citizenship to non *bona fide* converts.

¹³⁴ Had the petitioners been members of Jewish communities abroad and had converted prior to moving to Israel, under current Israeli law there would be no question regarding their eligibility for immigrant status.

¹³⁵ H CJ 366/03 The Commitment to Peace and Social Justice Foundation v. the Minister of Finance [2005] (not yet published).

low rate of dissenting opinions written by Israeli Supreme Court Justices. Although many of the dissenting opinions discussed above were voiced by Levi on panels of more than three judges, which significantly increases the probability of dissent within the Supreme Court,¹³⁶ there are also many examples of Levi's dissents on three-judge panels.¹³⁷ This pattern of dissent indicates Levi's frequent departure from the views of the majority that is currently serving on the Supreme Court. In many of the cases decided by a broad panel, Levi remained a minority of only one, suggesting that he often expresses opinions that are not shared by *any* of his colleagues. Therefore, one would have expected such differences of opinion to evoke dissent during Levi's temporary appointment period as well. However, this was not the case.

2. *On the Increase in Levi's Dissenting Opinions: An Alternative Account*

Levi's low rate of minority opinions during his temporary appointment may suggest that Levi concealed his dissenting views prior to being awarded tenure; the sudden increase in dissenting opinions is otherwise difficult to explain. According to the "concealment theory," Levi may have feared that voicing his true opinions would mark him as an "extremist" or an "outlier" within the Court, thus diminishing his chances of full appointment. Levi's views, which have often clashed with those of the Court's majority, coupled with the sudden increase in Levi's rate of dissent following his permanent appointment, seem to suggest that, without tenure, Levi did not feel sufficiently independent to express his true opinions. According to this account, only after Levi was awarded tenure do we see an expression of his distinctive voice.

However, there are other possible explanations for the sudden increase in Levi's dissent following his permanent appointment: the opportunity to dissent simply may not have presented itself often during Levi's temporary appointment to the Court. An examination of Levi's dissents reveals that Levi disagrees with his colleagues primarily on constitutional matters; assigning Levi fewer constitutional cases would, therefore,

¹³⁶ See Birnhak & Gussarsky, *supra*, note 72, p. 516.

¹³⁷ See e.g. CA 1644/04 the Municipality of Ramle v. Bank Hapoalim [2005] (unpublished); CA 3819/01 the State of Israel v. Aslan [2004] (unpublished); AdminA 10064/04 [2004] (unpublished); CA 1530/02 [2004] (unpublished); CA 361/00 [2005] (unpublished).

make him less likely to dissent. An examination of Levi's docket before being granted tenure provides support for this proposition. Levi's docket prior to August 2001 discloses a surprisingly small proportion of constitutional cases: only 4 decisions (7.41%). When taking Levi's notable dissents in recent years regarding constitutional and administrative matters into consideration, the small number of constitutional cases decided by Levi during his temporary appointment could, at least partially, account for his low rate of dissent.

Furthermore, the constitutional and criminal cases assigned to Levi during the year of his temporary appointment did not address questions with clear political nuances on which Levi has displayed particular sensitivity.¹³⁸ Therefore, it is difficult to conclude with any degree of certainty that Levi was deterred from voicing his true opinions due to a desire to secure a permanent position.¹³⁹

Things changed, however, after Levi received tenure: during Levi's first year as a permanent member of the Court, he wrote two dissenting opinions in which his political outlook clearly manifested itself. Although Levi continued to have few constitutional cases on his docket (10 cases, 11.36%), in the context of criminal cases he found occasion to dissent on overtly political, rather than purely doctrinal, grounds. Both cases dealt with aspects of the Arab-Israeli conflict.

In the first case, an Israeli living in the Occupied Territories was charged with the illegal possession of a weapon.¹⁴⁰ The prosecution reached a plea agreement with the defendant, whereby the people would limit themselves to requesting a three-year sentence in return for a guilty plea. Despite the prosecution's argument for the sentence that was agreed upon, the District Court ruled that three years in prison did not properly reflect the severity of the crime, especially given the defendant's prior record. Therefore, the District Court sentenced the defendant to four years in prison. On appeal, the Supreme

¹³⁸ The four constitutional cases assigned to Levi dealt with the advertisement of circumcision services by medical surgeons, an appeal regarding an administrative tender, a decision of the Ministry of Education to close down a specific school due to budget difficulties and proceedings concerning the appointing authority for the Muslim religious court system in considering the candidacy of a particular candidate for a *Kadi* position.

¹³⁹ The one instance in which Levi dissented from the opinion of the Court was in a criminal case which involved the Court's fact finding in a rape conviction: Levi, in his minority opinion, found the victim's testimony to be credible and, therefore, saw no reason to reverse the decision of the District Court, which found the defendant guilty. See CrimA 1889/01 Oknin v. The State of Israel [2001] (unpublished).

¹⁴⁰ See CrimA 5304/01 Sharvit v. The State of Israel [2002] IsrSC 56(1) 817.

Court upheld the sentence, rejecting the defendant's plea for a mitigated sentence, based on the fact that he carried the weapon in self-defense when traveling within the West Bank.

Levi, in a minority opinion, ruled that the physical danger in which the defendant lived, commuting from unsafe areas of the Occupied Territories to Jerusalem, constituted a mitigating factor in determining the appropriate sentence. Levi, therefore, recommended a sentence of 30 months, of which only 12 would be served in prison; the remainder would be a probationary sentence. The political undertones of Levi's decision are apparent in the language of his dissent:

Nevertheless, I believe that in sentencing the defendant, this Court has not given due consideration to the life-endangering reality in which innocent travelers on the roads of Judea and Samaria live. Whereas in the past this danger consisted primarily of stone throwing, presently the threat is posed by fire-arms which have only one purpose: to kill Jews. This slaying continues despite the attempts of the [Israeli] armed forces to avoid it.

The defendant is one of many who have found themselves under true distress; from his own perspective he is at an impasse, since he lives in Har Bracha, near Nablus, however, for his livelihood he must commute to Jerusalem. Needless to say that this commute is dangerous even for those who *do* bear arms, let alone for those who do not carry a weapon. Under these circumstances, it would have perhaps been wise for the defendant to settle within the Green Line,¹⁴¹ however, in the eyes of the defendant and others, such a step appears to be a cruel decree...

Levi wrote another dissenting opinion in a criminal case in which an Israeli Arab ran over an Israeli Defense Force soldier.¹⁴² According to the indictment, the defendant waited in the vicinity of a military bus station for an opportunity to commit the crime. After a military vehicle picked up soldiers from the station, the defendant followed the vehicle and forced it off the road. The defendant then returned to the bus station. Approaching one of the soldiers near the station, the defendant accelerated and ran the soldier over. The defendant then fled the scene, leaving the injured soldier bleeding. A few hours later the defendant turned himself in to the authorities.

¹⁴¹ The "Green Line" refers to the borders drawn by the Armistice agreement of 1949, following the Israeli War of Independence. It distinguishes the territory that was within Israeli sovereignty in 1949 and the territories that were captured during the Six-Day War in 1967.

¹⁴² See CrimA 426/02 Abu Nimmer Baha v. The State of Israel [2002] (unpublished).

The defendant reached a plea agreement with the prosecution, whereby he would serve a prison term of 15 months. The prosecution also agreed to state on the court record that the defendant acted without criminal intent.¹⁴³ Here too, however, the District Court decided to impose a higher sentence, condemning the defendant to 3 years in prison (with an additional probationary sentence of 3 years should he commit a similar offense; his driver's license was revoked for 13 years). On appeal, the Supreme Court reversed the decision of the District Court, thus affirming the sentence *agreed upon* by the defendant and the prosecution. Justice Levi, in a minority opinion, rejected the notion that the defendant could have acted without criminal intent. He emphasized the severity of the crime of intentionally assaulting and injuring a soldier and ruled that the appeal must be rejected.

As we can see, Levi's dissent in both cases bears political undertones. In both cases, the determination of the proper punishment did not rest solely on abstract concepts of penology. Judging from Levi's rhetoric, the sentence was also determined based on his convictions regarding the Arab-Israeli conflict: a settler's right to self-defense and the proper punishment for an Arab-Israeli who targeted IDF soldiers. Interestingly, both cases dealt with a similar dilemma: honoring a plea bargain in cases in which the lower court believes that the prosecution had been unduly lenient. However, the majority and Justice Levi reversed their positions in the two cases; the Court and Levi voted in an opposite manner regarding the binding power of a plea bargain. More importantly, in both cases Levi's opinion regarding the obligatory force of a plea bargain hinged on both implicit and explicit political convictions and is accompanied by ideological statements.

Nevertheless, in examining the increase in Justice Levi's dissent, one issue remains unresolved: the absence of controversial cases on Levi's docket during his untenured period. The obvious explanation is that this absence occurred by chance. However, as the statistical analysis suggests, the assignment of cases within the Court during the period surrounding Levi's temporary appointment does not appear to have been random. Therefore, chance may not suffice to explain the dearth of constitutional (or other politically controversial) cases on Levi's docket.

¹⁴³ This is the Supreme Court's account of the event; I have difficulty in explaining how the prosecution could agree that the defendant acted without *mens rea* in this case.

The reason Levi was assigned such a small number of constitutional cases may be an interesting topic for further exploration; I would like to propose one possible explanation. A recent statement made by Chief Justice Barak, namely, that expressing a clear “agenda”¹⁴⁴ should disqualify a candidate from judicial office,¹⁴⁵ may present a possible answer to Levi’s docket assignment. In a public speech made in November 2005, Barak argued that appointing a candidate with a known agenda would unduly politicize the appointment process; it would lead to counter-demands by other political parties to be “represented” on the bench as well. Therefore, Barak recommended that judicial candidates who have previously been engaged in political or public policy debates undergo a “cooling off” period before presenting their candidacy. Bearing Barak’s recommendation in mind, the assignment of fewer controversial cases to Justice Levi during the period leading to his appointment may be seen as an attempt not to expose his true “agenda,”(insofar as such an agenda could be anticipated).

¹⁴⁴ The “agenda” to which Chief Justice Barak referred was not only a clear political agenda, but also one regarding the role of the Supreme Court in Israeli society and judicial activism. See Yuval Yoaz, *Ruthi’s Agenda*, HAARETZ, (in Hebrew) December 12, 2005. Obviously, the question of judicial activism is often closely tied to concrete political questions. Presently, the criticism of judicial activism is primarily attributed to Israel’s right-wing parties. See Yoaz and also Efrat Weiss and Ilan Marciano, *Rivlin Is Threatening the Court and the Balance Between the Branches*, YNET, May 22, 2003. The article discusses attacks on judicial activism by Chairman of *Knesset* Reuven Rivlin and Chairman of the Legislative and Constitutional Committee of the *Knesset* Michael Eitan, both members of the *Likud*. In contrast, the article articulates the positions of central and left-wing politicians, such as former Minister of Justice Yoseph Lapid of *Shinui* and Zehava Galon and Haim Oron of *Meretz*, who view the attacks on judicial activism as a threat to Israeli democracy and human rights.

¹⁴⁵ In this discussion I allude to a debate currently taking place in Israel regarding the appointment of Professor Ruth Gavison of the Hebrew University to the Supreme Court. In past years, Gavison has been a strong critic of what she views to be the Supreme Court’s *judicial activism*; she has spoken out against the expansion of the Supreme Court’s authority to public policy issues that should be entrusted to the hands of the elected branches (See RUTH GAVISON, MORDECHAI KREMNIETZ & YOAV DOTAN, *JUDICIAL ACTIVISM: FOR AND AGAINST, THE ROLE OF THE HIGH COURT IN ISRAELI SOCIETY* at 69 and onward, and specifically p. 97 (in Hebrew, Jerusalem, 2000). Gavison was the author of the “against” chapter of the book). Chief Justice Barak has recently spoken publicly against Gavison’s appointment, because of her “agenda,” that he views as being undesirable for the Israeli Supreme Court. Barak’s speech, which was delivered in November 2005, has created great controversy in Israel and has resulted in allegations that the Court is not open to professionally qualified candidates who do not share the Justices’ political opinions. In “closed door talks,” Barak later clarified his statement, saying that it is not the *content* of Gavison’s agenda that disqualifies her; rather, it was the high-profile *voicing* of her opinions and her involvement in public policy debates that has made her a controversial, and, therefore, undesirable candidate. Barak commented that because of Gavison’s public activity, her appointment would seem to be political. Barak has suggested that Gavison could be considered for judicial office if she underwent a “cooling-off period,” during which she took no active role in public policy debates (See Yuval Yoaz, *Barak: Gavison Can Be Appointed After ‘Cooling Off’ Period*, HAARETZ (in Hebrew) December 12, 2005).

Thus, Levi was distanced from controversial cases that could make him appear to be an ideologically motivated, right-wing judge in the eyes of the Israeli public.¹⁴⁶ Distancing Levi from controversy, in turn, kept the debate regarding Levi's appointment away from the headlines. Levi's low profile enabled the Levi-Procaccia understanding between the Minister of Justice and the Chief Justice to proceed without the scrutiny of those who would have perhaps opposed and criticized Levi's views. The Court's attempt to conceal Levi's political agenda also manifests itself on the Supreme Court's official website: Levi's official biography makes no mention of his political past as Deputy Mayor of Ramle. The website simply states that Levi worked as a lawyer between 1970 and 1977.¹⁴⁷ However, with a lack of conclusive evidence regarding the Court's attempt to conceal Levi's agenda by assigning him less controversial cases during his temporary appointment, I state this conclusion as a tentative one and approach it cautiously.¹⁴⁸ Nevertheless, I believe it to be worth stating for the sake of further study.

In conclusion, a close analysis of Justice Levi's decisions suggests that Levi's lack of tenure did not necessarily play a significant role in his decision-making. Whereas

¹⁴⁶ In 1988, while serving in the Tel Aviv District Court, Levi was heavily criticized in MA'ARIV, one of Israel's leading newspapers, for sentencing two Jewish youths who had physically abused an Arab youth to only 11 months in prison. The newspaper claimed that had the victim been Jewish, the sentence would have been significantly longer. Interestingly, the writer of the article was Yoseph Lapid, then a journalist in MA'ARIV, who later became the Israeli Minister of Justice. See Zuriel, *supra* note 117. One can assume that had Lapid been the Minister of Justice when Levi was nominated for promotion to the Supreme Court, his appointment would have had greater difficulty in being confirmed.

¹⁴⁷ See: http://elyon1.court.gov.il/heb/cv1/fe_html_out/judges/k_hayim/210171380.htm

¹⁴⁸ I caution the reader that additional data is needed in order to draw a definitive conclusion that Justice Levi, during his temporary appointment, was deliberately assigned fewer constitutional cases than were other Justices. In order to establish this fact confidently, data are needed regarding the *overall* percentage of constitutional cases between September 2000 and August 2001 as well as data regarding the number of those constitutional cases that were assigned to judge Levi (not only cases resulting in decisions over three pages). Only based on such information may we draw a more definite conclusion regarding irregularities in the assignment of cases to judge Levi.

Having said that, when comparing Levi's docket to that of judge Procaccia, who served in a temporary capacity during the same year as Levi, we find that 12.86% of judge Procaccia's decisions dealt with constitutional cases, whereas only 7.41% of Levi's decisions dealt with constitutional law. Based on a binomial test, there is a chance of approximately 10.7% that the assignment of so few constitutional cases to judge Levi occurred by chance (assuming (a) that an equal proportion of cases assigned to both judges resulted in decisions over three pages and (b) that Procaccia's docket gives an indication of the percentage of constitutional cases during their year of temporary appointment (2000-2001)). We must note, however, that during their temporary appointment, both judge Levi and judge Procaccia had the lowest percentage of constitutional cases of all 7 of the judges studied; the *average* percentage of constitutional cases for all 7 judges during their temporary appointment was 21.78%. Assuming a probability of 21.78% of being assigned a constitutional case (that results in a decision of over 3 pages), the chance that during his temporary appointment Levi was assigned so few cases *by chance* drops to less than 1%.

the statistics gave reason to believe that before achieving tenure Justice Levi may have refrained from expressing views that were unpopular within the court, an analysis of Levi's docket indicates otherwise. A detailed examination of Levi's decisions demonstrates that during his temporary appointment few (or no) opportunities for ideological clashes between Levi and the Court were present. Therefore, we may conclude that the dearth of dissenting opinions cannot be attributed to Levi's lack of tenure, but rather to the cases assigned to him before August 2001. The assignment of cases to judge Levi before August 2001 has been identified as a topic of potential interest, which necessitates additional study before drawing further conclusions.

C. *Justice Jubran*

In 2004, Justice Salim Jubran became the first Arab judge to receive full tenure on the Israeli Supreme Court. The first Arab judge appointed to the Court, Abd el-Rahman Zuabi, had served only temporarily and was unsuccessful in receiving a permanent position. When Jubran was temporarily appointed to the Supreme Court in 2003, many hoped that he would bring a unique voice to the bench, especially in political cases and in decisions pertaining to the treatment of Arabs under Israeli law. The Supreme Court is faced almost daily with cases of discrimination against Arabs in Israel. This discrimination takes many forms: e.g. the allocation of national funds to Arab settlements, differential treatment in the awarding of citizenship to spouses of Israeli Arabs, and in criminal sentencing. In addition, the Court is faced with many politically charged cases related to the Arab-Israeli conflict, such as the case regarding the erection of a barrier between Israel and the territories and the disengagement from Gaza.

However, there were those who were more skeptical about Jubran's ability to express what they perceived to be the "Arab viewpoint" within the Israeli Supreme Court: first, when he was appointed temporarily, some expressed the concern that Jubran would not enjoy complete independence in his rulings.¹⁴⁹ They argued that Jubran might repress his true opinions about the treatment of the Arab minority in Israeli courts so as

¹⁴⁹ See for example Conal Urquhart, *The Outsider*, THE GUARDIAN, April 22, 2003.

not to jeopardize his chances of receiving tenure. Some insinuated that even if awarded tenure, Jubran might not show empathy toward Arab causes.¹⁵⁰ Hassan Jabarin of *Adalah*, one of Israel's leading Arab human rights organizations, articulated the difficulties inherent in serving as an Arab judge on an Israeli court: showing empathy to Arab causes might compromise the professional reputation of an Arab judge in the eyes of the Jewish majority within the legal profession, who may regard such empathy as bias. On the other hand, accepting the *government's* position on issues pertaining to the Arab minority might make the Arab judge appear, at least in the eyes of other Arabs, as though he is succumbing to the pressure to assimilate his opinions to those of the Jewish majority.¹⁵¹

Before considering Justice Jubran's decisions, some biographical information is in order. Jubran was born in Haifa, a city with a mixed Arab and Jewish population, in 1947. At the time, the State of Israel had not yet been established, and the territory was within the British Mandate of Palestine. Jubran is a Christian Arab, which is important in understanding why the majority of Arab Israelis, who are Muslim, might not view him as an appropriate representative (or in the words of the Zamir Committee – a proper *reflection*) of the Arab minority. Jubran received his legal education at the Hebrew University in Jerusalem and was admitted to the Bar in 1970. In 1982, at the age of 35, Jubran was appointed to the Haifa Magistrates' Court. In 1993, he was promoted to the Haifa District Court, where he specialized in criminal law.¹⁵² In 2003, Jubran was appointed temporarily to the Supreme Court, and in May, 2004, he received full tenure.

¹⁵⁰ See Yuval Yoaz, *The Catch 22 of Judge Jubran*, HAARETZ (in Hebrew), April 13, 2004. Similar concerns were expressed by Ibrahim Shaban of al-Quds University, who said about the appointment of Jubran: "I do not feel the appointment of an Arab Israeli will do anything to enhance the law and human rights in the occupied Palestinian territories and east Jerusalem. It's just a matter of decoration. My feeling, based on 35 years' experience of the occupation, is that the court always acts on a political basis, not a legal basis. Many requests are put to the court on the issues of house demolitions, torture, administrative detention, the closure of towns and the movement of ambulances. Very little positive comes out of it, except when there is a political impetus." See Conal Urquhart, *The Outsider*, THE GUARDIAN, April 22, 2003.

¹⁵¹ See Yuval Yoaz, *The Catch 22 of Judge Jubran*, HAARETZ (in Hebrew), April 13, 2004. Furthermore, Jabarin insinuates in the interview his prediction that Jubran specifically is likely to be a disappointment for the Arab minority's rights. When speaking of his fears of how Jubran's decisions may turn out, Jabarin refers to Clarence Thomas as a negative example of the rulings a Justice belonging to a minority might render. Jabarin contrasts Clarence Thomas with Thurgood Marshall and expresses the hope that Jubran may adopt the views of the latter, rather than the former. More interestingly, however, Jabarin says that when judge Zuabi was appointed temporarily to the Supreme Court, *Adalah* presented Zuabi with a book on Justice Marshall. The fact that Jubran was not awarded such a book by *Adalah* is perhaps telling of the hopes that the Arab minority has for Jubran.

¹⁵² See Yoaz, *id.*

Jubran's record both before and after being awarded tenure revealed a low rate of separate and dissenting opinions. As the reader may recall, Jubran scored lowest in the overall rate of dissent and of separate, yet concurring, opinions. Jubran contributed no separate opinions before being awarded tenure. Subsequent to his permanent appointment, Jubran wrote only three separate opinions, an increase that was not found to be statistically significant. Jubran's rate of dissent also did not change significantly between his temporary and permanent appointment: in fact, it decreased from one dissenting opinion to none.

1. Jubran's Judicial Decisions During His Temporary Appointment

In examining Jubran's docket, special attention was given to his stance on the treatment of the Arab minority (as well as other non-Jewish minorities) in Israel, and relations between Jews and Arabs. During his temporary appointment, Jubran was twice assigned cases concerning the demolition of houses in which Palestinian terrorists had resided.¹⁵³ Israel's house demolition policy has repeatedly been challenged before the Israeli Supreme Court on the grounds that such action constitutes collective punishment, since it punishes the families of terrorists, and is, therefore, prohibited under international law. In both cases regarding house demolition, Jubran concurred with the opinion of the court that the demolition was legitimate for deterrence (rather than punishment). In both cases Jubran did not contribute a separate opinion and simply stated: "I concur."

In June 2003, another highly charged case regarding the relationship between Jews and Arabs, this time within the Israeli military, was brought before a panel on which Jubran served. The case touched on the question of how minorities were being treated within the Israeli Defense Forces. In October, 2000, shortly after the beginning of the second *Intifada*, a fierce battle took place between Palestinian gunmen and the Israeli armed forces in the vicinity of Joseph's Tomb in Nablus. At the time, Joseph's Tomb was controlled by Israeli forces, yet the area surrounding the Tomb was under the control of the Palestinian Authority. During the course of the fighting, a Druze Israeli soldier named

¹⁵³ H CJ 893/04 Farj v. The IDF Commander of the West Bank [2004] IsrSC 58(4) 1; H CJ 6288/03 Sa'ada v. The Home Front Commander [2003] IsrSC 58(2) 289.

Madhat Yusuph was severely injured. Initially, Yusuph did not lose consciousness, and rescue forces were alerted to evacuate him to the nearest hospital. Attempts to transfer Yusuph via a Palestinian ambulance failed: a Palestinian mob blocked the road and would not allow the ambulance to pass. It took the IDF approximately three and a half hours to evacuate Yusuph, who by then had already died of his wounds.

The attempts made to evacuate Yusuph stirred up considerable sentiment in Israel regarding the commitment of the IDF to securing medical attention for its injured soldiers. By awaiting the arrival of a Palestinian ambulance, the IDF opted not to pursue another alternative for the evacuation of Yusuph: a broader operation, involving tanks and armored vehicles, by means of which Israel could have regained control of the evacuation path from the Tomb. Organizations of military veterans argued that one of the foundations on which the IDF rests is that it will pursue all necessary means to save its own soldiers; by not pursuing the armored option, the IDF left a soldier to die. However, the debate regarding Madhat Yusuph was not limited to abstract questions of comradeship and took on racial tones as well. Ayub Kara, a Druze Member of *Knesset* from the *Likud* party, along with others, argued that had Yusuph been Jewish, the armed forces would have acted with greater rigor and determination in evacuating him.¹⁵⁴ The allegations were that Israel discriminated among its soldiers based on their ethnicity.

The IDF appointed an internal inquiry committee that concluded that the commanders had acted reasonably in preferring an ambulance evacuation to an armored operation. However, the Yusuph family requested that an independent civilian inquiry committee be appointed to investigate the circumstances of Madhat's death. The family's request was denied by Prime Minister Ehud Barak. At this point, the family petitioned the Supreme Court against the Prime Minister's decision.

Justice Turkel delivered the opinion of the court.¹⁵⁵ Turkel reiterated that the scope of judicial review regarding the government's discretionary authority to appoint an inquiry committee is extremely narrow. Turkel determined that the Yusuph incident could have provided the necessary grounds for appointing an independent inquiry committee because of the importance of the incident from a moral and military

¹⁵⁴ See Amikam Horesh and Linoy Bar-Gefen, *Madhat Yusuph's Relatives Are Shocked and Infuriated*, YNET, October 2, 2000.

¹⁵⁵ H CJ 7232/01 Mahadi Yusuph v. The Israeli Government [2003] IsrSC 57(5) 561.

operational standpoint. Furthermore, Turkel stated that such an inquiry would help in re-establishing the public's trust in the military and its commanders (presumably by demonstrating that the military was not covering up anything).

Nevertheless, Turkel ruled that the *internal* inquiry addressed the essential aspects of the incident, and a review of the committee's records showed that no further inquiry by civilian authorities was necessary. Turkel, therefore, concluded that the Yusuph incident was *not* one of the rare occasions in which the Court would *order* the appointment of an inquiry committee. Despite loud public debate on the matter, the allegations regarding racial discrimination were only vaguely insinuated in the court's decision and not explicitly mentioned. Justices Levi and Jubran concurred without adding any observations. Knowing the racial tensions surrounding the incident, Jubran's concurrence with the opinion of the Court, without contributing any separate comments, came to many as a great surprise.¹⁵⁶

2. *Jubran's Decisions After His Permanent Appointment*

As we have seen, although Jubran was a member of numerous panels that addressed the rights of Palestinians and Arabs, during his temporary appointment he rarely expressed an opinion that differed from that of the Court.¹⁵⁷ Furthermore, Jubran rarely voiced any opinion at all. At first glance, this fact seems to support the prediction of skeptics who were concerned that Jubran would not be sufficiently independent to voice his opinions as long as he served on the court *temporarily*. Jubran's silence indeed suggests that he may have repressed his views so as not to jeopardize his chances of being appointed.

¹⁵⁶ Yuval Yoaz, *The Catch 22 of Justice Jubran*, HAARETZ, April 13, 2004.

¹⁵⁷ The reader may demand an explanation of the fact that Jubran was assigned controversial cases of constitutional law regarding the relations between Jews and Arabs during the year of his temporary appointment. Jubran's docket seems to challenge my hypothesis regarding Justice Levi, and the fact that Levi was deliberately not assigned controversial cases during his temporary appointment so as not to expose his potentially controversial views. One possibility is that some time before 2003, the Supreme Court underwent internal changes regarding the assignment of cases, whereby the assignment became more random (see Chapter III). Another possible explanation, which may seem somewhat conspiratorial, is that in contrast to Levi, Jubran was not expected to express controversial minority views; therefore, there was no fear in assigning him sensitive cases regarding the relations between Jews and Arabs. On the contrary: if Jubran were to concur in such decisions, he could lend further legitimacy to the opinion of the majority regarding seemingly discriminatory policies.

However, Jubran's decision-making in cases pertaining to the Arab minority did not change dramatically even after he was awarded tenure. An examination of Jubran's docket during the year that followed his permanent appointment indicates that Jubran's voice remained mute within the Court in cases pertaining to the relations between Jews and Arabs in Israel. Interestingly, Jubran voiced no dissents whatsoever during his first year as an Associate Justice; he voiced *separate* opinions in only three cases--all criminal--although one-third of his docket consisted of constitutional cases (32 cases). I shall briefly discuss some of the major decisions pertaining to the Arab-Israeli conflict that Jubran took part in during his first year of tenure.

In December 2004, the Court addressed the administrative detention of a Palestinian for over three and a half years, during which no criminal charges were filed against him.¹⁵⁸ The petitioner requested that Israeli authorities either prosecute him or release him. According to Israeli authorities, the petitioner was a member of the militant faction of *Hamas*. However, due to the confidentiality of the information against him and the inadmissibility of much of the evidence in criminal proceedings, criminal charges were not to be pursued against him. Nevertheless, the danger posed by the petitioner was seen as grounds for continuing to hold him under arrest.

Justice Procaccia delivered the opinion of the Court, ruling that despite the severe infringement upon the defendant's right to due process, administrative arrest was warranted in this case. The Court based its decision on confidential material that was presented to the Justices in the absence of the defendant, whereby the defendant was, and continued to be, an active member of *Hamas* even in prison. Justice Jubran concurred in the opinion of the Court and did not contribute a separate opinion. Bearing in mind the controversy surrounding administrative detentions, Jubran's silence is once again noteworthy.

Another case pertaining to the rights of Palestinians was brought before the Court in January 2005, a week before the Palestinian elections. The Israeli Supreme Court was asked to allow Palestinian prisoners in Israeli prisons to vote.¹⁵⁹ Without addressing the substantive questions, the court rejected the petition on technical grounds, citing the delay

¹⁵⁸ HCJ 11006/04 Kadri v. The IDF Commander in Judea and Samaria [2004] (unpublished).

¹⁵⁹ HCJ 65/05 Musalah v. The Prime Minister [2005] (unpublished)

in submitting the petition. Justice Jubran concurred in the opinion of the Court without seizing the opportunity to address the substantive aspects of the dilemma.¹⁶⁰

Perhaps the most important examples of Jubran's silence in petitions concerning the rights of Arabs in Israel are the "family unification" petitions. The petitions, which are currently still pending before the Supreme Court,¹⁶¹ challenge the constitutionality of legislation regarding the granting of Israeli citizenship. The legislation, which was initiated in 2002 as an executive directive, suspended the adjustment of visa status for Palestinian spouses of Israeli citizens; these spouses were only allowed to renew their previous status as it stood when the directive was issued.¹⁶² In August 2003, the *Knesset* approved the directive and gave it the force of provisional legislation, meaning that the legislation could be extended on an annual basis.¹⁶³ The provisional legislation resulted in an abundance of petitions to the Supreme Court requesting that the Court strike down the law as non-constitutional due to its sweeping and discriminatory basis in denying citizenship.¹⁶⁴ The Supreme Court decided that due to the importance of the question, the petitions would be heard before a panel of 13 Justices¹⁶⁵ (the broadest panel ever convened in the history of the Israeli Supreme Court), one of whom was Justice Jubran.

The main petition, presented by *Adalah*, was submitted in August 2003 after the *Knesset* approved the executive directive and gave it the force of provisional legislation.

¹⁶⁰ Compare to Levi's decision on in the Feiglin case, *supra*, note 129: although the Feiglin case was dismissed on technical grounds as well, in order to make his point that Feiglin should not have been disqualified, Levi insisted on substantively discussing whether sedition should disqualify a candidate.

¹⁶¹ Shortly after the completion of this thesis, on May 14, 2006, the Israeli Supreme Court reached a final decision in this petition. The Court decided by a majority of 6-5 that the provisional legislation was in accordance to Israel's Basic Laws and international human rights standards. See H CJ 7052/03 *Adalah* (et al) v. the Minister of the Interior [2006] (not yet published). The opinion of the Court was divided on a number of issues such as whether the right to establish a family is indeed a constitutional one and whether, even if this right is constitutionally protected under Israel's Basic Laws, whether it includes a right to grant one's spouse citizenship or residency rights. In any event, the opinion of the Court established that as a *provisional* measure (even for a number of years), a country may deny enemy citizens residency privileges even in cases where they are married to citizens and have children.

¹⁶² *Ibid.*, at 6.

¹⁶³ Exceptions to the general suspension of status adjustment were made with regard to males over the age of 35 and females over the age of 25, who were statistically found to pose less of a security threat; in such cases the Minister of the Interior was given discretion to grant temporary visas to the spouses of those residing legally in Israel.

¹⁶⁴ The main decision dealing with family unifications included seven petitions. A large number of other petitions were submitted separately and their outcome was made contingent upon the result in H CJ 7052/03.

¹⁶⁵ The final decision was given by a panel of 11 Justices, due to the retirement of a number of Justices during the period between 2003 and 2006.

Over a year later, the Supreme Court still had not reached a decision. In August 2004, the *Knesset* extended the provision by six months, until February 2005.¹⁶⁶ The government then notified the Court that the directive and the corresponding legislation were in the process of being reconsidered. On December 14, 2004, the court decided to suspend its judgment on the matter until the government announced its new policy regarding the residency and citizenship rights of Palestinian spouses.¹⁶⁷ By then, Jubran was already a tenured member of the Court.

On February 18, 2005, the government requested another extension. The government notified the Court that it had circulated a legislative proposal regarding an amendment to the Citizenship Law, whereby Palestinian spouses would be able, with certain restrictions, to apply for citizenship. According to the notice given to the Court by the government, the proposal was awaiting the comments of newly appointed ministers to the Israeli government.¹⁶⁸ In the meantime, the *Knesset* extended the 2003 temporary provision until May 2005.

On March 1, 2005, more than a year and a half after the provisional legislation was approved by the *Knesset*, the Court issued a decision, whereby it allowed the government to continue considering the proposed legislation without the intervention of the Court. The Court reached a similar decision three months later, in June 2005, when the *Knesset* extended the legislation by three more months, until August 2005. This three-month extension meant that the provisional legislation would be in force for two years. For more than a year of this period, Justice Jubran was a tenured member of the Court, yet made no comments or observations regarding the provision's constitutionality, nor did he comment on the Court's decision to suspend its judgment. In all three of the abovementioned extensions granted to the government, Jubran signed the decision without contributing any separate remarks.¹⁶⁹

¹⁶⁶ According to Israeli law, the directive, which was valid for only one year, had to be approved by the *Knesset* annually.

¹⁶⁷ See H CJ 7052/03 Adalah (et al) v. the Minister of the Interior [2004] (unpublished).

¹⁶⁸ The *Labor* party had become a member of the coalition and received a number of important portfolios, including the Ministry of the Interior, which was directly responsible for implementing the directive.

¹⁶⁹ After the completion of this thesis, the Israeli Supreme Court rendered its final decision regarding the family unification provisional legislation. See footnote ? Justice Jubran joined the 5 person minority opinion which was led by Chief Justice Barak. In his opinion, Jubran touches on the fact that although the government based its arguments for the legislation on security considerations, the outcome of the legislation discriminates primarily against the Israeli-Arab population; it is the Israeli-Arabs who are tied

As demonstrated by the decisions discussed above, Justice Jubran did not begin voicing different opinions following his permanent appointment as Associate Justice. Even after being awarded tenure, Jubran continued to concur with the opinions of the Court in seemingly discriminatory decisions regarding the rights of Arabs in Israel; his voice remained absent, neither dissenting nor separate. Therefore, it appears that Jubran's temporary position was not a determining factor in his decision not to depart from the opinion of the Court during his temporary appointment.

The lack of a change in Jubran's opinions after being awarded tenure still leaves unresolved questions regarding the reasons for Jubran's judicial behavior. There are at least two ways to interpret Jubran's decisions. One possible explanation is that Jubran genuinely identifies with the opinions expressed by the Court regarding Arabs' rights, which is why he has not voiced separate or dissenting opinions on these matters. This interpretation may, in turn, evoke criticism regarding the decision to appoint Jubran to the Court: critics may argue that Jubran's appointment was aimed at quieting criticism regarding a lack of nominal representation of the Arab sector within the Supreme Court; however, Jubran's appointment continues to deny the Arab minority in Israel a true *voice* in the nation's highest judicial authority.

Another possible interpretation of Jubran's voting pattern is that Jubran continued (and continues) to repress his true opinions, even after having been granted tenure. Under this interpretation, the repression did not end when Jubran was appointed for life; rather, the repression continued into his first year as a tenured member of the Court. The key to understanding why Jubran might continue to repress his views lies in the dilemma presented by Hassan Jabarin of *Adalah* when addressing Jubran's appointment: in ruling on cases pertaining to the rights of Arabs, an Arab judge in Israel experiences a difficult dilemma. In this view, Arab judges face an impossible tension between remaining loyal

linguistically and culturally to residents of the Palestinian authority. Israeli Jews only rarely marry non-Jewish residents of the territories. Jubran also addresses the legislative history of the legislation, which pointed to demographic considerations, not solely security ones. This decision perhaps marks somewhat of a turning point in Jubran's opinions and manifests a representation of the Arab minority.

Between June and August 2005, the *Knesset* completed the legislation process of the amended Citizenship Law 2005. Currently, the Court is considering the provisions of the permanent legislation, which provides a restricted possibility for Palestinian spouses to acquire Israeli citizenship. The Court is considering *Adalah's* claim that this legislation, too, discriminates against Palestinian spouses.

to their opinions and values, while distancing themselves from the potential criticism that their judgments are biased due to their origin.¹⁷⁰

The temporary appointment of Justice Jubran was accompanied by doubts regarding the likelihood of Jubran's expressing dissenting views on matters pertaining to the rights of the Arab minority in Israel, considering his lack of tenure. As we have seen, the data suggests that Jubran's lack of tenure cannot account for his refraining from voicing dissenting and separate opinions on such matters. Even after being appointed permanently, Jubran continued to concur with the opinions of the Court in decisions that might be regarded as infringing upon the rights of Arabs and other minorities. Jubran's subsequent concurrence may provide grounds for speculation regarding the possible motivations for selecting Jubran to serve on the Israeli Supreme Court. Furthermore, Jubran's decisions may raise questions regarding his ability, as the first Arab member of the Court, to express views that oppose those of the Jewish majority serving on the Court.

CONCLUSION

The manner in which most Justices are appointed to the Supreme Court of Israel poses a theoretical threat to the judicial independence of these judges during their temporary appointment. The theoretical analysis of the judicial appointment system revealed that the key role played by Justices in the appointment process might compel judges seeking promotion to concur with their senior colleagues in order to secure a

¹⁷⁰ A possible example of Jubran exceptional sensitivity to bias allegations can be seen in his decision to recuse himself from the panel deciding the legality of the barrier: in 2005, Justice Jubran was designated to be a member of a broad panel of 9 Justices that would decide the legality of a section of the barrier built by the Israeli government in A-Ram, near Jerusalem. On the morning of the hearing, Jubran notified the Chief Justice that he decided to recuse himself from the case because he discovered that the petition dealt with a section of the barrier near A-Ram, where one of his brothers resides and is, therefore, likely to be affected by the decision. See Yuval Yoaz, *Jubran Recuses Himself From Hearing Regarding the Fence*, HAARETZ (in Hebrew), May 9, 2005. Jubran's decision to recuse himself, especially on the morning of the hearing, seems unusual: by the same token, sections of the fence surrounding Jerusalem can be seen as affecting every one of the Justices residing in the city, yet none of them recused themselves from the case.

permanent position for themselves. The primary objective of the study was to examine *empirically* whether the theoretical threat to judicial independence can be seen to have practical implications as well.

Studying the judicial independence of temporarily appointed judges is not altogether a novel topic for academic research. However, a previous Israeli study conducted by Professor Eli Salzberger that addressed this topic, in my opinion, used tools that were too blunt to examine the effects of tenure with the necessary precision. Therefore, my study aimed at refining some of the methods used in Salzberger's research: by limiting the study to a shorter time frame (1999-2005), by examining only specific categories of cases, and by limiting the number of judges examined, I was able to pay greater attention to details that were omitted in Salzberger's analysis. Perhaps most importantly, this study looked at the judges as individuals, rather than solely as a group.

The results of the quantitative analysis confirmed some of the general findings of Salzberger's study, namely, that comparing the overall rate of dissent before and after temporary judges were awarded tenure showed no statistically significant difference; similarly, only a few significant differences were found in the *individual* rates of dissent and separate opinions among the judges. However, there are important differences between the two studies: whereas Salzberger's results indicated that a correlation between tenure and dissent, if found to exist, is *negative*, this study suggested a positive, albeit non-definitive correlation between the two variables. The quantitative study also demonstrated the dangers inherent in generalizations regarding the effects of tenure.

However, more importantly, this study offers a qualitative analysis of the decisions of temporarily appointed judges. The general rarity of dissent on the Israeli Supreme Court, even for the longer and more controversial decisions rendered, deemed even the more refined methods of quantitative data collection to be too coarse to uncover the delicate differences between pre-tenure and post-tenure decision-making. Nevertheless, it was the rarity of dissent that highlighted the importance of employing alternative methods: it emphasized the importance of carefully studying the few decisions in which judges *did* choose to dissent and the importance of being attuned to the ever-so-slight differences between the opinions that were expressed.

The majority of this research did exactly that: in an attempt to identify nuances in both outcome as well as rhetoric, the study carefully scrutinized specific opinions of Justices on well-defined topics. Indeed, the study's most significant findings were discovered in this manner: in the case of Justice Naor, these findings were based on a comparison of outcome and rhetoric in two opinions rendered during her temporary appointment that were later reconsidered by the Court. In the case of Justice Levi, the careful reading of his decisions demonstrated that despite what the statistics initially suggested, the key to understanding the increase in Levi's dissent rate lay in the types of cases assigned to him, rather than in the anticipated effects of tenure. Finally, in the case of Justice Jubran, the analysis demonstrated what we might learn about the effect of tenure by closely examining Jubran's decisions concerning the Arab minority.

Although the most interesting findings of this study resulted from looking at specific cases, these inferences could not have been drawn without looking at the broader picture provided by the quantitative analysis. For example, it was the quantitative analysis that indicated Justice Levi as a potentially interesting case for further study. Furthermore, the statistics suggested that Levi's case assignment might be significant in understanding the rise in his dissenting opinions following his permanent appointment. Only the quantitative and qualitative analyses considered jointly could portray more precisely what occurred in the decisions of the three Justices who were closely studied, providing a view from both the macro and the micro levels.

The study leaves a number of unresolved questions: was Justice Levi deliberately assigned fewer constitutional cases, and if so, why? What are the underlying reasons for Justice Jubran not expressing the opinions that some had expected him to express? In general, why are so few dissenting opinions written in the Israeli Supreme Court? Although these questions were not part of the original agenda for this study, the data and analysis inevitably touched upon them. It remains for future scholars to examine these questions in greater depth. With regard to the effects of tenure on judicial decision-making, I hope to have made a significant contribution to the understanding of the subject, both through the actual findings of the study, as well as through some new methods that I have employed in addressing the topic. In any event, the possible effects

of tenure on judicial decision-making remain a promising topic for further research, both in Israel and in other judicial systems.

APPENDIX A

Rate and Number of Dissenting Opinions Before and After Permanent Appointment

Judge	Before			After		
	Number of Decisions	Number of Dissents	% of Dissents	Number of Decisions	Number of Dissents	% of Dissents
Rivlin	56	0	0%	56	0	0%
Procaccia	70	4	5.71%	53	1	1.89%
Levi	54	1	1.85%	88	5	5.68%
Naor	64	3	4.69%	73	5	6.85%
Grunis	63	1	1.59%	84	3	3.57%
Jubran	95	1	1.05%	107	0	0%
Hayut	114	0	0%	122	2	1.64%

Rate and Number of Separate Opinions Before and After Permanent Appointment

Judge	Before			After		
	Number of Decisions	Number of Separate	% of Separate	Number of Decisions	Number of Separate	% of Separate
Rivlin	56	0	0%	56	4	7.14%
Procaccia	70	5	7.14%	53	4	7.55%
Levi	54	0	0%	88	4	4.55%
Naor	64	9	14.06%	73	4	5.48%
Grunis	63	1	1.59%	84	3	3.57%
Jubran	95	0	0%	107	3	2.80%
Hayut	114	7	6.14%	122	10	8.20%

Cases by Subject Matter Before and After Permanent Appointment

Judge	Before			After		
	Civil	Criminal	Constitutional	Civil	Criminal	Constitutional
Rivlin	35	11	10	32	14	10
Procaccia	40	21	9	25	16	12
Levi	20	30	4	38	40	10
Naor	29	24	11	27	19	27
Grunis	27	16	20	41	25	18
Jubran	30	37	28	26	45	36
Hayut	36	37	41	50	36	36

APPENDIX B: The Judges of the Israeli Supreme Court¹⁷¹

Name	Prior Occupation	Year of Temporary Appointment	Year of Permanent Appointment
Smoira, Moshe	Lawyer	-	1948
Olshan, Itzhak	Lawyer	-	1948
Dunkelblum, Menachem	Lawyer	-	1948
Cheshin, Shneor Zalman	Judge	-	1948
Assaf, Simcha	Professor of Talmud	-	1948
Agranat, Shimon	Judge	1948	1950

¹⁷¹ Sources: Eli M. Salzberger, *Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings From the Supreme Court of Israel*, 35 ISRAEL LAW REVIEW, 481, 511 (2001); MARTIN EDELMAN, COURTS, POLITICS AND CULTURE IN ISRAEL 36-37 (University Press of Virginia, 1994).

Silberg, Moshe	Judge	1948	1950
Goitein, David	Diplomat	-	1953
Sussman, Yoel	Judge	1951	1953
Landau, Moshe	Judge	1951	1953
Berinson, Zvi	Director General, Ministry of Labor	-	1953
Witkon, Alfred	Judge	1951	1954
Cohn, Haim H.	Attorney General	-	1960
Manny, Eliyahu	Judge	-	1962
Halevi, Binyamin	Judge	1952	1963
Kister, Itzhak	Judge	-	1965
Kahan, Itzhak	Judge	1967	1970
Etzioni, Moshe	Judge	1966	1970
Shamgar, Meir	Attorney General	-	1975
Schereschowsky, Ben Zion	Judge	1951	1975
Asher, Shlomo	Judge	1973	1977
Ben Porat, Miriam	Judge	1976	1977
Elon, Menachem	Professor of Jewish Law	-	1977
Bechor, David	Judge	1977	1978
Barak, Aharon	Attorney General	-	1978
Bejsky, Moshe	Judge	1975	1979
Levin, Shlomo	Judge	1977	1980
Cohen, Moshe		-	1981
Levin, Dov	Judge	1981	1982
Bach, Gavriel	State Prosecutor	-	1982
Cohen, Yehuda	Judge	1981	1982
Netanyahu, Shoshana	Judge	1981	1982
Goldberg, Eliezer	Judge	1983	1984
Halima, Avraham	Judge	1982	1984
Malz, Yaakov	Judge	1986	1988
Or, Theodore	Judge	1982	1989
Mazza, Eliyahu	Judge	1989	1991
Cheshin, Mishael	Lawyer	-	1992
Dorner, Dalia	Judge	1993	1994
Tal, Zvi	Judge	1963	1994
Kedmi, Yaakov	Judge	1989	1994
Strassberg-Cohen, Tova	Judge	1984	1994
Zamir, Itzhak	Professor of Law	-	1994

Turkel, Yaakov	Judge	1980	1995
Beinisch, Dorit	State Prosecutor	-	1995
Englard, Itzhak	Professor of Law	-	1997
Rivlin, Eliezer	Judge	1999	2000
Procaccia, Ayala	Judge	2000	2001
Levi, Edmond	Judge	2000	2001
Grunis, Asher	Judge	2002	2003
Naor, Miriam	Judge	2001	2003
Rubinstein, Elyakim	Attorney General	-	2004
Arbel, Edna	State Prosecutor	-	2004
Jubran, Salim	Judge	2003	2004
Hayut, Esther	Judge	2003	2004

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