

# Israeli Institutions at the Crossroads

RAPHAEL COHEN-ALMAGOR

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In this concluding essay I wish to consider some of the issues raised by the contributors to this volume. The discussion is supposed to give the readers some food for thought as to how we can contribute to the safeguarding and enhancing of Israeli institutions.

## THE ROLE OF THE PRESIDENT

Yitzhak Navon discusses in his article the SHABAC (line 300 episode) of 12 April 1984, specifically the decision of President Haim Herzog to grant clemency to the SHABAC agents involved in the killing – and its cover-up – of the two Arabs who kidnapped a bus and were subsequently caught. Israeli democracy has known many tragic affairs and scandals but I think the SHABAC affair is arguably the most serious of all. Almost all the key figures involved in this episode acted, in my opinion, wrongly. The affair started with the decision of the head of the SHABAC, Avraham Shalom, to execute the two kidnappers after they surrendered; continued with the SHABAC attempts to sabotage the work of two investigation committees – the Zorea Committee established in April 1984 and the Blatman Committee established in April 1985. The SHABAC insisted on having a representative in the Zorea Committee and here SHABAC top agent, Yossi Genosar, excelled himself in his attempts to clear his colleagues and in incriminating Brigadier General Yitzhak Mordechay, who interrogated the two Arabs in the field outside the bus but did not kill them. Mordechay had to face a trial, which exonerated him. Then, in October 1985, three top SHABAC officers, Reuven Hazak, Peleg Raday and Rafi Malka, who could not continue living with the deceit, approached Prime Minister Shimon Peres and told him what they knew about the affair. However, Peres preferred to back Avraham Shalom. Consequently, the three officers were forced to resign from the service. The two other members of the 'Prime Ministers' Forum', Yitzhak Shamir and Yitzhak Rabin, backed Peres' erroneous decision.

The government, wishing to put an end to this affair, in effect terminated the attorney general's term in office, although Yitzhak Zamir made it clear

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Raphael Cohen-Almagor is a senior fellow at the Center for Policy Studies and lecturer at Johns Hopkins University.

that he wished to serve in office until the affair was concluded. The main figure who stood for law, order and furthering truth and justice had to step down from office because of his determination to pursue the matter by ordering a police investigation. However, the scheme did not help as Zamir's replacement, Yoseph Harish, who entered office in June 1986, reached the same conclusion and ordered the opening of a police investigation.

Then came President Herzog's shameless decision to grant clemency to the SHABAC agents before they were convicted. The decision was backed by Yoseph Harish, the minister of justice Yitzhak Modai, the minister of defence Arens and most of the government ministers (the only objection came from Ezer Weitzman, who later became president). This act mocks the procedures of justice. And finally the Supreme Court refrained from overturning the amnesty, preferring security considerations over the principle of equality before the law. The Supreme Court, in a 2:1 decision (Meir Shamgar and Miriam Ben-Porat *v.* Aharon Barak) held that were the SHABAC agents to stand trial, severe damage was to be expected to the public interest, and that under the circumstances no other reasonable solution could be reached. I beg to differ. To my mind, severe damage was inflicted on the public interest as a result of the decision to grant clemency, and the reasonable solution would have been to unveil the deceit and corrupt behaviour of the SHABAC in this affair, introducing law and order norms into a service that was acting secretly, away from the public eye, and consequently allowed itself to condone unacceptable norms of murdering people after they surrender, lying to law and order authorities, implicating others for their own misdeeds, and then got away with this misconduct by approaching the state president, pleading the altar of security. Never in our history there was such a lunar eclipse, where key figures cooperated to defend a corrupt secret service, holding false security considerations as a supreme value.<sup>1</sup>

#### THE GOVERNMENT

In the near future it seems that the Likud Party will continue to lead the country. The Labour Party should resist the temptation to join another coalition government with the Likud. Stable democracy needs a strong government and no less importantly a strong coalition. Labour, and Israel, paid a high prize for sitting with the Likud in the previous governments. Labour lost its identity. You cannot be part of a government and then go out and criticize it for misconduct. The public is not stupid. The public realizes that Labour was part of this same government until recently and all it has to offer is different people, not a different direction. If the choice is between the original and the copy, the original is preferable.

Israel also paid a high price. I see a direct link between the lack of strong opposition and the rising corruption. Without sufficient safeguards and

restraints, both parties are celebrating their powers and some are tempted to cross not only ethical but also legal boundaries. I think that the only exception to this anti-Likud/Labour coalition is a time of war. Such a coalition was justified in 1967, on the eve of the Six Day War for a limited period of time. I did not imagine that Labour and the Likud would stick to this coalition for years after the 1980s. I hope the leaders of the second largest party will be wise enough to understand the political price they will have to pay if they do this. The Labour leaders were not very prudent in entering into coalition government under Ariel Sharon's leadership. Now they are paying the price.

In the long run patience will have its reward. To be credible, the second major party should offer an opposition to the government, otherwise it would lose its identity.

#### THE KNESSET

The Knesset, as Naomi Chazan rightly notes, has far too many parties. Consequently, its legislative effectiveness is relatively low, and the government's ability to sustain power is lessened. The multi-fraction composition opens the way to manipulation, gives rise to blackmail and undermines the coalition. The threshold to enter parliament, 1.5% of the electoral vote, gives a lot of leeway to representation and exploitation at the expense of stability, working to further the ends of partisan groups. I would suggest raising the threshold to 5%, as in Germany. Effectively, this law restricts the number of splinter parties in the Bundestag and the regional parliaments and promotes political stability.<sup>2</sup> The 5% clause has been a factor in every federal election since 1957.

Germany has certainly learnt the lessons of its history and can serve as a model also with regard to the voting system. Germany uses a mixed electoral system<sup>3</sup> in which part of the Bundestag is elected in single majority districts in which a candidate must gain the greatest number of votes to win, and part is elected through proportional representation, which gives all parties a fair opportunity to gain some representation in the legislature based on their electoral strength. Germany's policy makers after World War II wanted to avoid a repetition of the Weimar proportional representation system, which encouraged multiplicity of parties to run candidates for the Reichstag, thereby contributing to political instability and to the rise of National Socialism.<sup>4</sup> In the early 1990s, Russia, Mexico and Japan adopted a similar mixed electoral system. I suggest the same for Israel: 60% of the Knesset to be elected directly via a party list as is now the case in the proportional system, and 40% to be elected in the provinces.<sup>5</sup> The idea is to split Israel into several provinces in a way that would reflect the various groups in society and their relative prominence.<sup>6</sup> Each voter would cast two ballots: the first for one of the competing party candidates

in the province; the second for one of the lists of candidates drawn up by each party. The number of mandates received by the party is based on its percentage of votes in the entire country. The seats are then distributed to the parties according to their strength in each province.<sup>7</sup> The combination of a relatively high threshold and a mixed electoral system would reduce the ability of small interest group parties to be elected, make the Knesset less diversified, with five or six parties at most, and reduce the influence of the small parties, some of which would disappear altogether. The Knesset's power would increase and its effectiveness as a legislative body would grow.

I am not the first to suggest these reforms. They have been put on the public agenda time and again, and every time have been turned down due to pressure exerted by the small parties fighting for their survival. Most notably, the religious parties have resisted such attempts. Israel needs strong and bold leaders who are able to rise above and beyond their immediate interest to sustain power in order to carry out these reforms to better legislative ability.

#### THE SUPREME COURT

The Supreme Court has attracted quite a lot of criticism in recent years. It was attacked by conservative and religious circles for its liberal adjudications on civil matters. In turn, the court was attacked by the political left for its often hard-line approach on security matters. I would like to take issue with two general lines of criticism: the court's activist approach, and its lack of representation of significant segments of society.

As for the first issue, Israel has no constitution, no bill of rights, not even a Basic Law to defend fundamental civil liberties, thus the Supreme Court is the main bastion of safeguarding democracy and human rights. For this reason justices of the Supreme Court are often required to adopt the creative approach in adjudication. The court cannot hide behind the lack of explicit written provision when crucial questions of a constitutional nature are at issue, leaving their resolution in the hands of partisan politicians. Since political parties had failed to reach a compromise over the enactment of a law to safeguard civil rights, requiring individuals and bodies to approach the court to find assistance, it should not refrain from taking a stand on constitutional matters. Having said that, the court derives its authority from the law, and it has to adjudicate in accordance with the law. In addition, it cannot ignore the social and political environment in which its decisions are made and their likely implications.

This collection describes in detail the tensions and schisms that are part and parcel of Israeli life. In such an atmosphere, the role of the judge is to set standards of action for both politicians and the courts when they are faced with constitutional matters, especially where attacks on the very

foundations of democracy are concerned. Hence scope exists for taking normative constitutional principles into account. These principles may in some 'hard cases' convince the Supreme Court to take a creative approach.<sup>8</sup> Here are two set of considerations that inevitably play their part when judges come to formulate a judgment. One set is related to the moral convictions held by the judges, influenced by their own upbringing and educational background, as well as by the tradition and values of the society in which they live. The other is concerned with the specific legal history. Precedents and other legal facts are bound to limit the moral considerations of judges but they should not exclude moral considerations altogether. When faced with an unprecedented situation, in which they are required to use their discretion to find a judicial solution to a 'hard case', judges should decide the case by interpreting the political structure of their community so as to find the best possible justification, in principles of political morality, for the structure as a whole. Accordingly, if the right of people to be treated as equals and not to be harmed by others can be defended only by creative adjudication, then creativity is not only in order but necessary. This is the case so long as the judge tries to make the creative decisions in line with previous ones rather than starting in a new direction.<sup>9</sup>

At the same time, a difference exists between *creative interpretation* and *judicial legislation*. It is not the role of the court to legislate. Instead, one of its roles is to scrutinize the legislature. One may argue that the difference between the two concepts is merely semantic. I, on the other hand, think that the tone often makes the music. Even only for tactical reasons, the court should be aware of its place and of its role in the democratic system and exhibit its awareness to the public. It should not attempt to replace the work of the Knesset.

The second major critique that is often voiced against the court relates to its lack of representation. It has been attacked for its social homogeneity. There has never been an Arab justice in permanent appointment. The court consists of mainly Ashkenazi, secular Jews and it is argued that they tend to have much in common. Consequently their adjudications do not reflect ideas and opinions that are prevalent among the Sephardi and the more traditional circles.

The ethnic/religious/national origins of a candidate should not be the major consideration in appointing him or her to the court. Merit, of course, should be the first and foremost consideration. But sometimes there may be two or three candidates with similar credentials and experience. Then the candidate's social background may play a role. The court should strive to represent major spheres of society, and not hold itself aloof from the social environment and the citizens whom it serves. It is to its advantage to try to represent large segments of society and to have plurality of worldviews stemming from different religious, national and cultural backgrounds.

## NOTES

1. For further discussion, see 'Maariv Report: The Shabac Affair', *Maariv*, 18 July 1986, pp.6–8 (Hebrew); M. Kremnitzer, 'The Case of the Security Services Pardon', *Tel-Aviv Univ. L. Rev.*, Vol.12 (1986), p.595; Ilan Rachum, *The Shabac Affair*, Jerusalem, 1990 (Hebrew).
2. In Germany, parties that achieve less than 5% of the votes or do not receive at least three direct mandates for the constituency candidates cannot participate in the allocation of seats. See Eckhard Jesse, *Elections: The Federal Republic of Germany in Comparison*, New York, 1990, p.71.
3. But see Eckhard Jesse, 'The Electoral System: More Continuity than Change', in Ludger Helms (ed.), *Institutions and Institutional Change in the Federal Republic of Germany*, Houndmills, 2000, pp.124–42, esp. p.127.
4. Gerhard Braunthal, *Parties and Politics in Modern Germany*, Boulder, CO, 1996, p.46. See also Susan E. Scarrow, 'Political Parties and the Changing Framework of German Electoral Competition', in Christopher J. Anderson and Carsten Zelle (eds.), *Stability and Change in German Elections*, Westport, CT, 1998, pp.301–22.
5. In Germany, each of the two systems carries 50% of the voting power. I suggest breaking the balance and giving more weight to the proportional system because experience of primaries held in the two major parties, Labour and Likud, showed that candidates competing on the national level were better equipped to serve as legislators than representatives elected in the provinces. The Likud does not hold primaries any more and shifted the locus of power to its central committee. Labour still resorts to primaries that combine the mixed electoral system: some are elected nationally; others in the provinces.
6. Until German unification in 1990, each Bundestag had at least 496 deputies, half of them elected directly by plurality in the 248 single member provinces and the other half elected on a system of proportional representation by party lists in the country. Since unification, the deputies number at least 656, and the provinces 328 to provide sufficient representation to eastern German voters. The size of each province must not deviate by more than one-quarter from the national average. See David P. Conradt, 'The 1994 Campaign and Election', in David P. Conradt, Gerald R. Kleinfeld, George K. Romoser and Christian Soe (eds.), *Germany's New Politics*, Providence, RI, 1995, p 2; Braunthal, *Parties and Politics in Modern Germany*, p.47. See also Peter James, *The German Electoral System*, London, 2003.
7. Of the two ballots, the second is the more important because it will determine the number of parliamentary seats that each party gains. If a party receives more direct seats than it would be entitled to under proportional representation, then it receives additional seats. In the 1994 Bundestag elections, two of the parties (CDU and SPD) received 16 additional mandates. For further discussion, see Gert-Joachim Glaessner, *The Unification Process in Germany*, London, 1992.
8. Ronald M. Dworkin, 'Hard Cases', *Harvard Law Review*, Vol.88, No.6 (1975), pp.1057–109; idem, *Law's Empire*, Cambridge, MA, 1986.
9. R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance*, Gainesville, FL, 1994, chapter 11.

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