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Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law

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Investigating the Executive Branch in Israel and in the United States: Politics as Law, The Politics of Law

ARIEL L. BENDOR*

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I. INTRODUCTION

Over many years, beginning with the legal realism movement and later with public choice theory and the critical legal studies movement, there has been a growing awareness of the political significance of law and of it being the result of political mechanisms. Expressions such as

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“the politics of law”¹ and “law and politics”² are among the most common and useful terms in contemporary legal scholarship. This does not abolish the distinction between legal rules and other cultural, social and ethical norms and customs. Indeed, there are situations in which this distinction is quite vague, but principally it exists. Law and politics, although related concepts, are not identical.

Applying comparative law, this article portrays one aspect of the nexus between law and politics, namely, the phenomenon of politics-as-law (or, in other words, the legalization of politics) and the link between this phenomenon and the politics of law. These phenomena and their linkage will be illustrated by focusing on one of the most prominent meeting points between law and politics: the process of investigation, occasionally followed by indictments, of politicians holding senior positions in the executive branch (the branch which is itself entrusted with investigations and indictments).

The politics-as-law phenomenon occurs when political questions are decided by legal institutions, by legal rituals, or according to legal rules. Critical legal approaches that diffuse traditional lines of separation contribute to this phenomenon. This tendency reflects postmodern orientation where borders merge and distinct disciplines trespass into each others' fields.

The politics-as-law phenomenon occurs in many democracies around the world, but its expression differs from country to country. This article suggests two basic prototypes of politics-as-law. One prototype is governmental-institutions oriented. In this variation, which is common in the United States, the legislative and executive branches of the government make final decisions in questions of law or make political decisions via legal ritual (“politics-as-trial”). The second prototype of politics-as-law is judicial-institutions oriented. Under this variation, which is common in Israel, courts and judges make final decisions in matters of politics and public policy.

Both prototypes of politics-as-law reflect social trends, yet only a fraction of final legal decisions in the United States is actually taken by the legislative and executive branches. Similarly, there are relatively few significant national policy decisions in Israel that are made by the courts. However, legalization of politics may reflect, and sometimes constitute, social images that influence the substance of both legal and political decisions.

1. *See generally* THE POLITICS OF LAW (David Kairys ed., 3d ed. 1998); STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY (1984).

2. *See, e.g.*, JACOB HERBERT, LAW AND POLITICS IN THE UNITED STATES (2d ed. 1995); RICHARD E. MORGAN, THE LAW AND POLITICS OF CIVIL RIGHTS AND LIBERTIES (1985).

In the United States, a clear manifestation of politics-as-law is the impeachment procedure that recently took place against President William Clinton. A political move (in the traditional sense) veiled with the cloak of a criminal trial, politicians from both sides of the spectrum did not even try to conceal the true political nature of the impeachment process.

An entirely different variation of politics-as-law is found in Israel. Political questions in Israel often are resolved by judges. For instance, the Israeli Supreme Court once fired a Government minister.³ On another occasion, a commission headed by the Chief Justice ordered the transfer of the Defense Minister from his office because of his negligent performance while in office.⁴ Another commission headed by a Supreme Court Justice presented detailed recommendations regarding reform in the public health system.⁵

It would appear that the differences between expressions of politics-as-law in the United States and Israel are connected to significant differences between the countries' common views regarding the relationship between law and politics.⁶ In Israel, the majority of the general public, jurists, politicians, and center-line academics acknowledge the fact that the legal establishment, comprised of judges and Civil Service jurists, is professional and apolitical (or at least non-partisan). The decisions made by this establishment enjoy a wide measure of confidence from most of the public, short of religious Jews and the ultra-Orthodox community in particular. The legal establishment is perceived as objective, substantive, and as disregarding personal or party considerations.⁷ This image is the antithesis of the image of the political authorities and many politicians, who are suspected of routinely weighing improper or irrelevant considerations.

Over the years, there has been a growing phenomenon in Israel of transferring issues that are naturally regulated by the political branches of the state (the legislative and the executive) to the legal establishment

3. The Court ordered Minister of the Interior Arie Deri's removal from office, due to the indictment pending against him on charges of corruption. See H.C. 3094/93, *The Movement for Quality of Governance in Israel v. The Government of Israel*, 47(5) P.D. 404.

4. The Commission of Inquiry in regards to the Sabra and Shatilla Affair, Headed by Chief Justice Itzhak Cahan, held that Ariel Sharon, then Minister of Defense, did not take all the necessary precautions to prevent the massacre of Palestinian refugees by Lebanese residents, in territory under Israel military rule at the time. See also *infra* note 143.

5. This Commission of Inquiry, headed by Supreme Court Justice Shoshana Netanyahu, dealt with the organizational, administrative, fiscal and social aspects of the Israeli health system.

6. See generally Colin S. Diver, *Israeli Administrative Law from an American Perspective*, 4 MISHPAT UMIMSHAL (HAIFA U. L. & GVT. REV.) I (1997).

7. See GAD BARZILAI, EPHRAYIM YUCHTMAN-YAAR & ZEEV SEGAL, *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* 127-131 (1994) (Hebrew).

for handling and determination. At times, this phenomenon is deliberately encouraged. Other times it is passively supported by those connected with it: the legal establishment, the political authorities (both the ruling coalition and the opposition), and the general public.

A number of tools have been used to transfer issues to the Israeli judicial branch. Occasionally, use is made of traditional legal methods, such as the prosecution service and criminal courts. In other cases, changes have been made to existing procedures, such as a significant expansion of *locus standi* and justiciability in political matters. Other changes include the broadening of the jurisdiction of the State Comptroller to embrace matters that are politically controversial, while giving great, and occasionally even decisive, weight to this official's conclusions and recommendations.⁸ New tools also have developed, such as commissions of inquiry chaired by judges who conduct judicial hearings and possess the power to impose sanctions on political figures who have not fulfilled their duties properly. These commissions can even recommend policy changes.

At the same time, the substantive legal handling of political matters has remained fairly restrained. In other words, the Israeli legal system deals with political matters, but contrary to its image, it often does not grant concrete relief or amend or annul decisions that fall within the political arena.

The situation is different in the United States. The ethos of the American legal system is not apolitical. Some of the persons who form the legal establishment in the United States (judges and prosecutors) are elected by the public in a process that is similar to the election process for the legislative and executive authorities. Many others are appointed by politicians, openly taking into account the appointees' political viewpoints. A few, such as the Attorney-General, are political persons.⁹

Nevertheless, the American Courts gradually have developed threshold doctrines that are fairly strict in relation to *locus standi* and political questions. These doctrines enable the Courts to refrain from hearing cases that are being contested between political authorities and politicians. Approaches exist that negate the judiciary's "monopoly"

8. The State Comptroller in Israel is recognized as an autonomous branch of the State, distinct from the classic branches of the executive, the legislative and the judiciary. See H.C. 2581/91, *Salahat v. Government of Israel*, 47(4) P.D. 837, 843; H.C. 4914/94, *Terner v. State Comptroller*, 49(3) P.D. 771. The State Comptroller possesses a special status in the eyes of the Israeli public, which has no comparison in other countries. See AMNON RUBINSTEIN, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 681 (5th ed. 1996) (R.19.1.4, 19.2).

9. For the difficulties arising out of this, see, e.g., Tom Rickhoff, *The U.S. Attorney: Fateful Powers Limited*, 28 ST. MARY. L.J. 499, 504-08 (1997).

over the interpretation of the Constitution and construction of statutes,¹⁰ these approaches contribute to the judiciary's ability to restrict its functions in relation to politically controversial matters.

At the same time, the political elements in the United States have not left a vacuum in areas where the legal establishment wishes to limit its intervention. Thus, for example, investigations conducted by Congress play an important role in personal matters (within the framework of confirmation proceedings of the Presidential candidates for Secretaries of State, Supreme Court Justices and the like) and in matters that attract public attention in the United States.

The Israeli "Bar-On Affair,"¹¹ in addition to its historical importance, is recognized as a highly significant milestone in the relations between law and politics in Israel. The affair exposed the limitations and weaknesses of the politics-as-law phenomenon as it had developed in Israel and the opportunities offered to politicians to exploit the phenomenon for their own benefit. It illustrated the disadvantages of the legal establishment's application of traditional legal tools to handle problems which by their nature fall within the political sphere, although it is doubtful whether there is, or should be, an alternative in the current governmental, political and social system which prevails in Israel. The affair also exposed the politics of law, or the declared and hidden policy considerations that affect the legal establishment upon dealing with definite political matters.¹²

As is well known, American case law and academia tend not to seek to learn from other countries' experiences. This is particularly true

10. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What The Law Is*, 83 GEO. L. REV. 217 (1994); Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1 (1996); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 5 (4th ed. 1997). For a criticism of this approach see Larry Alexander & Frederick Schauer, *On Extra-judicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

11. This term, which originated in the press, also was adopted by the Supreme Court. The official publication of the judgments given during the affair, issued by the Supreme Court and carrying the symbol of the State of Israel, states on its binding: "Judgments in the Bar-On Affair." The words "Bar-On Affair" were even used without quotation marks. This title was used even though Bar-On was not a party to any of the proceedings, as no recommendation was made to indict him and no petition was filed in respect of that decision. The Supreme Court, in response to an application of the Israel Bar, clarified in a formal decision that the title was used only for reference.

12. This issue is much more limited and focused than the general issue (which is the subject of voluminous literature on jurisprudence and constitutional law) of the political functions of the courts, and their nexus in that connection to the other authorities. In this article I refer to the general issue only indirectly. It is also different from another issue that has attracted great interest, namely, the "internal politics" of the court system.

in the fields of constitutional law and judicial review.¹³ The constitutional law of other countries is perceived by American jurists as largely irrelevant.¹⁴ Indeed, engaging in comparative law, and even more so comparative constitutional law, requires particular caution.¹⁵ Certainly, one country should not hurry to copy constitutional rules from another, yet comparison is the basis for understanding.¹⁶ Through study of other cultures, a country can learn something important about itself.¹⁷ Consideration of a foreign legal system may, on occasion, actually demonstrates that certain rules applicable in that system would not be appropriate for adoption by another system, that has a different political and social background.¹⁸

In this article I do not propose that any of the systems under discussion is an appropriate model which is compatible for other countries. The purpose of the discussion is to present how the points of similarity between both political and social cultures in Israel and the United States contribute to the politics-as-law phenomenon. At the same time, this article shows that the points of cultural disparity contribute to a divergence of paths through which this phenomenon is expressed.

In this article, I shall present the main elements of the Bar-On Affair. I shall show how the affair and a line of legal decisions that have arisen as a consequence of the affair, illustrate different aspects of politics-as-law in Israel. This article will try to expose the nexus between the affair and the politics of law. This will be done by comparing analogous issues in American law, particularly the Watergate and Clinton-Lewinsky affairs. Finally, from a more general perspective, I shall describe the politics-as-law phenomenon in Israel in comparison with the United States. I will explain and present the advantages and disadvantages it presents in each country, and I will consider how the politics of law expresses, and even how it should express, the balance between such advantages and disadvantages.

In Part II, I shall consider the role of the Attorney-General and statutes dealing with the investigation and indictment of senior public officials, including the Prime Minister, the Minister of Justice, and a

13. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772-74 (1997).

14. See Scott H. Bice & Larry G. Simon, *Introduction*, 53 S. CAL. L. REV. 401-03 (1980).

15. See Pnina Lahav, *The Art of Comparative Constitutional Law*, 53 S. CAL. L. REV. 697 (1980).

16. See Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 412 (1980) (quoting Novalis).

17. See Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 966.

18. See generally Susan Rose-Ackerman, *American Administrative Law Under a Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279 (1994).

member of the Knesset (the Israeli Parliament, who were at the center of the Bar-On Affair). In Part III, I will review the background, facts, and proceedings of the Bar-On Affair. Part IV discusses the decision of the court not to indict the Prime Minister and Minister of Justice for their roles in the Affair and the judicial review of these decisions. In Part V, I will consider the decision not to remove the Minister of Justice from office and the judicial review involved in that decision. Part VI explores the decision not to set up a legal commission of inquiry to investigate the Bar-On Affair and the judicial review of that decision as well. Notwithstanding that the leading narrative in these sections will concern the Israeli Bar-On Affair, the sections also include analogous American narratives and general legal paradigms regarding the two countries.

In Part VII, I will consider the phenomenon of politics-as-law in Israel by drawing a comparison with the United States. Part VIII will deal with the nexus between politics-as-law and the politics of law.

II. THE ATTORNEY-GENERAL AND THE INVESTIGATION AND PROSECUTION OF PUBLIC OFFICIALS

The appointment of the Attorney-General is extremely important in Israel. The position is a senior office in the executive branch and, in contrast to the United States, is separate and distinct from the political position of Minister of Justice.¹⁹

The Israeli Attorney-General fulfills at least four central functions.²⁰ First, the Attorney-General is the chief legal adviser to the State Authorities. Her opinion on legal matters binds the Government.²¹ It

19. For the Attorney-General in the United States, see LUTHER A. HUSTON, ARTHUR SELWYN MILLER, SAMUEL KRISLOV, & ROBERT G. DIXON, JR., *ROLES OF THE ATTORNEY-GENERAL OF THE UNITED STATES* (1968); CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE, THE ATTORNEY-GENERAL AND THE MAKING OF LEGAL POLICY* (1992). Cf. *STATE-ATTORNEY-GENERAL* (Lynne M. Ross ed. 1990).

20. Professor Ruth Gavison also has pointed to the function of preserving the interests of the public. See Ruth Gavison, *The Attorney-General: A Critical Examination of New Trends*, 5 *PLILIM* (ISR. J. CRIM. JUS.) 27, 34, 45-47 (1996). In my opinion, this function does not stand on its own, but is usually integrated within the three general functions. For a division of the functions of the Attorney-General into two categories only, advice and representation, see Abraham Weinrot, *Duality in the Attorney-General's Roles*, 2 *HAMISHPAT* 85 (1996).

21. See H.C. 3094/93, *Movement for Quality of Governance in Israel v. Government of Israel*, 47(5) P.D. 404, 425; H.C. 4267/93, *Amiti v. Citizens for Proper Administration and Purity of Standards v. The Prime Minister*, 47(5) P.D. 441, 473; H.C. 320/96, *German v. Council of the City of Hertzlia* (not yet published); H.C. 4247/98, *Meretz Faction v. Minister of Religious Affairs* (not yet published); Itzhak Zamir, *The Attorney-General and the Struggle for the Legality of Government*, 11 *TEL AVIV U. L. REV.* 411 (1987) (Hebrew). However, there are those who disagree with these judgments. See Gavison, *supra* note 20, at 85-96. See also REPORT OF THE PUBLIC COMMISSION INTO THE MANNER OF APPOINTMENT OF THE ATTORNEY-GENERAL AND MATTERS CONNECTED WITH HIS OFFICE (1998) (hereinafter, *The Shamgar Report*). The

may be said that the Attorney-General is the primary organ of the Government authorities in matters of law. In other words, the Government is forbidden to perform an act that the Attorney-General declares unlawful. It is customary to state that in this job, the Attorney-General's first duty is to the law and public interest, and subject only to these does she advise the Government.²² Secondly, the Attorney-General is entrusted with the preparation and formulation of bills on behalf of the Government and the examination of private bills submitted by Knesset members.²³ Third, the Attorney-General heads the criminal prosecution service. She, as well as those subordinate to her, have the power to order the police to conduct (or not to conduct) a criminal investigation. Fourth, the Attorney-General, and those subordinate to her, are the exclusive representatives of all of the State branches in the Courts.²⁴ This "monopoly" is an instrument of the Attorney-General that enables her to force the Government to abide by her legal views. Accordingly, if the Government fails to obey the Attorney-General on a particular matter, she may ask the Court, on behalf of the Government, to uphold a petition filed against it in that matter.²⁵

In the United States, the Solicitor-General fulfills functions parallel to those of the Israeli Attorney-General in terms of her powers of representation. There is an ongoing debate whether the Solicitor-General should be an ordinary lawyer, who, subject to basic standards of professional ethics, owes a duty of trust to her client, or whether she may only make legal representations in accordance with what, in her opinion, the law provides. Today, the balance is tilting towards the first approach, namely, that the Solicitor-General makes representations in accordance with the instructions of the administration in so far as she receives them.²⁶

Commission was appointed by the Minister of Justice following the Bar-On Affair. Chairing the Commission was Meir Shamgar, a former Chief Justice and Attorney-General. Three former Ministers of Justice and Professor Ruth Gavison joined him on the panel. The Commission had reservations in portraying the Attorney-General's opinion as binding the government in every case, and was of the opinion that in exceptional cases the government should be enabled to argue against the opinion in Court. See Gavison, *supra* note 20, at 71-75.

22. See, e.g., Itzhak Zamir, *The Attorney-General: A Public Servant, Not a Government Servant*, in CLINGHOFFER BOOK ON PUBLIC LAW 451 (Itzhak Zamir ed., 1993); Ariel Bendor & Zeev Segal, *The Attorney-General – The Law and the Government*, HAPRAKLIT (forthcoming 1999) R. 17.2 (Hebrew).

23. See the Knesset's Regulations, § 118(b); The Shamgar Report, *supra* note 21, at 12, 20.

24. See The Civil Procedure Amendment (The State as a Litigant) Act, § 4 (1958).

25. See The Shamgar Report, *supra* note 21, at 12, 22.

26. See, e.g., Todd Lochner, *The Relationship Between The Office of Solicitor-General and the Independent Agencies: A Revolution*, 79 VA. L. REV. 549, 566-567 (1993); REBECCA M. SSILOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 77 (1992). *But cf.* Kathryn Mickle Werdeger, *The Solicitor-General and Administrative Due Process: A Quarter Century of Advocacy*, 36 G.W. L. REV. 481 (1968); John O. McGinnis, *Principle Versus Politics: The*

In any event, both countries' executives are entitled to dismiss the Attorney-General (in Israel) or the Solicitor-General (in the United States), if they are unwilling to represent them as desired. In Israel, for example, Attorney-General Itzhak Zamir was hastily replaced in 1986 because of the Government's unwillingness to be represented by him in various proceedings concerning the exposure of offenses in the General Security Services.²⁷ In the United States, similar incidents took place regarding the representation of the Administration in the Watergate Affair and in relation to a variety of issues during the Reagan Administration.²⁸

It seems that in Israel the Attorney-General is less dependent on the elected Government and, overall, more autonomous than her American counterpart. In contrast to the American Solicitor-General, whose cadence is linked to that of the elected President, in Israel there is no custom of replacing the Attorney-General with every new Government formation.

It also should be noted that the functions that are fulfilled by the Israeli Attorney-General are carried out in the United States by two persons: the Attorney-General, who holds a position equivalent to that of a Secretary of State, and the Solicitor-General. Both are appointed by the President and confirmed by the Senate.²⁹ On a federal level, even these functions are more narrowly defined than in Israel.

In view of the importance of the position in Israel, a custom has developed whereby the appointee to Attorney-General is a person whose qualifications are equivalent to those of a Supreme Court Justice.³⁰ These qualifications are expressed in terms of professional skills and experience, as well as nonpartisanship. Past critiques have held that only lawyers whom the government could assume would act in its favor were appointed to the post. However, those assumptions often were unfounded. In recent decades, the office has been filled by senior jurists not affiliated with any political party or with a defined political view.

An important American effort to contend with difficulties imposed by investigations and indictments of senior public officials was the

Solicitor-General's Office in Constitutional and Bureaucratic Theory, 44 STAN. L. REV. 799 (1992).

27. For this affair, see MOSHE NEGBI, *ABOVE THE LAW THE CONSTITUTIONAL CRISIS IN ISRAEL* (1987) (Hebrew); YEHIEL GUTMAN, *A STORM IN THE G.S.S. – THE ATTORNEY-GENERAL AGAINST THE GOVERNMENT* (1995) (Hebrew).

28. For a description of this and other affairs, see LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR-GENERAL AND THE RULE OF LAW* (1987). See also Leland Ware, *Book Review*, 33 ST. LOUIS U. L.J. 1129 (1989).

29. See U.S. CONST., art. II, § 2, cl. 2.

30. See Cabinet's announcement of September 5, 1960.

Office of Independent Counsel,³¹ which was known originally as the Special Prosecutor.³² This office was anchored in the Ethics in Government Act of 1978,³³ which was enacted after the Watergate Affair.³⁴ The statute, the constitutionality of which was confirmed by the Supreme Court,³⁵ was renewed and amended on a number of occasions.³⁶ The Act expired on June 1999, after Congress chose not to renew it.

The Ethics in Government Act was required because the heads of the investigation and prosecution service are political figures who are adherents of the President and whose positions in office depend upon him. The purpose of the law was to assure that high-level officials would be investigated by people who were not influenced by their hierarchical superiors.³⁷ This was necessary to preserve the rule of law and to make the President himself, together with other senior government officials, subject to the law. It also was designed to ensure the confidence of the public in the enforcement of the law in an equal and fair manner. The Ethics in Government Act aimed to accomplish these goals by providing for investigations and prosecutions of senior government officials which were to be conducted by independent prosecutors. These special prosecutors were to be appointed by a bench of three judges, which acted as the sole supervisor of their activities. The Attorney-General was granted authority to decide the appointment of Independent Counsel.³⁸ Congress could request that the Attorney-General exercise her powers, and it was also empowered to impeach Independent

31. See generally KATY JEAN HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* (1992); Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011-2389 (1998); Symposium, *Special Prosecutions and the Role of the Independent Counsel* 16 HOF. L. REV. 1-130 (1987); JOHN. E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 267-72 (5th ed. 1995); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 73-75, 185-86 (4th ed. 1997).

32. The title of the lawyer appointed under the act was changed from Special Prosecutor to Independent Counsel in order to avoid any connotation that the appointment meant that a criminal violation had occurred and that prosecution would ensue. See Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2079 (1998).

33. 28 U.S.C.A. § 591, et seq.

34. The Watergate Affair is a general term, used to describe a complex web of political scandals between 1972 and 1974. The burglary and subsequent cover-up led to moves to impeach President Richard Nixon. Nixon resigned from the presidency on the 8th of August 1974.

35. See *Morrison v. Olson*, 487 U.S. 654 (1988). For the briefs which were submitted to the D.C. Circuit in this case, see *The Constitutional Validity of the Ethics in Government Act: Morrison v. Olson*, 16 HOF. L. REV. 65 (1987).

36. See Jerome J. Shestack, *Forward: The Independent Counsel Act Revisited*, 86 GEO. L.J. 2011, 2013 (1998).

37. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2271 (1998).

38. See *id.*

Counsel.³⁹

The extent to which the institution of independent counsel in the United States has succeeded in achieving its aims remains disputed. There are those who believe that the damage it has caused outweighs its benefits.⁴⁰ It is argued, *inter alia*, that the Ethics in Government Act compels criminal investigations of senior officials in relation to political power disputes between the executive and the legislative branches.⁴¹ The Attorney-General was put under serious political pressure to recommend appointments of Independent Counsel.⁴² With the encouragement of the media, and in view of their desire to justify their actions and high costs in terms of time and money, independent counsel tended to over-file indictments.⁴³ These are some of the reasons that the role of independent counsel was terminated recently.⁴⁴

The impression is that at the root of the problem of the independent counsel was the fact that the office was not shaped successfully, and in effect had not tried to detach the investigation and prosecution of senior officials from the political system. The institution was shaped, in accordance with the tradition of American government, by the attempt to create checks and balances between the legislative and executive branches. These branches never were attempted to be neutralized. As noted, the Attorney-General and Congress were involved in the process of appointing independent counsels. Many of the independent counsels (Kenneth Starr is certainly a prominent example) were distinct political figures. Often, not only would a political connection not prevent the appointment of a person to the post of independent prosecutor, it would help the individual obtain that appointment.⁴⁵ Further, the American system whereby state judges are elected implies that the three-judge panel that confirmed the appointment and supervised the activities of the independent counsel was also not entirely dissociated from the political arena.

Against this background it is not surprising that in order to contend

39. *See id.*

40. *See id.*; Joseph E. di Genova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299 (1998); Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L.J. 2179 (1998); Shestack, *supra* note 36.

41. *See* di Genova, *supra* note 40, at 2303; Orenstein, *supra* note 40, at 2188-89; Sunstein, *supra* note 37, at 2276-77.

42. *See* Morrison v. Olson, 487 U.S. at 697 (1988) (J. Scalia, dissenting).

43. *See* Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2027, 2230 (1998); di Genova, *supra* note 40, at 2304.

44. *See* NEW YORK TIMES, June 28, 1999, June 30, 1999.

45. *See* Laurence E. Welsh, *The Need for Renewal of the Independent Counsel Act*, 86 GEO. L.J. 2379, 2383 (1998); *see* Michael R. Bromwick, *Running Special Investigations: The Inspector General Model*, 86 GEO L.J. 2027, 2230 (1998); di Genova, *supra* note 40, at 2304.

with the difficulties in the activities of independent counsel, it has been suggested that the political balances underlying their activities be changed.⁴⁶ Thus, for example, a proposal has been made to give the President absolute discretion over whether to appoint independent counsel, thereby eliminating the judiciary's role and placing responsibility with the politically-accountable executive.⁴⁷

Indeed, it is doubtful whether in the political tradition of the United States it is possible, or even desirable, to confer investigative and prosecutorial powers on completely apolitical bodies. Such bodies, even if they could be established, might be seen as weak and ineffective. Moreover, in so far as the investigations may lead to impeachment proceedings (which are a clear example of politics-as-law in its American manifestation), the political nature of these proceedings are consistent with the political characteristics of the investigative processes leading to them.

The main problem with the structure of the Ethics in Government Act is that it encourages excessive investigations and prosecutions.⁴⁸ This is undoubtedly less serious than would be the case if there were too few prosecutions against senior public officials, a situation which potentially has serious repercussions for the rule of law and public confidence in government. In any event, the problem of a surplus of investigations and prosecutions may be dealt with by changes in the allocation of power between the various authorities involved in the appointment of independent counsels and their supervision. This would eliminate the need to eradicate the office as a whole.

As a result of Israel's Bar-On Affair, there may be room to adopt the institution of Independent Counsel in Israeli law, despite the fact that the United States model of the office was cancelled. This suggestion is based upon the multiplicity of functions of the Israeli Attorney-General, who acts as both legal advisor to the Government and as the head of the prosecution in criminal trials. The fear that arises in light of routine working relations between the Attorney-General and senior government officials is that the Attorney-General may find it difficult to make unbiased and objective decisions regarding the conduct of investigations or filing of indictments against those officials.

In light of this problem, some scholars have proposed that the functions of the Attorney-General be divided and responsibility for criminal

46. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2136 (1998).

47. *Id.*

48. *But see* Dan W. Reicher, Note, *Conflicts of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975 (1983).

prosecutions be entrusted to a person who does not act as legal advisor to persons whom she may be required to one day indict.⁴⁹ Following the Bar-On Affair, a committee headed by former Chief Justice Meir Shamgar, in which three former Ministers of Justice and a professor of law were members, was appointed to consider and formulate recommendations relating to the appointment and powers of the Attorney-General. The committee rejected this proposal.⁵⁰ It was of the opinion that severance of the functions of the Attorney-General would weaken and impair the effectiveness her office and of the criminal prosecution.⁵¹ This was so, *inter alia*, because the power of the Attorney-General to institute criminal proceedings contributes to the willingness of government leaders to comply with her legal instructions for fear of an indictment if they fail to do so. In the opinion of the committee, the actual working relations between the Attorney-General and government officials did not prevent the institution of criminal proceedings against the latter.⁵² This was particularly true in light of the willingness of the Supreme Court to review the exercise of the Attorney-General's discretion not to indict. However, some members did argue that the Bar-On Affair raised doubt as to whether this was indeed the case.⁵³

Appointing a special prosecutor to handle concrete cases in which a suspicion exists that a criminal offense has been committed by senior government officials would not substantively impair the status of the Attorney-General. In view of the apolitical character of the Israeli legal establishment, it is likely that such an arrangement would not encounter the problems involved in its operation in the United States, namely the tendency to over-prosecute generated by political and media pressure. It may be assumed that, in Israel, professional jurists having no political affiliation (appointed as special prosecutors by apolitical Courts at the request of the Attorney-General or by the Attorney-General herself, who is also not a political figure) will not routinely lean towards an increase or decrease of prosecutions.

The proposal to adopt the institution of independent counsel in Israel is an example of an unconventional use of comparative law. Precisely because of the governmental and cultural differences between

49. See GAD BARZILAI & DAVID NACHMIAS, *THE ATTORNEY-GENERAL: AUTHORITY AND RESPONSIBILITY* 45-47 (1997) (Hebrew). The authors recommend that the government will be distanced from the appointment of the head of the criminal prosecution and that the appointment be entrusted to a primarily professional committee.

50. See The Shamgar Report, *supra* note 21, at 52-56.

51. See The Shamgar Report, *supra* note 21, at 48, 53-56.

52. See The Shamgar Report, *supra* note 21, at 48, 55-56.

53. For a discussion of judicial review of decisions of the Israeli Attorney-General not to indict government officials, see *infra* Part III.C.

Israel and the United States, an institution of American origin may achieve greater success in Israel than it has achieved so far in the United States.

III. THE BAR-ON AFFAIR: THE BACKGROUND, THE FACTS, AND THE LEGAL PROCEEDINGS

A consideration of Israel's Bar-On Affair requires knowledge of its basic facts. Naturally, it is not possible to set out the full details of the affair in this article.⁵⁴ It is essential however, to review the central factual and legal issues. The legal issues will be considered through a comparison with analogous laws of the United States.

On January 10, 1997, the Government of Israel decided to appoint Roni Bar-On to the post of Attorney-General. The appointment of Bar-On caused debate in the Government, and he was not unanimously appointed. This was due to the fact that at the time of his appointment Bar-On was an active member of the Prime Minister's political party (the "Likud"). He also was not considered to be one of the senior lawyers in Israel. Nevertheless, honoring the wishes of then Prime Minister Benjamin Netanyahu and his Minister of Justice Tzahi Hanegbi (in the past a paralegal of Bar-On), Bar-On was appointed by majority vote.

However, less than three days later—in the aftermath of public outcry, and petitions to the Supreme Court against the appointment and criticism of Bar-On's life style—Bar-On gave notice of his resignation. A few weeks later, in a highly acclaimed move, the Government decided to appoint Judge Elyakim Rubinstein to the office of Attorney-General. The Minister of Justice gave notice of the establishment of a distinguished committee, which was headed by the former Chief Justice Meir Shamgar, to make recommendations relating to the proper method of appointment of the Attorney-General.⁵⁵

It is likely that the affair would have ended at this point had it not been for a news item broadcast by the Television Channel 1 News Division. In the broadcast it was reported that the appointment of Bar-On had been made by the instigation of Knesset Member Arie Deri, then standing trial on charges of corruption. According to the news item, an understanding had been reached between Deri and Bar-On to the effect that if Bar-On were appointed to the post of Attorney-General, he would enter into a favorable plea bargain arrangement with Deri.⁵⁶ This plea

54. For a detailed description and discussion of the Bar-On affair, see Zeev Segal, *Shadows Surrounding the Rule of Law – Along with the Bar-On Affair and its Outcome*, 4 MISHPAT UMIMSHAL (HAIFA U. L. & GOVT. REV.) 587 (1998) (Hebrew).

55. See The Shamgar Report, *supra* note 21.

56. See HAARETZ, Jan. 23, 1997.

bargain would enable Deri, who prior to his trial had held the office of Minister, to return to his former position in the Government, thereby rescuing his political career. The journalist claimed that Deri insisted on the appointment of Bar-On and threatened that the political party headed by him ("Shas") would not support the Prime Minister in the important pending vote regarding Israel's withdrawal from the city of Hebron.⁵⁷ The broadcast charged that criminal elements had succeeded in bringing about the appointment of the head of the criminal prosecution service in Israel, thereby taking control of it. The seriousness of these charges led the acting Attorney General to order a police inquiry into the affair, a decision supported by the Prime Minister.⁵⁸

The police inquiry took approximately three months. It was conducted by the Head of the Investigative Branch of the Israeli Police, and it was closely supervised by the Attorney-General, the State-Attorney, and their staff. During the inquiry, all those involved in the affair were investigated, including the Prime Minister and various other ministers. At the conclusion of the investigation, on April 15, 1997, the police submitted all findings and recommendations to the Attorney-General. The police recommended that charges be brought against four people: Prime Minister Netanyahu, Minister of Justice Hanegbi, Knesset Member Deri, and Director-General of the Prime Minister's Office, Avigdor Liberman.⁵⁹

After the findings and recommendations of the police were examined, the Attorney General and the State Attorney published a detailed report on April 20, 1997, which included a decision of the Attorney General and an opinion of the State Attorney which was adopted by the Attorney General. The report gave notice of intention to bring charges solely against Knesset Member Deri (subject to his right to an oral hearing) and to close the files remaining against the other persons involved in the affair, including the Prime Minister.⁶⁰

Following are a number of brief excerpts from the report, the full version of which is, very long and detailed:

Our legal approach was that offenses of a political-public nature should be treated like every other offence, *i.e.*, the fact that the persons connected to the affair are from the public-political sector should not work for their benefit nor to their detriment. . . . Our

57. See JERUSALEM POST, Jan. 26, 1997.

58. See HAARETZ, Jan. 26, 1997.

59. See *id.*

60. The Attorney-General requested that the investigation continue with respect to two secondary persons involved – Director-General of the Prime Minister's Office Liberman and businessman David Appel, who were suspected of acting as middle-men in the affair. Ultimately, the investigation against both these persons was closed.

dilemma was very difficult also because of the need in our decision to examine the line distinguishing between culpability from a moral-public-ethical point of view, and what is criminal. . . . There are numerous sanctions against those committing offenses or who are guilty of omissions in the political arena. . . . [The political sanctions] do not negate, of course, the criminal aspect. . . . We did not regard this case as a “borderline” case, where – subject to the evidence – it is possible not to initiate criminal proceedings but to make do with other sanctions. . . . Our approach in examining the body of evidence was that if sufficient evidence existed, indictments would be filed – in the light of the extreme importance of the matter, which exposes the most unexplored elements of proper governance, and touches upon the heart of the system of law enforcement.

Sadly, the evidence gives rise to the suspicion that people who were subject to criminal proceedings united in order to decide who would be the Attorney-General, out of personal interests, using connections and political power, and even succeeded in this. At the same time, the inquiry did not reveal the full picture connected with the appointment of Bar-On. In this connection we should add that some of those involved did not cooperate and the impression left is that they did not tell everything known to them.

[In relation to Prime Minister Netanyahu:] The factual chronology of events . . . *prima facie* gives rise to puzzlement. . . . This puzzlement leads to a suspicion that those considerations mentioned by the Prime Minister [on which he based his decision to appoint Bar-On] were not the exclusive considerations, and that there was an additional motive to his desire to appoint Attorney Bar-On specifically. Indeed, there is a real suspicion that this motive was an illegitimate motive, the desires of Knesset Member Deri who influenced and pressurized the Prime Minister on this matter. . . . [However,] the existing evidence is not sufficient to prove this suspicion adequately in a criminal trial . . . although the doubts are looming, even if sufficient evidence was not found to file an indictment.

[In relation to Minister of Justice Hanegbi:] Indeed, from the beginning, he should have examined Deri’s reasons for wanting the appointment of Bar-On. . . . At the same time, in our opinion, against the background of his real desire to appoint Bar-On and his not being part of a wrongful conspiracy to appoint Bar-On to the position, his failing was not in the nature of a criminal offence. . . . [With regard to the conduct of the Minister of Justice during the Government meeting:] In our opinion, there was no criminal offence, even if there was a deviation from the norms of proper conduct.⁶¹

The very existence of an investigation conducted by the Head of the Investigative Branch of the Police, with the close and personal

61. The Shamgar Report, *supra* note 21.

involvement of the Attorney-General, coupled with the fact that the Attorney-General personally made the decision whether charges would be filed, demonstrates the complex relationship between politics-as-law and the politics of law. The fact that the Attorney-General himself made the decision not to prosecute gave rise to the impression that the Prime Minister was not being treated in the same way as every other citizen.⁶²

The difficulty increases in the context of the close working relations between the Prime Minister, the Minister of Justice, and the Attorney-General. It should also be noted that three of the attorneys assisting the Attorney-General in handling the affair, recommended that charges be brought against the Prime Minister, but their recommendations were rejected. These attorneys were far-removed in their regular work from the politicians standing at the head of the executive authority. In contrast, among the supporters of the decision of the Attorney-General were attorneys who worked in the Petitions Section of the State-Attorney's Office and who dealt with the representation of the State and its leaders in petitions brought before courts. In practice, the position of the Prime Minister was subjected to standards outside of the norm.

Despite this, it is difficult to see how the Attorney-General could have refrained from intervening in the affair for numerous reasons. First, such intervention is required by Basic Law: the Government, Section 25(a), which provides that "no criminal investigation shall be opened against the Prime Minister save with the consent of the Attorney-General, and no indictment shall be filed against the Prime Minister, save by the Attorney-General."⁶³

Secondly, and more importantly, the decisions that had to be made were grave decisions of historical significance. Attorney-General Rubinstein himself mentioned this when he noted that ". . . in the history of the State of Israel there is no case similar to the instant one in terms of sensitivity, the rank of those involved and also the heavy suspicion that casts its shadow on the investigation."⁶⁴ In such a case, and in the absence of an office of independent counsel in Israel, it is the head of the pyramid who bears overall responsibility in decision making. Accordingly, it is inevitable that the regulation of politics by law will result in the influence of politics on the law, or at least the semblance of such influence.

Immediately following the conclusion of the press conference in

62. See Mordechai Kremnitzer, *The Role of the Prosecutor*, 5 PLILIM (ISR. J. CRIM. JUS.) 173, 186 (1996) (Hebrew).

63. S.H. 1992, at 214.

64. Decision Atty. Gen. No. 3164/97, *The Investigation of the Affairs of Appointing Attorney Roni Bar-On to the Office of the Attorney-General-Findings and Conclusions* (Apr. 20, 1997).

which the decision of the Attorney-General and the State-Attorney was published, Prime Minister Netanyahu praised the fact that justice had been upheld and vowed to ensure that the necessary lessons would be learned from the affair.⁶⁵ Simultaneously, the Prime Minister condemned the political motives of those who had stood behind the broadcasts made against him.⁶⁶ Minister of Justice Hanegbi also applauded the result, which he regarded as a total vindication and a repudiation of all the charges made against him, including the charge of misleading the Government as to the stance of the Chief Justice in relation to the appointment.⁶⁷ Hanegbi stated that he intended to apply the lessons learned from this affair.⁶⁸

As a consequence of these events, petitions were filed before the Supreme Court sitting as the High Court of Justice. This is the central court in Israel for constitutional and administrative matters. All of the petitions were filed by public persons or bodies, most of which were opposition Knesset members. An organization specializing in the submission of petitions on matters of public interest ("The Movement for Quality of Governance in Israel") and a variety of citizens, the majority of whom were lawyers also filed petitions.

In these petitions, the Court was asked to order a number of remedies: (1) to order the Attorney-General to file indictments against Prime Minister Netanyahu and Minister of Justice Hangebi for their participation in the affair; (2) to order that the Minister of Justice be removed from his position as a minister in the Government, or at least that he be transferred from the office of Minister of Justice to another ministerial position; and, (3) to require the Government to set up a legal commission of inquiry, headed by a judge, to investigate the affair.⁶⁹

65. See JERUSALEM POST, Apr. 21, 1997.

66. Prime Minister Netanyahu stated, "There is a big difference between making a mistake and committing an offense. I made a mistake in the appointment [of Bar-On], but did not commit a transgression. . . . Some media people identified with the left were happy to adopt every malicious accusation, as imaginary as it may be or as groundless, as long as I was at its center." JERUSALEM POST, Apr. 21, 1997.

67. See HAARETZ, June 16, 1997.

68. See *id.*

69. The Court also was asked, as secondary relief, to order the State to give the petitioners all investigative material gathered by the police during the course of the affair, the final report of the police, and the dissenting opinions of a number of attorneys who were part of the investigative team and who reached the conclusion that the evidentiary material was sufficient for an indictment against the Prime Minister. This application was denied by majority decision, on the grounds that the delivery of the material asked for would not assist the adjudication of the petitions, in light of the detailed report of the Attorney-General and State-Attorney. See H.C. 2534/97, *Yahav v. State-Attorney*, 51(3) P.D. 39. An additional petition filed against the decision to indict Knesset Member Deri, contending that the decision was tainted by discrimination on ethnic grounds, was withdrawn by the petitioner at the suggestion of the Court. In this article I shall not deal with the

In a line of judgments, all of which were given on June 15, 1997, the Supreme Court dismissed all the petitions. Some of the petitions were dismissed unanimously, while others, including the petition to indict the Prime Minister, were dismissed by a majority of four justices to one.⁷⁰

It should be noted that the hearing in the High Court of Justice takes place in two stages. In the first stage, the Court decides whether there is a *prima facie* basis for the petition.⁷¹ If such a basis is found, a decree *nisi* is issued requiring the respondents to make an affidavit in reply.⁷² The issue of a decree *nisi* in effect shifts the onus of proof, and it is for the respondents to persuade the Court why it would be proper to dismiss the petition.⁷³

In the Bar-On case the petitions were dismissed in the first stage, without the grant of a decree *nisi*. Thus, it may be inferred that even the minority justices in the petitions dismissed by a majority did not express a firm opinion that the petitions should be upheld, but they merely held that, *prima facie*, the petitions were serious and could potentially be upheld, and that there was room to issue a decree *nisi*.

Hereafter, I shall consider the grounds for the decisions in relation to each of the issues that arose in these hearings.

IV. THE DECISION NOT TO INDICT THE PRIME MINISTER AND THE MINISTER OF JUSTICE, AND JUDICIAL REVIEW THEREOF

A. *The Prime Minister*

Both in Israel and in the United States, the decision whether or not to indict requires a determination in relation to three subsidiary considerations: (1) whether the act which a person is alleged to have committed is an offense; (2) whether there is a public interest in putting that person on trial; and (3) whether there is sufficient evidence against the suspect to warrant an indictment.⁷⁴

In Israel one does not encounter the American problem of whether it is possible to criminally indict a sitting President who has not first

public reaction to the decision to indict Knesset Member Deri alone, a decision which was indeed interpreted by part of the public as reflecting a discriminatory attitude.

70. As a rule, the Supreme Court of Israel, which is comprised of twelve justices, does not sit with a full complement, but with benches of three justices, generally selected at random and changing from case to case. Nevertheless, in important petitions, greater numbers of justices sit. In view of the importance of the Bar-On Affair, five justices sat in judgment.

71. See Regulations of Procedure in the High Court of Justice, 1984, K.T. 1984 at 2321, regulation 5.

72. See *id.* regulations 7, 8.

73. See *id.* regulations 7, 8, 16.

74. See 1951, S.H. 228.

been impeached by the Senate.⁷⁵ The Israeli Basic Law enables the indictment of a sitting Prime Minister, provided that the charges are personally filed by the Attorney General and are heard by a bench of three judges in the District Court of Jerusalem.⁷⁶

The offense attributed to Prime Minister Netanyahu was a breach of trust affecting the public. This offense is considered problematic because its *actus reus* is not clearly defined in an objective manner. This is contrary to what is generally required in criminal law. Therefore, the Courts require that each of the three aforementioned considerations be rigorously met.

With regard to Prime Minister Netanyahu, the Attorney-General concluded that the first two requirements for instituting an indictment had been satisfied. The Prime Minister was suspected of committing the offense of breach of trust in one of two ways. Either Netanyahu had promised Knesset Member Deri to appoint Bar-On to the position of Attorney General with the knowledge that Deri had hoped for the appointment to promote his own interests in the criminal proceedings being conducted against him, or he had recommended the appointment of Bar-On to the position knowing the improper connection between Bar-On and Deri. Each of these alternatives amounted to a criminal offense. They were not borderline behaviors from the point of view of criminality. Similarly, there was a public interest in filing indictments in relation to such acts.

Nevertheless, the Attorney General did not find sufficient evidence to prove the suspicions against the Prime Minister, which would have warranted issuing an indictment against him. In so finding, the Attorney General was of the opinion that the evidentiary material in relation to the Prime Minister should be examined in accordance with ordinary standards accepted in every criminal case. Effectively, he took a stance on what was not an easy question. On the one hand, distinguishing between the Prime Minister and ordinary citizens in such a way that evidence which would be sufficient to indict the latter would not be regarded as sufficient to indict the former could be interpreted by the public as a serious violation of the principle of equality. This was true because it appeared to favor those in governmental positions. On the other hand, indicting the Prime Minister could have far-reaching repercussions. There is a strong possibility that had a decision been made to indict him, Prime Minister Netanyahu would have resigned or at least suspended

75. See JOHN HART ELY, ON CONSTITUTIONAL GROUND 137-40 (1996); ERIC M. FREEDMAN, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7 (1992).

76. 1992, S.H. 214.

himself for a significant period of time until the conclusion of his trial. This, in turn would have altered the history of the State of Israel. Should this consideration not be taken into account when determining the evidentiary standard for filing an indictment? Shouldn't the Prime Minister be subject to more exacting standards to ensure that he would only be indicted when it was certain that the existing evidence would lead to his conviction? Is this not the best way to prevent any possibility of an unjustified displacement of a Prime Minister elected by the people?

Indeed, Justice Dalia Dorner, the minority judge in the petition to order the Attorney General to indict the Prime Minister, in a restrained formulation, commented that "from the reasons for the closure of the investigative file against the Prime Minister, it appears that the Attorney General erred in applying the test, and in fact the threshold according to which the evidentiary material was examined was higher than the standard which he wished to apply."⁷⁷

The justices of the majority did not dispute this statement, but they noted that in the light of the particularly wide discretion conferred on the Attorney General, and the thoroughness with which he had considered the material, there was no room for the Court to annul his decision. In other words, the Attorney General declared that he had acted in the matter of the Prime Minister in accordance with standards which were equal to those applied in the case of ordinary citizens. This declaration was inescapable from public scrutiny. Yet, in practice, he applied more exacting standards to the case of the Prime Minister than was customary.

The consequential impression is that the Court was aware that the Attorney General had applied strict standards, or at least suspected that this was the case, but it was willing to acknowledge and accept this exigency. Indeed, this is a clear example of the inevitable link between the concern of the law with politics and politicians and the infiltration of political considerations into the substance of the law and the legal establishment.

In the United States, this problem is less prominent because there is no link between ordinary criminal proceedings and the holding of office by elected officials, whereas impeachment proceedings are conducted by manifestly political authorities that openly take into account considerations that differ from those weighed in ordinary criminal proceedings.⁷⁸

As noted, immediately upon the publication of the Attorney General's decision (and again thereafter, with the publication of the judgment of the Supreme Court) Prime Minister Netanyahu praised his acquittal and the repudiation of the charges made against him. He did

77. H.C. 2534/97, *Yahav v. State-Attorney*, 51(3) P.D. 1, 36.

78. See also *supra* notes 50-55 and accompanying text.

not refer to the grave matters raised in the report issued by the Attorney-General and the State-Attorney concerning the "puzzling aspects" of his version of events and the affair as a whole, which raised "a real suspicion" that there had been an "improper motive" for Bar-On's appointment. It is possible that there is no fault in the explanatory tactics adopted by the Prime Minister, who is entitled to justify himself before his electorate and before all the citizens of the country. Nevertheless, his remarks also exploited a gap (of which the general public was unlikely to be aware). This is the gap between the determination that the evidence against the Prime Minister did not justify the far-reaching step of filing an indictment against him and the conferral of public and ethical approval of his conduct.

The strict laws of evidence that are adapted to the needs of criminal law, where it is sufficient to point to a reasonable doubt for an acquittal, have therefore been transferred to the political arena, where it is doubtful they were ever intended to apply.⁷⁹ Clearly, the Prime Minister did not emerge the loser from the application of criminal law standards to his conduct. On the contrary, despite the embarrassing remarks in the Attorney General and State Attorney's report in relation to his conduct and the explanations offered by him, the Prime Minister could present himself as someone exonerated by the professional, non-political establishment, by reason of his not having been put on trial. The legal handling of his "suspicious" political actions actually conferred a political benefit, which was obviously unintended by the report's authors. Some people even speculated that the Prime Minister, who, as noted, supported the institution of a police inquiry into the affair, took that risk believing the police would not find sufficient evidence to bring an indictment against him. He indeed preferred this course of action to the institution of a legal commission of inquiry, which might have rejected the application of strict standards of evidence as accepted in criminal proceedings, and might instead have recommended his dismissal from office.

At this point it is illustrative to draw a comparison with the American Watergate and Clinton-Lewinsky Affairs. In the Watergate affair, President Richard Nixon never was put on trial, having been pardoned by his successor, President Gerald Ford. Nixon himself applied to the Courts only over the issue of whether certain conversations held between himself and his advisors enjoyed presidential privilege.⁸⁰

79. This is because the standard of proof needed on the administrative-public level, and even in circumstances where there is a possible violation of a basic right, is generally lower than the standard of proof needed in criminal proceedings. See BARUCH BRACHA, II ADMINISTRATIVE LAW 305-306 (1996) (Hebrew).

80. See *United States v. Nixon*, 418 U.S. 683 (1974); Senate Select Committee on

Despite the criminal charges brought against some of Nixon's aids, it appears as though the huge impact the affair had on American society, culture, and politics did not arise primarily from the legal fact that certain acts were prohibited by penal law. As noted by one interviewee, Rabbi Stewart Weiss, in a survey conducted among Israeli residents of American origin following the Bar-On Affair:

The real issue in Watergate was not the crime itself, it was the cover up and the tremendous arrogance and disregard for public sentiment. . . . [In the Bar-On Affair] I . . . don't get the sense of arrogance, and that was something else you had as a backdrop, this tremendous antiestablishment feeling against the arrogance of Nixon totally stonewalling [the investigation]. You didn't have the same kind of "us against them" setup that you had then.⁸¹

Similar characteristics, notwithstanding the difference in their manner of expression, became part of the political and public discourse in the Clinton-Lewinsky Affair. The various decisions made during the course of the impeachment proceedings instituted against President Clinton were essentially guided by party considerations. The proceedings, legal in form, were merely ceremonial. Their substance was political. The fact that the open arguments and reasoning were all legal in character, could not conceal the true nature of the proceedings, is reflected in the almost exact division along party lines of the positions taken in the various votes. This party division was particularly obvious in view of the American system of government, which encourages the independence of elected officials and weakens party discipline. The fact that the recommendations of Independent Counsel Kenneth Starr⁸² were also not regarded as free from political prejudice certainly contributed to the blatantly political nature of reactions to them.

The usual interpretation given to the constitutional provisions regarding impeachment,⁸³ provided in Article II, Section 4, of the Con-

Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (1974); see also Nixon v. Administrator of General Services Administration, 433 U.S. 425 (1977). This case law is widely discussed in legal literature. See, e.g., Paul A. Freund, *The Supreme Court, 1973 Term – Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974); NOWAK & ROTUNDA, *supra* note 31, at 236-40.

81. JERUSALEM POST, April 25, 1997.

82. KENNETH W. STARR, OFF. OF INDEP. COUNS., *THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR* (1998) (referred to the Committee on the Judiciary pursuant to 28 U.S.C. § 595 (c)).

83. See generally BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (1999); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974) and Akhil Reed Amar's forward to the 1999 reprint; MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* (1995); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 86 TEX. L. REV. 1 (1989); JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* (1978); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 289-96 (2d ed. 1988).

stitution, illustrates the American politics-as-law attitude. Indeed, the Constitution only empowers the Senate to remove the President, the Vice-President, and other civil officers of the United States from office if these persons are found guilty of the criminal offenses of "treason, bribery, or other high crimes and misdemeanors."⁸⁴ The Senate is not empowered to remove the President and other civil officers from office on grounds of a political dispute, however serious, or for behavior that does not fall within the limits of the offenses set out in the Constitution, even if the behavior is immoral or makes the official unfit for her office.

The traditional interpretation of the Constitution, however, requires that the grounds for removal from office disclose unfitness of the officer for the office and take into account the significance, from a democratic values point of view, of removal from office.⁸⁵ Accordingly, particular caution must be exercised in removing an elected President from office, where the significance is the negation of the choice of the people.

Additionally, Congress' decisions during impeachment proceedings are not subject to judicial review. The Senate sits in these proceedings as a supreme court, and other courts are not entitled to interfere with its decisions.⁸⁶ The significance of this is that there is no way of compelling Congress to follow substantive legal rules in relation to the impeachment and removal of civil officers. In practice, the House of Representatives may impeach, and the Senate may remove from office civil officials, including the President, who have been proved to have committed the offense of treason, bribery, or another high crime or misdemeanor. The opposite is also true. Notwithstanding the imperative language of the Constitution, which provides that a person convicted of an offense of this type by the Senate "shall be removed from office," the Senate may refrain from removing civil officers from office even when there is no doubt that cause exists for such removal. In exercising its discretion Congress may thus weigh considerations. As noted, the Clinton-Lewinsky Affair showed that many of Congress' members weighed partisan considerations. They may also take ethical issues into account, even if these are not within the ambit of their jurisdiction.

Thus, the grounds that American constitutional law provides for the

84. See U.S. CONST., art. II, § 25.

85. See William Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903 (1991).

86. See, e.g., Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments after Nixon*, 43 DUKE L.J. 231 (1994). But see Robert S. Catz, *Judicial Review of Congressional Exercise of Impeachment Process*, 40 KAN. L. REV. 853 (1992); Lisa A. Kainec, *Judicial Review of Senate Impeachment Proceedings: Is a Hands Off Approach Appropriate?*, 43 CASE W. RES. L. REV. 1499 (1993); Thomas D. Amrine, Note, *Judicial Review of Impeachment Proceedings*, 16 HARV. J.L. & PUB. POL'Y 809 (1993).

removal from office of civil officers are connected to criminal law, but they also take into account the moral, political, and democratic significance of the displacement. Moreover, in the absence of any judicial review, it is possible to weigh considerations other than those which are criminal or which are formally permitted. Yet all this is carried out within the framework of a traditional criminal trial even though the content is fundamentally political.

The ritual of a criminal trial in which certain political and ethical decisions are made in the United States fulfills a dual function. On one hand, it provides a legitimate instrument for making grave decisions, at least some of which infringe upon the democratic choices of the public. Removal from office on the basis of a conviction may be perceived as more legitimate than displacement in a routine political-administrative process. On the other hand, the ritual of a criminal trial contributes to restraint of Congress itself in the exercise of its powers. Even if the members of Congress do not restrict their deliberations to legal-criminal considerations, the ritual in which decisions are made symbolizes the thoughtfulness and restraint which society expects of them. Even if the House of Representatives may impeach, and the Senate may remove from office, on the basis of party political or moral-ethical considerations, the ritual of a criminal trial prevents this from being done, save when these considerations are weighty, from the point of view of the members of Congress and in public perception.

This ensures the stability of American government institutions that seem to be the greatest in the world. In Israel, for example, even after the shift from the election of the Prime Minister by the Parliament to his direct election by the people, the Knesset may remove her from office in an ordinary parliamentary procedure. There is no need for impeachment or for any other criminal ritual. It suffices to show ordinary political grounds, such as disagreement with the policy of the Prime Minister, and, even for the sake of appearances, there is no need for the Knesset to bring charges against her.⁸⁷ This state of affairs encourages continuous efforts to bring down the Prime Minister. One of these efforts recently succeeded.

In contrast, a determination by the American Senate within the impeachment process, whether there is an acquittal or a conviction, does not amount to a public closure. The openly political character of the process derogates from the public's confidence in it. The legal ceremony with which it is held does not compensate for this. Almost paradoxically, it is actually the legal determination, which seeks to reflect the law rather than the public view, that has the potential to attract public

87. See 1992, S.H. 214.

confidence beyond that which is attracted by decisions made by clearly representative political branches.

At the same time, it seems that the gap between the law and public opinion is wider in Israel than in the United States, where the legal establishment is not perceived to be totally detached from the political legislative and executive branches. Whereas the significance and political consequences of the Watergate and Clinton-Lewinsky Affairs ensued from the political and moral construction given them by the public, Israel's Bar-On Affair was judged mainly by its criminal implications. Following the finding that there was no room for criminal sanctions to be imposed against the heads of government (except for Knesset Member Deri), the incident as a whole was perceived as essentially legitimate, and, in any event, not one that justified unusual public or political scrutiny beyond the legal inquiry already conducted.

B. *Minister of Justice*

With regard to Minister of Justice Hanegbi, there was no evidence that he was a participant in or aware of the conspiracy alleged to have existed between Bar-On and Knesset Member Deri. It became clear, however, that the Minister avoided making a report to the cabinet with regard to the stance taken by Chief Justice Aharon Barak, with whom the Minister had spoken shortly before the cabinet meeting in which the Bar-On appointment was recommended. In that conversation, which has become something of a constitutional custom in Israel, the Chief Justice made clear to Hanegbi his opinion that Bar-On was not a suitable candidate for the post of Attorney General. With regard to this conduct of the Minister of Justice, the State Attorney wrote, and the Attorney General agreed, that it reflected a "deviation from proper norms of conduct," but did not amount to a criminal offense.⁸⁸

This opinion is correct. Not every political scheme that involves lack of complete honesty and deviates from "proper norms of conduct" is a criminal offense that should impose on the person engaged in the scheme the stigma of an "offender" and expose her to criminal sanctions of imprisonment, fines, and the like. The Minister of Justice nevertheless presented himself to the public not as one whose acts were found not to be criminal, but as one whose conduct had been legitimized. It is doubtful whether one should criticize a political figure who does his best to explain himself and defend his reputation before his electorate. As with the case of the Prime Minister, the political gains that politicians

88. See Decision no. 3164/97, *supra* note 64.

may earn from having their conduct pass through the filter of the criminal legal system is exposed.

The substance and objectives of the criminal system were not intended to determine the public or moral propriety of the conduct of political figures. Much of the public, however, is unaware of this, and it is therefore possible to manipulate public opinion in such a way that it equates the absence of criminal guilt with moral and public propriety.

C. *Judicial Review of the Attorney-General's Decisions*

Since the early 1980s,⁸⁹ the Israeli Supreme Court has been prepared to engage in judicial review of decisions to indict. In this context, the position in Israel is different than the prevailing climate in the United States, where, as a rule, the courts refrain from judicial review of indictment decisions.⁹⁰ In the United States, on the other hand, competent public figures are not detached from politics, and some even are elected by the citizens.

The central reason for forbidding judicial review of indictment decisions in the United States is the separation of powers principle. The executive branch is exclusively responsible for filing indictments, a function which it performs, by taking into account political considerations that are outside the sphere of the judicial authorities. Judge Jones commented on the separation of powers doctrine:

The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney-General is the hand of the President in taking care that the laws of the United States in legal proceedings and in prosecution of offenses, be faithfully executed. . . . The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the Court, he is nevertheless an executive official of the government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the Courts are not to interfere with the free exercise of the discretionary powers of the attorney of the United States in their control over criminal prosecutions.⁹¹

Conversely, Israel has no similar fundamental obstacle to judicial

89. See H.C. 329/81, *Nof v. Attorney-General*, 37(4) P.D. 326.

90. See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Wade v. United States*, 504 U.S. 181, 185 (1992).

91. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

review of the Attorney General's decisions. This consideration is generally not raised as a concern leading to the Court's decision not to intervene⁹² because the common perception in Israel does not regard the judicial review of the legality of actions of other branches as a violation of the separation of powers. It regards judicial review as the proper fulfillment of judicial functions.⁹³ Further, in practice, the Attorney General, by reason of the autonomous and apolitical nature of the office, is perceived to be a part of the legal establishment, which is as close to the judiciary as it is to the executive branch.⁹⁴

To date, the Israeli Supreme Court has annulled the decision of the Attorney General in relation to the filing of indictments in only two cases.⁹⁵ While the Court purported to exercise its review on the basis of all the grounds of judicial review applicable to administrative decisions, its judgments essentially concentrated on the grounds of lack of reasonableness.

Normally, a decision of a public authority may be annulled by the Court if the authority attributes unreasonable relative weight, which no reasonable authority would have attributed, to the various relevant considerations. As a rule, a number of options are available from which an authority may choose to exercise discretion; these options are located in the "zone of reasonableness."⁹⁶ Only an option that is plainly outside the "zone of reasonableness" will be regarded as unlawful and annulled.⁹⁷

In practice, the connection exists between the development of the unreasonableness ground for judicial review, which was shaped into its modern form in the 1980s⁹⁸ and the development of the willingness for

92. For criticism of this, see an article of the Attorney-General who preceded Bar-On, Michael Ben-Yair, *Judicial Review in Israel of the Attorney-General's Decisions Concerning Law Enforcement*, 5 PLILIM (ISR. J. CRIM. L.) 5, 19-23 (1996).

93. See, e.g., H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 463.

94. For the contention that the Attorney-General in Israel has actually become a separate authority, see Eli M. Salzberger, *The Doctrine of the Separation of Powers and the Role of the Attorney-General in Israel*, 5 PLILIM (ISR. J. CRIM. L.) 149 (1996).

95. See H.C. 223/88, Sheftel v. Attorney-General, 43(4) P.D. 356; H.C. 935/89, Ganor v. Attorney-General, 44(2) P.D. 485; H.C. 7074/93, Suissa v. Attorney-General, 48(2) P.D. 748 (requiring the Attorney-General to order the continuation of an investigation into the possibility of instituting disciplinary proceedings against the Inspector-General of the Police). In another case, the Supreme Court annulled a decision of the Military Advocate General, whose power to decide on the indictment of soldiers corresponds to that of the Attorney-General in relation to civilians, not to bring criminal proceedings against an officer. See H.C. 425/89, Tsufan v. Military Advocate-General, 43(4) P.D. 718.

96. See Itzhak Zamir, *Administrative Law*, THE LAW OF ISRAEL: GENERAL SURVEYS 51, 71-73 (Itzhak Zamir & Sylviane Colomob eds. 1995).

97. See Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in PUBLIC LAW IN ISRAEL 327, 327-30 (Itzhak Zamir & Allen Zysblat eds., 1996).

98. See H.C. 389/80, Gold Pages Ltd. v. The Broadcasting Authority, 35(1) P.D. 421.

judicial review of the decisions of the Attorney General. The unreasonableness ground, which is presented by the Court as a substantive rule of lawfulness,⁹⁹ is used cautiously. In practice, however, it has no life of its own outside the scope of judicial review. During the nearly twenty years in which courts exercised judicial review under the ground of unreasonableness, less than twenty decisions have been annulled on this ground. As previously noted, two of these have been decisions of the Attorney General.

The ground of unreasonableness is of great value because it forces authorities, including the Attorney General, to be prepared to justify their decisions and actions. Only in rare cases, however, will a decision be annulled by the Court on grounds of lack of reasonableness. As a result, the ground is more than an effective review of administrative decisions. It is a means of conferring unintended judicial approval and legitimization of them.

The Bar-On Affair provides an interesting illustration of this phenomenon. In the judgment concerning the Attorney General's decision not to indict Prime Minister Netanyahu, the Court held that the decision lay on the borderline of reasonableness, within "the gray area."¹⁰⁰ In the opinion of the Court, the decision was not "reasonable" within the ordinary meaning of the word, but the Court was not willing to hold that it was "unreasonable in an extreme manner."

A supporting opinion by Justice Theodore Orr, along with Deputy Chief Justice Shlomo Levin and Justice Itzhak Zamir, clarified that a distinction should be drawn between the Attorney General and other authorities.¹⁰¹ The Court held that its decision to refrain from intervening in the decision of the Attorney General was made against the background of the wider than usual "zone of reasonableness" afforded to the Attorney General and the particularly extensive credit to which he was entitled. Nevertheless, the Attorney General's decision fell within the "gray area" that lies on the border of annulment.

The Prime Minister and Minister of Justice were not the only parties who praised the decision of the Supreme Court.¹⁰² Even the Attorney General and his staff expressed satisfaction with the determination of the Court relating to the "reasonableness" of the decision, particularly its decision to refrain from issuing a decree *nisi* in respect of it.¹⁰³ Here

99. See, e.g., H.C. 3094/93, The Movement for Quality of Governance, 47(5) P.D. at 420.

100. H.C. 2534/97, Yahav, 51(3) P.D. at 25.

101. *Id.* at 27-33.

102. Prime Minister Netanyahu stated: "I'm very happy with the decision of the High Court. I think this is a day that has made all citizens of Israel happy." JERUSALEM POST, June 16, 1997.

103. The Director of the Petitions Division in the State-Attorney's Office, Uzi Fogleman, who represented the Attorney-General and the State-Attorney in the Supreme Court, said that "the

too, it appears that the general public was not aware of the niceties of the distinction between non-intervention on the part of the Court and a positive determination by the Court that the decision was reasonable and proper.

The Supreme Court's decision in the Bar-On Affair is another example of how the exercise of judicial review of a decision may, contrary to its purpose, become a tool which confers substantive public legitimacy on that decision.

V. THE DECISION NOT TO REMOVE MINISTER OF JUSTICE FROM OFFICE, AND JUDICIAL REVIEW THEREOF

As a result of the Bar-On Affair, a petition was filed asking the Court to order that Tzahi Hanegbi be removed from his position from the office of Minister of Justice. The petitioner relied on the opinion of the State-Attorney, which stated that even if Hanegbi's conduct did not amount to a criminal offense, it still comprised a "deviation from proper norms of behavior."¹⁰⁴ The petitioner asked that the Prime Minister be required to exercise his powers in accordance with Section 35(b) of Basic Law, which states, in pertinent part, that to remove a minister from office, the Government must use the powers conferred under Section 39(a)(2) of this Basic Law, which changes the distribution of functions of the ministers.¹⁰⁵ This petition was also dismissed, but this time against the dissenting opinion of Justice Goldberg.¹⁰⁶

In the eyes of an American jurist, a petition of this type probably would be regarded as fairly surprising. In terms of American law, the power to appoint and dismiss State Secretaries is located exclusively within the province of the elected political authorities, i.e., the President and Congress, and the Supreme Court would regard it as a clearly "political question," in which it would not intervene.¹⁰⁷ This is not the case in Israel. A number of years ago, the identical petitioner succeeded in persuading the Supreme Court to order the Prime Minister to dismiss a

bottom line was that the Court had upheld the State's version as being reasonable." The Attorney-General himself, Elyakim Rubinstein, stated, "There is no universal truth and there are always dissenting opinions about what is right or wrong." *JERUSALEM POST*, June 16, 1997. These comments, which referred to the minority opinion of Justice Dorner, imply that in the opinion of the Attorney-General, the majority had held that his opinion was "right."

104. See Decision no. 3164/97, *supra* note 64.

105. S.H. 1992, at 214.

106. H.C. 2533/97, *The Movement for Quality of Governance in Israel v. The Government of Israel*, 51(3) P.D. 46.

107. For a summary of the "political question" doctrine, see JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUT SHELL* 47-53 (2d ed., 1991); Robert J. Pushaw, Jr., *Justiciability And Separation Of Powers: A Neo-Federalist Approach*, 81 *CORNELL L. REV.* 393, 498-99 (1996).

minister charged with offenses of corruption.¹⁰⁸

Justice Zamir, who wrote the leading opinion in the petition to require the Prime Minister to remove Minister of Justice Hanegbi from office, refrained from a rigid delineation of the duty to remove a minister from office in the event that an indictment for a serious offense was filed. In his words, "one should not negate the possibility that the conduct of a minister. . . in a certain case, even if it does not amount to a criminal offense, will be serious in a sufficiently extreme manner, so that it would be unreasonable in the extreme to enable him to continue in office."¹⁰⁹

The Court nevertheless dismissed the petition requiring the Prime Minister to remove Minister of Justice Hanegbi from office. This was due to the fact such a duty would be imposed only in rare and exceptional circumstances when an indictment is not filed. Hangebi's case did not meet these criteria. Justice Zamir wrote, "There is a great gap between an extreme case such as this which forms an exception to the rule, and a wide rule which invalidates a minister or deputy minister in every case of conduct which exceeds the norms of proper behavior."¹¹⁰

The Supreme Court considered the fact that the use of judicial force to exercise the power to dismiss a minister creates tension between the Court, "which is largely built on values,"¹¹¹ and democracy, "which is primarily built on representation."¹¹² The Court stated, "[I]t is for the Court to balance these interests."¹¹³ In this balance, wrote Justice Zamir, "[L]aw cannot, and should not, replace ethics, except in a partial manner, in respect of a particular point, in a cautious and supervised fashion."¹¹⁴ Quoting another judgment, which he had also written, Justice Zamir added, "[T]he Court must also consider, *inter alia*, the realities of life, which sometimes lead the public to ask to be represented by a person who is not a model of proper behavior."¹¹⁵ As in earlier cases on similar issues, the Israeli Supreme Court refrained from referring to the separation of powers doctrine, which underlies the American political question doctrine, as a ground for a court's self-restraint when considering the dismissal of a minister.

Consistent with their reactions to the other legal decisions dis-

108. H.C.J. 4267/93, *Amiti - Citizens for Proper Administration and Purity of Standards v. Prime Minister*, 47(5) P.D. 441.

109. H.C. 2533/97, *The Movement for Quality of Governance*, at 63.

110. *Id.* at 64.

111. *Id.* at 63.

112. *Id.*

113. *Id.*

114. *Id.* at 62.

115. A.S.S. (Appeal of the State Service) 4123/95, *Orr v. State of Israel - State Service Ombudsman*, 49(5) P.D. 184, 190.

cussed above, the public figures involved here expressed their satisfaction with the judgment.¹¹⁶ In practice, despite feeble political efforts to force the Prime Minister to transfer Hanegbi from the Ministry of Justice to another Government ministry, Hanegbi remained in office. His political strength exceeded that of his opponents. The attempt to remove him from office by means of a petition for judicial relief was left as the sole significant effort to impose political sanctions on him for his conduct in the Bar-On Affair.

This discussion clarifies that, while the Israeli Supreme Court upheld the right to judicial review of nominations for ministerial positions, it also greatly restricted its actual intervention in such matters. The legal and judicial treatment of this matter is the principal, and often the sole, way of scrutinizing such nominations. In that respect, there is little basis for Justice Orr's words concerning the "variety of means of scrutiny," which allegedly applies to the oversight of Government work. From a different point of view, however, the legal standards may be met easily by politicians who are not corrupt or who have not been proven corrupt according to legal evidentiary tests. Moreover, the refusal of the Court to intervene is construed by politicians concerned in the matter. The general public, which looks only at the judgments' bottom lines also attempts to legitimize and justify substantively the conduct at issue.

It is interesting to speculate as to the political result in the United States of non-disclosure by a Secretary of State (or other senior official) of data relevant to a decision which that official has asked the authority to make to a competent authority, such as a congressional committee.¹¹⁷ The likelihood is that even though the Court would not intervene, the official would be dismissed or resign from her post, as the "deceived" authority. Public opinion would probably find it difficult to accept that such an official should continue to remain in office.

VI. THE DECISION NOT TO ESTABLISH A LEGAL COMMISSION OF INQUIRY, AND JUDICIAL REVIEW THEREOF

A. *The Nature of a Legal Commission of Inquiry in Israel, its Powers, and the Purposes for which it is Established*

The subject of legal commissions of inquiry, established in accordance with the Commissions of Inquiry Act of 1968,¹¹⁸ has achieved constitutional importance in Israel. This is unlike the situation of any other country. A legal commission of inquiry, despite its English origins in

116. See JERUSALEM POST, June 16, 1997.

117. In the United States there is no "government" in the Israeli format of a cabinet which comprises all the ministers and stands at the head of the executive branch.

118. 1968, S.H. 28.

England¹¹⁹ and other countries influenced by the English system of law such as Canada and Australia, is an institution unique to Israel.¹²⁰ In the United States, no institution performs a similar function.¹²¹ Inquiries, which in Israel are subjected to legal commissions of inquiry headed by judges, are traditionally conducted in the United States by congressional committees.¹²²

Israel's Commission directs political questions into legal judicial channels.¹²³ The commission of inquiry, which was originally an arm of the Government, has become a judicial institution. Some see it as epitomizing the infiltration by the executive branch into matters that were within the competence of the judiciary,¹²⁴ because it often deals with political matters, or with matters that involve questions of policy.

The principal elements of the Israeli Commissions of Inquiry Act are as follows: Section 1 of the Act provides, "When it appears to the Government that a matter exists which is at the time of vital public importance and requires clarification, it may decide to set up a commission of inquiry which shall inquire into the matter and shall make a report to it."¹²⁵

At the head of the commission stands a judge or a retired judge of the Supreme Court or a District Court.¹²⁶ The chairman and members of the commission are selected by the Chief Justice.¹²⁷ Like court proceedings, those summoned before the Commission have a duty to testify before a Commission of Inquiry and produce documents for it.¹²⁸ The Commission is entitled to appoint evidence collectors on its behalf, and

119. See Ze'ev Segal, *The Power to Probe into Matters of Vital Public Importance*, 58 TUL. L. REV. 941, 941-942 (1984).

120. See RUBINSTEIN, *supra* note 8, at 834.

121. Although, in exceptional cases, a special *ad hoc* committee chaired by a judge is appointed, which investigates matters of public importance. An example of such a committee is the committee chaired by Justice Earl Warren, which was appointed to investigate the murder of President John F. Kennedy.

122. See JAMES HAMILTON, *THE POWER TO PROBE* (1977); PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 17-33 (1978); TRIBE, *supra* note 83, at 287-89. It should be pointed out that in Israel too, the committees of the Knesset have the power to institute an investigation. See Basic Law: The Knesset, Section 22. Use of this power, however, is rare, and investigations conducted by these committees do not attract the same public prestige as investigations conducted by the United States Congress (or by the legal commissions of inquiry in Israel).

123. See RUBINSTEIN, *supra* note 8, at 834.

124. See Ze'ev Segal, *Commission of Inquiry According to the Commissions of Inquiry Law, 1968: Its Constitutional Status and its Legitimate Scope of Action*, 3 BAR-ILAN L. STUD. 199, 206 (1984) (Hebrew).

125. 1968, S.H. 28.

126. See *id.*

127. See *id.*

128. See *id.*

an attorney who is not in the State Service to assist it.¹²⁹ The Commission is required to allow a person who is likely to be harmed by the inquiry or its results to be heard, as well as to allow her to review evidence which is in the Commission's possession, examine witnesses, and bring evidence before the commission.¹³⁰ Therefore, the Commission is not bound to follow the other rules of procedure or rules of evidence applied to courts. Instead, it may decide these matters at its discretion.¹³¹ The Attorney-General may, by herself or through her representative, appear before the Commission and examine witnesses.¹³²

As a rule, the deliberations of the Commission are public and the report prepared by it is published. However, the report may be kept secret where necessary, "in the interest of protecting the security of the State, the foreign relations of the State, a vital economic interest of the State or secret methods of operation of the Israel Police, or to safeguard morality or the welfare of a person."¹³³ At the conclusion of its work, the Commission submits a report to the Government, setting out the results of its inquiry, "and its recommendations, if it sees fit to add recommendations."¹³⁴ In practice, commissions of inquiry routinely make recommendations on personal matters and even political issues. Often, where the factual findings are subsidiary, the recommendations become a primary subject of "investigation."¹³⁵

Section 28(a) of the Act clarifies that "this Act shall not derogate from the power of a minister to appoint an investigation commission to examine any matter within the scope of his functions."¹³⁶

As noted, legal commissions of inquiry are not generally satisfied with merely determining the facts. Their primary activity and the rationale for their existence is to make recommendations. Examples of legal commissions' recommendations arise from commission inquiries into the methods of investigation of the General Security Services into terrorist activities (reported in 1988) inquiries into the functioning and efficiency of the health service (reported in 1990).

In the petitions filed in the Bar-On Affair asking the Court to require the Government to appoint a commission of inquiry to investigate the affair, it was argued that while the police were engaged in a thorough investigation of the facts of the affair, there remained questions

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. *See* RUBINSTEIN, *supra* note 8, at 840.

136. *See* 1968, S.H. 28.

of public interest that required investigation by a commission of inquiry. What were these questions? Some of the more relevant ones are: what was the proper conduct in the appointment of the Attorney General; what are the lessons which should be learned in order to prevent a repetition of the errors committed in the appointment of an Attorney General in the future; how should public responsibility be shared by the Prime Minister, Minister of Justice, and other public figures who were involved in this affair?¹³⁷

In other words, the petitioners did not demand that the commission investigate questions of fact. They asked that it investigate questions of policy and questions relating to personal responsibility. The Supreme Court confirmed that despite the thorough police investigation into the affair, the power (even if not a duty) to appoint a legal commission of inquiry for these purposes existed.¹³⁸

It is generally accepted that the *factual findings* of a legal commission of inquiry are binding on the Government.¹³⁹ To what extent do the *recommendations* of such a commission also bind the Government? A distinction is made between two types of recommendations: (1) personal recommendations, which relate to the guilt of office holders and their responsibility for the events that are the subject of the inquiry and sanctions which should be imposed upon them, and (2) recommendations relating to the proper policy that should be adopted in relation to the matter from that point forward. Recommendations of the first type usually are recognized as binding, amounting especially to a court sentence.¹⁴⁰ In the past, legal commissions of inquiry recommended the dismissal or removal from office of, among others, the Army Chief of Staff and other senior officers,¹⁴¹ bank managers (including the managers of a private bank),¹⁴² and even, as noted before, a minister.¹⁴³ These recommendations were fully implemented. Indeed, matters reached such proportions that if a commission of inquiry refrained from making a personal recommendation in relation to a certain official whose con-

137. See H.C. 2624/97, Ronel v. Government of Israel, 51(3) P.D. 71, 85.

138. See *id.* at 81.

139. See AVIGDOR KLAGSBALD, *TRIBUNALS OF INQUIRY IN ISRAEL* 318 (1987) (Hebrew). However, this is generally subject to the findings not being contrary to the judgment of a competent Court. See H.C. 152/82, Alon v. Government of Israel, 36(4) P.D. 449, 459.

140. See Itzhak Zamir, *Commissions of Inquiry From a Legal Point of View*, 35 *HAPRAKLIT* 323 (1984).

141. The Commission of Inquiry into the October 1973 War, chaired by Chief Justice Shimon Agranat, made this recommendation in reports issued in 1974 and 1975.

142. The Commission of Inquiry into the mismanagement of bank shares, chaired by Justice of the Supreme Court Moshe Beisky, made this recommendation in a report issued in 1986.

143. The Commission of Inquiry into the events at the refugee camp in Beirut, chaired by Chief Justice Itzhak Cahan, recommended in a report issued in 1983 that the Minister of Defense, Ariel Sharon, be removed from office.

duct was found to be improper, for example, because in the meantime she had resigned from office and there was no longer any point in recommending her dismissal, such inaction was perceived by the media and the public as an "acquittal."¹⁴⁴

In contrast, the Government is not regarded as being bound by recommendations that relate to general policy that should be adopted in the future in connection with the subject matter of the inquiry. In practice, governments often have refused to implement such recommendations.¹⁴⁵ Against this background one may understand the apologetic comments of the commission of inquiry into the massacre at the Cave of the Patriarchs in Hebron, which refrained from making personal recommendations.

The point on which the hearings of the commission have focused is the "matter" for which the investigation was established. Conclusions of a personal nature are not outside the scope of operation of the commission. [Yet] it is possible that the matter under investigation primarily raises general questions, of an institutional nature . . . the commission is not a Court which determines the fate of a person . . . but its purpose is to act as a legal tool, which the legislator created to assist in the investigation of a matter of public importance . . . and the main effort must be directed to this end.¹⁴⁶

These comments may well reflect the most appropriate practice. However, they do not seem to express the actual political and public culture of Israel. In view of the fact that "institutional" recommendations are not regarded as binding, the primary practical, political, and public significance of a legal commission of inquiry lies in its recommendations on personal issues. Thus, generally, an Israeli political leader or other senior official in the executive branch (such as the Chief of Staff) will not resign and will not be dismissed by reason of his failings unless a legal body so orders.¹⁴⁷ A legal commission of inquiry is a legal institution which, in addition to the courts, is perceived as compe-

144. See RUBINSTEIN, *supra* note 8, at 842.

145. For instance, many of the structural recommendations of the Commission of Inquiry regarding the health system were not implemented by the Government; and the same goes for recommendations concerning security issues of the Commission of Inquiry that was appointed to review the reasons for Israel's unreadiness for the 1973 Yom Kippur war. See RUBINSTEIN, *supra* note 8, at 841-43.

146. REPORT OF THE COMMISSION OF INQUIRY REPORT INTO THE MASSACRE AT THE CAVE OF THE PATRIARCHS IN HEBRON 214 (1994).

147. An exception to this rule occurred in the case of Prime Minister Golda Meir, who resigned together with her government following heavy public pressure. The resignations came despite the fact that the commission of inquiry into the October 1973 War did not impose on her or the Minister of Defense personal responsibility for the failings which occurred prior to the outbreak of the war.

tent to impose binding political sanctions on senior officials who have failed in their functions.

What standards guide a legal commission of inquiry in deciding whether or not to attribute personal responsibility for the occurrence of mistakes? It would seem that an act that is wrongful from a legal perspective, such as a criminal act, a tort, or a breach of a rule of constitutional or administrative law, also would attract personal responsibility by a commission of inquiry, and, where necessary, be subject to a recommendation by the commission that sanctions be imposed. Moreover, the commission inquiring into the events at the refugee camps in Beirut, headed by Chief Justice Itzhak Cahan, held that a commission of inquiry should consider, not only the legal aspects of the matter under investigation, but also its public and moral aspects.¹⁴⁸ Still, the commission would not recommend sanctions if the relevant minister bore only parliamentary political responsibility, as distinct from personal responsibility.

Despite indications that legal commissions of inquiry may recommend the dismissal of senior political officials, in circumstances where the Court will not order such an action to be taken, legal commissions of inquiry are as wary of exercising their power to recommend personal sanctions as are the courts. Testifying to this is the fact that, to date, a Commission of Inquiry has recommended the dismissal of minister only once.

Despite the caution and restraint generally exercised by Israeli commissions of inquiry in making personal recommendations, these commissions undoubtedly represent a threat to officials of the executive branch, whether politicians or non-politicians. This threat is aggravated by the fact that the investigation is not subject to purely "legal" standards, but it is also likely to be based on more general public and moral considerations. In contrast to judicial review, for which politicians have no control, the power to appoint a legal commission of inquiry is conferred on the Government.¹⁴⁹ Accordingly, the Government may order

148. REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT 76 (1983) (Hebrew).

149. Another route for establishing a commission of inquiry is set up by section 14(b) of the State Comptroller Act [Consolidated Version], 1958, which provides:

When an inspection [by the State Comptroller] has revealed defects or infringements which the Comptroller, in view of their bearing upon a fundamental problem or in the interests of upholding moral standards or for any other reason, deems worthy of consideration by the Committee [of the Knesset for matters relating to the State Comptroller]. . . he shall submit a separate report to the Committee; and upon his doing so, the Committee may, of its own motion or upon the proposal of the Comptroller, decide upon the appointment of a commission of inquiry; . . . subject to any necessary changes, the provisions of the Commission of Inquiry Act, 1968, shall apply to the said commission.

the establishment of a commission of inquiry in matters in which it has an interest in a commission investigation, even if there are conflicting views as to whether it falls within the definition of "a matter which is at the time of vital public importance and requires clarification" as required by section 1 of the Act.¹⁵⁰ In the past, the Government of Israel has ordered the establishment of commissions of inquiry on policy matters that it has felt uncomfortable deciding itself, in the hope that the prestige of the legal establishment would ease public acceptance of the difficult decisions that are to be reached in these matters.

Thus, for example, the commission of inquiry into the functioning and efficiency of the health service, headed by Justice Shoshana Netanyahu, was set up in 1989 against the background of the politically difficult task of setting policy in the area of public health and hospitalization. In connection with this Commission of Inquiry, it was written that:

It is difficult to correlate the judicial character of this commission. . . with the matter that it has been required to investigate. The only explanation for this appointment lies in considerations which are not relevant: the desire to postpone difficult decisions and rely on an external body, possessing legal prestige, in order to adopt conclusions which are likely to be unpopular, or the adoption of which will entail confrontation with interested parties.¹⁵¹

I am doubtful, however, whether the considerations referred to by this commentator are in fact "not relevant." In the legal-political culture of Israel (described above in a different context) the legal establishment has achieved a public status that empowers it and sometimes obliges it to participate in making decisions of a political nature.¹⁵² It is debatable whether this is a desirable situation but it is doubtful if one may regard a decision that reflects this phenomenon as being based on irrelevant considerations.

The significance of empowering the Government to decide on the

A similar arrangement is provided by Section 14(b)(1) in respect to another type of report that may be submitted by the State Comptroller. But this course, too, is conditional upon the establishment of a commission of inquiry by virtue of a decision of a Knesset committee, and all the Knesset committees contain a majority of members affiliated with the coalition. In other words, in practice, the Government has control over Knesset decisions, and has the power to ensure that the committees refrain from making decisions that are particularly displeasing to it.

150. 1968, S.H. 28.

151. RUBINSTEIN, *supra* note 8, at 844-45.

152. It should be noted that, from this point of view, a legal commission of inquiry is unique in that the initiative for the appointment must come from the political authorities. In contrast to other contexts, where the Court has ways of evading the issue and refusing to intervene in what is essentially a political question, the decision to appoint a legal commission of inquiry and the determination of its scope of operation are within the exclusive power of the Government, and the capacity of the judiciary to evade the political burden imposed on it by the executive branch is limited.

establishment of a legal commission of inquiry lies in the Government's power to prevent the establishment of such a commission. The Government may prevent the establishment of the commission even in a matter which should properly be investigated, where it is likely that responsibility will be laid at the door of Government ministers or other senior officials of the executive branch and particularly where the Government can anticipate recommendations that personal sanctions be imposed. It is unlikely that the Government would decide on such a hazardous course of action on its own initiative.

Indeed, Israeli history proves that commissions of inquiry that recommended the imposition of personal sanctions were set up by the Government as a result of substantial public pressure.¹⁵³ Despite the fact that the conferral of power on the Government to decide on the appointment of a legal commission of inquiry involves a manifest conflict of interest that is exemplified by the Bar-On Affair, it is doubtful whether there is any other institution, besides the Government, which could be empowered to decide on the establishment of legal commissions of inquiry.

In any event, the Government may find it difficult to revoke the establishment of a legal commission of inquiry if it were demanded by the President of the State (which in Israel is a symbolic, apolitical office) or by the State Comptroller (who in recent years has enjoyed wide public esteem). As noted, each of these officials was involved in the establishment of commissions of inquiry for which the Government had little enthusiasm.

B. *Judicial Review of the Establishment of Legal Commissions of Inquiry*

May the Court order the Government to appoint a legal commission of inquiry? One can question whether the judiciary will require the executive to set up a body possessing power to impose sanctions on members of the Government on the basis of public or moral considerations, which are outside of the Court's jurisdiction.

During the Bar-On Affair, a number of petitions were submitted on

153. This was the case in relation to the Agranat Commission, dealing with the October 1973 War; the Cahan Commission, dealing with the massacre in the refugee camps in Beirut (which was largely set up as a result of a call for a commission made by the President of the State); and the Beisky Commission, relating to the mishandling of bank shares, an affair which resulted in a major crisis for the Israeli economy and the government having to pay out huge sums of money to stabilize the situation. The latter commission was set up in 1985 by virtue of a decision of the Committee of the Knesset concerned with the State Comptroller, following a harsh report by the State Comptroller, and the government was not involved in its establishment at all (although, in view of the gravity of the affair, the government was also not in a position to oppose it).

this issue. One petition asked the Court itself to impose political sanctions, namely, the removal of the Minister of Justice from office, and it was dismissed.¹⁵⁴ The petitioners asking for the establishment of a legal commission of inquiry hoped that such a commission, whose considerations were more extensive than the "legal" considerations governing the Court, and expressly included political and moral matters would do what the Court was unable or unwilling to do. One may assume that the petitioners also believed that the evidentiary standards applied by a legal commission of inquiry would be less strict than those underlying the undisturbed decision of the Attorney-General not to indict the Prime Minister. These hopes and beliefs probably were unfounded. Whatever the case, the Court decided to dismiss all petitions asking for the establishment of a legal commission of inquiry. In doing so, it refused to give the petitioners an opportunity to satisfy their political ambitions indirectly, after having already dismissed petitions for equivalent direct relief. The grounds for dismissing the petitions indicate that even if there is a theoretical possibility for the Court to force the Government to set up a legal commission of inquiry, in practice, the Court will refuse to do so.

Even assuming that the Bar-On Affair was a matter of vital public importance, "[T]his was insufficient to require the Government to appoint a commission of inquiry specifically on this matter among the variety of other matters which also possessed greater or lesser public importance."¹⁵⁵ Thus, among the various types of governmental powers, the power to appoint a commission of inquiry is one of the widest. This is because it is conferred on the highest authority in the executive branch, the cabinet. It is also true in light of the language of the empowering provision. The commission of inquiry's power to make personal recommendations, on the basis of public and moral considerations is not a reason for requiring the Government to make such an appointment.¹⁵⁶

VII. FROM POLITICS-AS-LAW TO THE POLITICS OF LAW

A. *The Politics-as-Law Phenomenon in Israel and in the United States*

In Israel, legal rules and the legal establishment, as led by the Supreme Court embrace all affairs of the State and the public, including matters which are customarily regarded as "political".¹⁵⁷ As a rule, the

154. See H.C. 2533/97, *The Movement for Quality of Governance*, 51(3) P.D. 46.

155. H.C. 2624/97, *Ronel*, 51(3) P.D., at 80.

156. See H.C. 6001/97, *Amitai – Citizens for Improvement of Administration and Purity of Ethics v. Prime Minister* (not yet published).

157. See Shimon Shetreet, *Standing and Justiciability*, in *PUBLIC LAW IN ISRAEL* 265 (Itzhak

Israeli legal establishment does not refrain from dealing with a dispute brought to it for adjudication merely because of its political aspects. Justice Barak has discussed the concept underlying this approach:

Every action – whether it be political or a matter of policy – is embraced by the world of law, and there is a legal rule taking a position in respect of it, permitting or prohibiting it. The contention that “the issue was not a legal issue but a clearly political issue”, mixes what cannot be mixed. The fact that a matter is “clearly political” cannot displace the fact that it is also a “legal” matter.¹⁵⁸

Indeed, numerous political disputes in Israel take the form of legal disputes. In addition to the cases already referred to in this article, petitions have been submitted to the Courts in recent years seeking to prohibit the Israeli Government from conducting negotiations with Syria in relation to the withdrawal from the Golan Heights;¹⁵⁹ to annul the Government’s policy in relation to the settlement of Jews in the Territories;¹⁶⁰ to prohibit the Government from signing political agreements with Palestinian organizations;¹⁶¹ to prevent the implementation of agreements between the Israeli Government and the Palestinian Authority in relation to the release of Palestinian prisoners;¹⁶² and to negate political agreements between parties.¹⁶³ To date, numerous petitions have been submitted by Knesset members against decisions of the Knesset Chairman or other Knesset authorities in relation to the regulation of its work.¹⁶⁴ Some of these petitions have been upheld.¹⁶⁵ In others

Zamir & Allen Zysblat eds. 1996); Ariel Bendor, *Parties: Between Law and Politics*, SAN DIEGO INT.LA. REV. (forthcoming).

158. H.C. 910/86, Ressler v. Minister of Defense, 42(2) P.D. 441, 547.

159. See H.C. 4354/92, Movement of the Land of Israel and Temple Mount Faithful v. The Prime Minister, 47(1) P.D. 37.

160. See H.C. 4481/91, Bargil v. Government of Israel, 47(4) P.D. 210 (petition against the establishment of settlements in the administered territories); H.C. 4400/92, The Local Authority Kiryat Arba-Hebron v. Prime Minister, 48(5) P.D. 597 (petition against the policy of the government to limit the establishment and development of settlements).

161. See H.C. 4877/93, The Organization of Victims of International Arab Terrorism (NETA) v. State of Israel (not published).

162. A number of petitions were submitted on this matter. See, e.g., H.C. 5218/95, Hanegbi v. Prime Minister (not published); H.C. 5205/96, Indor v. State of Israel (not published).

163. See, e.g., H.C. 501/80, Zoabi v. Abu Rabia, 35(2) P.D. 262; H.C. 1601/90, Shalit v. Peres, 44(3) P.D. 353; H.C. 1523/90, Levy v. Prime Minister, 44(2) P.D. 213; H.C. 1635/90, Zarjevski v. Prime Minister, 45(1) P.D. 749; H.C. 5364/94 Valner v. Chairman of the Israeli Labour Party, 49(1) P.D. 758. For a line of articles relating to political agreements and the Court’s intervention in them, see 26 ISR. L. REV. 407-558 (1992).

164. For a discussion of the issue of judicial review of the proceedings of the Knesset, see Meir Shamgar, *Judicial Review of Knesset Decisions by the High Court of Justice*, 28 ISR. L. REV. 43 (1994); David Kretzmer, *Judicial Review of Knesset Decisions*, 8 TEL AVIV U. STUD. L. 95 (1988).

165. See, e.g., H.C. 742/84, Kahana v. Chairman of the Knesset, 39(4) P.D. 85; H.C. 73/85, “Kach” Caucus v. Chairman of the Knesset, 39(3) P.D. 141; H.C. 620/85, Miari v. Chairman of

however, the Court gave the effect of judgment to compromises reached by the litigants.¹⁶⁶

In other words, there is an increasing tendency in Israel to perceive politics as law and to regard political questions as legal questions. Political questions, such as "what is useful?", "what is just?", and "what (or who) has political power?", are transformed and reformulated as: "what is legal?" or "what will withstand judicial review?"

Many Israeli political questions are directed for legal resolution from an institutional and a substantive point of view. However, the rituals and modes of adjudication adopted by the Israeli legal system when dealing with these questions do not always conform to traditional methods. An extreme example of this can be seen in the activities of the legal commissions of inquiry, which operate methods and apply substantive rules which are only partially compatible with those accepted in the legal arena. Even when political questions are considered in court, however, they are heard differently than the way in which conventional "legal" questions are heard.

In the United States, too, the phenomenon of politics-as-law exists, but it takes a different form than its Israeli counterpart. In the United States, politics-as-law is expressed in the fact that legal questions are directed for handling and resolution by the legislative and executive branches, which frequently make decisions based upon standards and values which are either wholly or partially political. However, the rituals with which the hearings are heard have a manifestly legal dimension. The politics-as-trial of President Clinton's impeachment proceedings was a clear example of this. Determination of policy disguised as interpretation of the law in which the Court does not intervene so long as it is not obviously unreasonable, is also a good example.¹⁶⁷

B. *Explanations for the Politics-as-Law Phenomenon*

The explanations for this phenomenon are found largely in the uniformity of interests of the legal establishment, the political minority, and the political majority. This uniformity of interests is generally accompanied by public support.

In Israel, the legal establishment is willing and interested in considering these questions. Indeed, and as the Bar-On Affair well illustrates,

the Knesset, 41(4) P.D. 169; H.C. 5711/91, Poraz v. Chairman of the Knesset, 46(1) P.D. 299; H.C. 1843/93, Pinhasi v. The Knesset, 49(1) P.D. 661.

166. See, e.g., H.C. 4804/91, Poraz v. Chairman of the Knesset (not published); H.C. 6181/94, Livnat v. Prime Minister (not published).

167. See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); ALFRED C. AMAN, JR., & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 461-90 (1993); STEPHEN G. BREYER, ET. AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 250-345 (4th ed. 1998).

the number of cases in which the courts actually annul or change political decisions is very low. However, these cases, which by their nature attract enormous media coverage, are sufficient to create the perception that the legal establishment is conducting Israeli politics. This perception, even if it rests on shaky ground, prevails among the general public, politicians, and many academic scholars. Yet, even if the number of cases in which the Israeli Courts have cancelled or changed political decisions is negligible, the near complete removal of obstacles to *locus standi* and justiciability and the development of the doctrine of the all-embracing nature of the law have led the courts to deliberate on these decisions and refuse to dismiss outright attempts to make it take a stand on these matters.

It is possible to explain this willingness of the Israeli legal establishment to consider political questions which the “vacuum” in this area, which the Courts have been called to fill.¹⁶⁸ This “vacuum” has double significance. One, which I shall consider in more detail below, is the channeling of political issues by governmental authorities for determination by the courts. The other is the absence of mechanisms for political scrutiny of political decisions so that the essential task of scrutiny is performed by the legal establishment.

The Israeli system of governance, despite important changes in recent years, still lacks a real separation between the two central political branches – the legislature and the executive. As a result, the Knesset is not capable of properly fulfilling the task of constructive and efficient scrutiny of the Government. The nature of the regime in Israel is such that the Government is based on a coalition of parties, which include the majority of members of the Knesset, who support the Government and fulfill its wishes on every significant topic and who do not possess the level of autonomy needed for effective review. The principal members of the Knesset from the coalition parties sit in the cabinet as the Prime Minister, the ministers (or the overall majority of them), and deputy ministers. As a result, one-fourth of the Knesset members and two-fifths of Knesset members belonging to coalition parties are members of the executive branch. Ordinary Knesset members, who are regarded as junior and whose political power is generally smaller than the power of the members of the Government, aspire to be appointed ministers or deputy ministers. The approach of Knesset members belonging to the opposition parties is not purely substantive either, instead it aims to undermine the Government in almost every matter. They, too, are unlikely to engage in trustworthy and pertinent scrutiny. Moreover, a significant portion of the activities of the Knesset are devoted to political struggles

168. See RUBINSTEIN, *supra* note 8, at 28-35.

for survival or downfall, and the substantive problems of the country are often neglected or used as instruments in these struggles.

In this situation, the legal establishment is often the last resort, without which there would be no appropriate scrutiny at all. As a result, the legal establishment made itself available for an important national task.

In the United States, in contrast, there is no governmental vacuum that the courts are required to fill. In the American regime of the separation of powers, the federal and state legislative branches are not attached to the executive branches. Their members enjoy independence whether or not they are affiliated with a particular party that has been elected to represent the executive authority. There is less fear than in Israel that the executive branch will be able to exercise great power without effective review without routine judicial supervision.

Moreover, the United States still bears the scars of the threat to the independence of the judiciary following the far-reaching judicial review in the *Lochner* case.¹⁶⁹ The courts must preserve their power for circumstances in which judicial intervention is required, and they must exercise care that their review is not trivialized.

In addition, one may consider the significant entrenchment in American culture of ideas that have originated in legal realism and, to a certain extent, in critical legal studies. In this context, I am referring to structures that were developed during these movements, even if not to their political agenda. It is, possibly the increasing recognition, both among judges and among the public at large, regarding the political substance of judicial activity itself and the fact that the courts are political bodies that contributes to the restraint exercised by the judges (the position of many of whom is not dependent on achieving a majority among the public) in applying their powers.

Against this background, it is possible to understand the differences between the approaches of the Courts in the two countries towards judicial review of decisions regarding indictments. In Israel, these decisions are reached by professionals who enjoy an apolitical ethos. It is easier for the courts to review decisions of such officials, who are counted among their peers, than to intervene in decisions of political bodies, some of whom have been elected and have been entrusted with bringing indictments in the United States.

From the political minority perspective in Israel, applying to the courts has become a routine and sometimes the only device for achieving objectives and overcoming the power of the political majority.

169. See *Lochner v. New York*, 198 U.S. 45 (1905).

Thus, each year, tens of petitions are submitted to the Supreme Court by Knesset members from the opposition parties. These petitions deal with both the internal regulation of the work of the Knesset and with public and political issues on the country's agenda. The Bar-On Affair is an example of this, as the majority of petitioners during that controversy were Knesset members belonging to the opposition. An important yardstick for the success of a Knesset member belonging to the opposition is the number of petitions filed by her before the Court, and, of course, the number of times judgment is given in her favor. This enables Knesset members from the opposition to overcome their weakness in being part of the minority. It also allows them to enforce their wishes by means of the judgment on the majority.

In the United States, petitions also are submitted occasionally by members of Congress against actions of the executive branch that allegedly injure the legislative branch. However, the extent of the phenomenon in the United States does not match that in Israel. In the United States, these petitions are perceived as likely to violate the concept of separation of powers, and, in many cases, they are received by the Court with a marked lack of enthusiasm.¹⁷⁰ Different parties often control the legislative body and the executive authority. In any case, parties forming a minority in a particular branch, but controlling another, have the political tools to contend with discrimination against them by the branch in which they form a minority or in which they are not represented and thus, do not require judicial relief.

From the perspective of the Israeli political majority, which controls the Government and the Knesset, the legalization of politics has significant advantages, notwithstanding the price, namely, the occasional negation by the Court of the will of the majority. As already mentioned, this price is quite low. In practice, annulment of political decisions by the Court, and, in particular, reliance on the controversial ground of unreasonableness, are fairly rare.

The phenomenon of politics-as-law in Israel has two primary advantages from the point of view of the Government and the coalition in the Knesset that supports it. First, it enables difficult political problems, which the political authorities cannot or do not wish to resolve, to be channeled into legal and judicial paths, among these legal commissions of inquiry. Secondly, the legal standards generally confer particularly wide discretion upon the political authorities. From a legal perspective, only in exceptional and extreme cases will a political decision be declared unreasonable or improper. This is illustrated by the

170. See Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

judgments following the Bar-On Affair. In view of this, the legalization of politics confers an image of propriety and reasonableness in a high percentage of decisions made by the governing authorities. This image is given by the legal establishment, which is headed by the Supreme Court. This is a branch that enjoys wide public esteem and is perceived as being trustworthy and objective.¹⁷¹ It would be extremely difficult for the political branches to achieve such an image for their decisions from other sources.

Furthermore, to a large extent, judicial review defeats the claims of the opposition. This is especially true if it was the opposition that initiated it. It is difficult for a political figure who applied to the Court against a Government decision and whose petition was denied to obtain public support for the argument that her petition was denied for purely "legal" reasons and that the Government decision was in fact substantively wrongful. As clarified in the discussion on the Bar-On Affair, the figures against whom legal measures were adopted (the Prime Minister and the Minister of Justice) were successful in exploiting the advantage resulting from the channeling of the affair into legal proceedings. They presented the fact that from a legal perspective there was no place to impose sanctions that would be justified by their conduct.

To an extent, it would seem that politics-as-law in its American version also contributes to the legitimization of the decisions reached by political authorities. The very existence of legal rituals has the effect of softening the image of their decisions even if not necessarily their content.

Public support in Israel for the legitimization of politics largely relies on the image of apolitical objectivity enjoyed by the legal establishment. A legal establishment that is perceived by the public as political, or at least as not detached from politics or politicians, would not necessarily attract the same support and confidence that encourages it to regulate political questions as would a legal establishment which is seen as politically unbiased or impartial. One possible explanation for the difference in this context between the United States and Israel may be the apolitical image of the legal establishment in Israel. This contrasts with the more politically oriented image, of the legal establishment in the United States.

C. *Drawbacks of the Politics-as-Law Phenomenon*

Despite the publicly-supported uniformity of interests that exists

171. Many studies show that the judiciary in Israel enjoys more public confidence than any other authority. See, e.g., GAD BARZILAI, EPHRAIM YAAR, & ZEEV SEGAL, *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* (1994).

between the legal establishment (the political minority and the political majority) in Israel and the United States the politics-as-law phenomenon has many drawbacks.

First, politics-as-law often focuses attention on marginal issues. Thus, in its Israeli version, the phenomenon may lead to public debate on questions that are essentially as political as if they were purely legal questions. In contrast, in its American version, legal questions may be determined on the basis of purely political considerations and strength. This may result in “question begging”. Former Israeli Chief Justice Meir Shamgar referred to this difficulty when discussing what he regarded as the pointlessness of the Court’s attempt to apply the legal standard of reasonableness to certain actions of the Government. In this connection, the Chief Justice wrote:

There are circumstances where the adjudication of a particular case on the basis of legal standard will miss the point, for the purely legal solution may obscure the true inherent nature of the problem being adjudicated. Not infrequently, it is not the legal rules that cause the problem to arise, and a purely legal determination will have no decisive significance as to the political decision being reviewed itself. Yet, when the judicial decision has been rendered, and it has been determined, after passing through the process of judicial review, that the political decision at issue had, in fact, been taken by one authorized to take it, in good faith and in a non-discriminatory manner, and that the decision was within the zone of reasonableness, the conclusion may form that everything is fine – when the substance of the political decision itself may be far from that. Does consideration of the decision to manufacture an airplane or questions related to foreign affairs reach its end point when it successfully answers the legal criteria? The answer is no. Yet, that could be the mistaken conclusion that could arise from judicial review of an issue. . . . Although . . . legal standards can [always] be applied, these standards cannot be seen, in many areas, as answering the ultimate issue.¹⁷²

There are many reasons why the law and, from the institutional point of view, the Court, is prevented from regulating certain issues in such a manner as to embrace their principal substantive elements. One reason is the binary nature of the judicial process, which is usually based on a determination or balance between two conflicting principles.¹⁷³ Another reason is that, occasionally, the fundamental elements of the law and its rules are not relevant to the issue with regard to which the Court is asked to take a legal stand, such as when the issue is profes-

172. H.C. 910/86, *Ressler*, 42(2) P.D., at 520.

173. See Menachem Moutner, *The Reasonableness of Politics*, 5 *THEORY & CRITICISM* 25, 46 (1994) (Hebrew).

sional or technical.¹⁷⁴

Second, legal rules frequently are required to be minimalistic, particularly when they touch upon the establishment of prohibitions, the imposition of sanctions for their breach, and the regulation of the operation of the powers of governmental or administrative authorities. Over-regulation, particularly where penalties exist for a breach of the law, is likely to impair freedom and create an atmosphere in society which is unpleasant and constricted.¹⁷⁵ It also may make the governmental activities more difficult and complex. This was the main reason given by the Israeli Supreme Court in the Bar-On Affair regarding the determination that Minister of Justice Hanegbi would not be indicted for his conduct in the affair, nor would he be removed from Government office, even if his conduct contained a deviation from accepted norms of behavior. In other words, there is no overlap between legal rules including the criteria for judicial review and norms of proper behavior from a moral, administrative, or professional point of view. Legalization of politics may legitimize, and even encourage, improper norms of behavior within the political arena, even if there is no justification for imposing a legal prohibition of them.

Third, bound up with politics-as-law in its Israeli version is the intensive involvement of the legal establishment in controversial political matters. This involvement is likely to impair the status of the law and the legal establishment, their prestige, the public confidence in them as objective and apolitical entities, and, ultimately, the willingness of governmental bodies and the general public to abide by their judgments. Politicians often praise the Court when judgment is in their favor. However, they do not hesitate to condemn the Court with harsh and offensive language on the few occasions when it disappoints them.

In recent years, Israel has witnessed attacks on the legal establishment in which religious leaders, senior politicians, chairmen of the Bar Association, media figures, and even senior members of academia¹⁷⁶ have participated. The attack is based on the contention (which, as noted, is not founded in practice) that the Court is attempting to become, and perhaps has already become, the "General Manager" of the country

174. See *id.*

175. See Itzhak Zamir, *Ethics in Politics*, 17 MISHPATIM (HEB. U.L. REV.) 250, 255 (1987).

176. For a particularly sharp academic criticism, see Ronen Shamir, *The Politics of Reasonableness: Discretion as Judicial Power*, 5 THEORY & CRITICISM 7 (1994). The author claims that the development of judicial review on grounds of unreasonableness is based on the rise in power of the professional and managerial class, of which the judges see themselves as part, and which "take the liberty of scrutinizing the acts of the governing authorities, by virtue of acknowledging theirs [sic] own superior wisdom." *Id.* at 18-19. For similar comments, see also Andrei Marmor, *Judicial Review in Israel*, 4 MISHPAT UMIMSHAL (HAIFA U.L. & GVT. REV.) 133 (1997) (Hebrew).

by concentrating all the power into the hands of several judges. These judges are not elected by the public and are not representative of it.

In the United States, such criticism is not unusual. To a large extent it is the basis of the American Critical Legal Studies movement.¹⁷⁷ One should not negate the legitimacy of such a contention, nor should it be regarded as dangerous. There are two reasons for this. First, extreme criticism of this type is not routinely heard in the United States from governmental figures, who have the legal power to harm the judiciary. Second, substantive changes of the judiciary's authorities require amending the Constitution. This would be a difficult task that would necessitate broad national consensus.

It is not certain that in Israel an all-embracing criticism of the legal establishment does not also present a danger. Israel is a young democracy, and it is doubtful whether all of its authorities and the general public have completely internalized the game rules of democracy. Moreover, its constitutional law still has not achieved the stability and solidity of American constitutional law. Many judges in Israel have indeed referred to the fear of injury to the prestige of the judiciary as grounds for restraint by the Court in dealing with political matters in a way that is likely to be perceived as taking a political stand.¹⁷⁸ On its face the American version of politics-as-law is very different. To a large extent it is even contrary to the Israeli version. Thus, whereas in Israel it is a common phenomenon to deal with political questions by using substantive and institutional, legal tools in the United States, politics-as-law is expressed by legal questions being dealt with by the political branches. Even if they deal with legal questions by establishing legal and judicial rituals, in practice these branches weigh considerations which, either openly or under some guise, are largely the political considerations natural to them.

Notwithstanding this, some of the disadvantages of American politics-as-law are similar to Israeli politics-as-law. Thus, American politics-as-law also may lead to question-begging. The discussions held in

177. The Critical Legal Studies movement (CLS) is characterized with un-empathic - sometimes even hostile - critique, which concerns the legal system as a whole, if not the legal phenomenon itself. This hostility makes the translation of the CLS critique into relevant suggestions for conceptual changes or reforms of existing legal doctrines or conceptions very difficult. CLS are based upon the perception that law is politics. The Crits propose to expose the political essence of the law, and the ways in which the law camouflage its true essence and pretends to be politically neutral. See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

178. See, e.g., H.C. 396/79, *Dukat v. Government of Israel*, 34(1) P.D. 1 (D.C.J. Landau); H.C. 910/86, *Ressler*, 42(2) P.D. 441 (J. Barak); H.C. 1635/90, *Zarjevski*, 45(1) P.D. 749 (D.C.J. Elon); H.C. 4481/91, *Bargil*, 47(4) P.D. 210 (J. Goldberg).

the United States Senate on the question of whether to permit the summoning of witnesses on behalf of the prosecution (representatives of the judicial committee of the House of Representatives) in the impeachment proceedings conducted against President Clinton are a good example of such question-begging. Despite the trial ritual and the arguments of the parties, which referred to the question of the relevancy of the witnesses concerned in the process, it was clear that the considerations weighed were primarily political the division of forces in the votes held in the matter was evidence of this point is clarity.

Indeed, this was not harmful in this specific case because there were no significant disputes regarding the facts. The situation could have been different had the Senate been required to decide factual issues. The substantive question that was to be determined by the Senate, namely, whether on the basis of these facts it was appropriate to remove the President, was a political public question, which the Senate properly could consider. Yet, the fact that the Senate held this hearing under the guise of a criminal trial was a form of question-begging that, in certain circumstances, could have inappropriately swung the results of the hearing.

Even shifting the decision-making power in relation to interpretive legal questions from the judiciary to the executive branch, as emerges from the *Chevron*¹⁷⁹ ruling, involves the possibility of question-begging and, potentially, the weighing of irrelevant considerations. Thus, the fundamental interest of an executive political branch is not giving authentic interpretations to political rules, but rather the implementation of its policy. It is doubtful whether the ritual of legal interpretation can be a replacement for formal change or clarification of the legal rules under discussion by the political authority competent to do so.

Although underlying American politics-as-law is the shift of the decision-making power with respect to certain legal questions with political aspects from the judiciary to the legislative and the executive branches in order to protect the neutral status of the courts, this shift also may cause harm to the public image of the law and the judiciary from at least two vantage points. First, the use of legal and judicial ceremonial procedures for political purposes may harm the far-from-politics image of the judiciary. The public may find it difficult to distinguish between a "trial" that is conducted by the Senate and a real trial. Public confidence in the legal and judicial system may thus be damaged. Secondly, the public may find it difficult to distinguish between the Court refraining on the basis of the political question doctrine from hearing a legal question by reason of its political ramifications leaving it to be determined

179. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

by other authorities and substantively adopting the position of those authorities. The Court is likely, therefore, to be regarded as bearing responsibility for certain policies without having examined them on their merits.

VIII. CONCLUSION: TOWARDS A RIGHT BALANCE

It appears that on one hand, politics-as-law, both in Israel and in the United States, is an inescapable phenomenon that it has substantive justification. On the other hand, it has serious drawbacks. These conflicting elements need to be balanced.

On occasion, this balance is carried out by rules that are determined by elected political branches. The balance effected by these branches is a declarative political act that is made in the natural course of political considerations. Yet, the balance often is carried out by the legal establishment headed by the Court. The Court has the power to interpret the boundaries of competence of the political authorities. Thus, for example, in the United States, the political question doctrine is a judicial creation, as is the interpretation, linked to this doctrine, which rejects judicial review of Congressional decisions in impeachment proceedings.

The creation of this balance by the Court is the central expression of the politics of law. In other words, the Court does not only examine what solution is provided by existing law to questions brought before it that are within the political arena. It does not merely content itself, in addition to examining the existing law, with attempts to define proper political behavior and explore the possibilities of overturning it (by means of interpretation, the filling of *lacunae*, and other means of judicial development of the law) into part of the existing law. Rather, the Court, like the political branches and politicians, examines the questions of whether it is desirable to make the proper political behavior obligatory from a legal point of view and whether it is desirable that that should be done. In this context it considers the societal and public repercussions of its stance, including the impact on its own prestige.

The Israeli Bar-On Affair and the legal deliberations that were an integral part of it presented a line of examples of the shift from law-as-politics to the politics of law in the above sense. Many of the examples have been referred to in this article. Summarized below are merely some of them.

First, supervision of the police investigation into the affairs of senior political figures and decisions whether or not to indict them were made personally by the Attorney General. Secondly, it is doubtful whether the Prime Minister was subjected to the same law in terms of the standard of evidence required to indict as that generally applied.

Third, if indeed the usual law was not applied to the Prime Minister, and it has been argued that this is not necessarily an improper approach, the Attorney General denied the same. Fourth, improper actions of the Minister of Justice that deviated from the proper norms of behavior were found to be neither criminal offenses nor actions that legally required the imposition of political sanctions. Fifth, it was held that the Attorney General possessed wider than usual discretion and that the judicial review of his decisions was more restricted than usual. In practice, however, it is doubtful whether this was the case. Sixth, in all of the questions raised before it, the Court exercised judicial review. It did not set obstacles of *locus standi* or justiciability. In practice it showed very limited willingness to intervene in the type of decisions being reviewed. This policy has a deterrent effect on the authorities, who are aware that they may be required to justify their decisions to the Court and to the public. At the same time, it prevents an overly onerous impact on the substantive freedom of action of the authorities and limits potential harm to the prestige of the judiciary, which would have occurred had the judiciary routinely intervened in the decisions of the elected political authorities, and changed or canceled those decisions. Seventh, the Attorney General and the State Attorney held that there was no room for legal proceedings against the majority of those involved in the affair. At the same time, they condemned some of their actions and portrayed a grave picture before the public. Yet, ultimately, the impression was that most of the public was satisfied with the legal conclusions and little value was accorded to the harsh comments preceding them.

It is beyond the scope of this article to present a general theory of the right way of drawing a political balance. Instead I propose two guidelines.

The first guideline, which I have illustrated throughout the article, is that the balance should be drawn while taking into consideration the conditions prevailing in the State and society in question. *Inter alia*, one should take into account the character of the regime, the extent of the political links of the legal establishment, and the nature of the societal, political and legal culture. Accordingly, the question whether the American approach is or is not preferable to the Israeli approach has little significance. The relevant circumstances in each of the societies are different. It is possible only to attempt to express an opinion whether the approach adopted in a particular country is a proper approach, bearing in mind all of the circumstances prevailing in that country.

The second suggested guideline, which to a certain extent qualifies the first one as it attempts to be universal in character, is that the politics of law, in the above context, has limitations. The legal establishment

must be faithful to the legal rules that are binding on it. The legal rules stand above politics — not only above the politics of the legislative and the executive branches, but also above the politics of the judiciary.