
Economic Analysis of the Doctrine of Separation of Powers: The Independence of the Judiciary

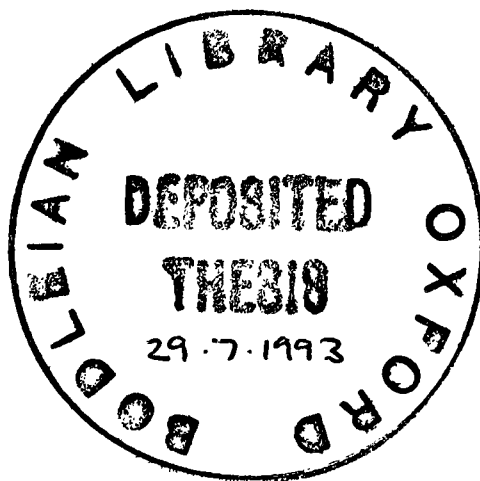
By

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For the Women in my Life

Abstract

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This thesis attempts to apply an economic approach to deal with the positive analysis of the doctrine of separation of powers, focusing on the judicial branch of government, and more specifically on the question: why do we find an 'independent' judiciary as an almost universal phenomenon in democratic countries?

The first part of the thesis sets the analytical framework - what I perceive as the broad and moderate view of the economic approach towards law - and defines the phenomenon of the independence of the judiciary to be examined - the gap between the structural independence of the judiciary and its substantive independence. It also includes a literature survey of previous work related to the economic analysis of the doctrine of separation of powers and the positive analysis of the judiciary.

A theoretical discussion is in the focus of the second part. It departs from a critical view of the Landes-Posner model of the independence of the judiciary, and proceeds to offer an alternative model. The main argument of the thesis is that, in contrast to the traditional view of separation of powers, we have an independent judiciary because it is in the interests of the government of the day to maintain one. Such an institution is delegated legislative and other powers, by which politicians can maximize their self-goal choices.

The third part of the thesis presents some empirical findings in an attempt to support the proposed positive model of judicial independence. A statistical approach is taken to investigate the decisions whether to promote judges from the English Court of Appeal to the House of Lords, shedding new light on attitudes of British governments towards the independence of the judiciary. A more descriptive-narrative approach is taken in the final chapter, portraying and analyzing the relations between the Israeli judiciary and the other branches of government. It is argued that the analysis of these relations lends support to the delegation theory of the independence of the judiciary.

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My initial interest in economic analysis of law I owe to my teachers at the Hebrew University Law School, especially Uriel Proccacia and Yisrael Gilad. My clerkship for Judge Aharon Barak and my teaching assistantship to Ruth Gavison instigated me to look into the positive analysis of the judiciary.

In the course of the work on my thesis I received many comments on my ideas and written words. I want to thank the participants of the various seminars in which I delivered papers based on parts of the thesis, among which are the Oxford Law Faculty Don-Graduate seminar, the Centre for Socio-Legal Studies seminar, the Berkeley Law School colloquium, the Law and Society conference and the European Association of Law and Economics conference. I benefited from discussions with Bob Cooter, Josh Getzler, Ben Kingsbury, Geoffrey Marshall, Amos Oz, Matthew Palmer, Joseph Raz, Daniel Rodriguez, Bernard Rudden, Pablo Spiller, Yizhar Tal, Cento Veljanovski, Izhak Zamir and Alan Zlutar. Special thanks to Ruth Gavison who read early versions of the important chapters of the thesis; her comments were always beneficial and generous. I owe a great debt to my supervisors Paul Fenn and Chris McCrudden, who led me competently and kindly through the Oxonian experience from the conception and birth of this work, through the complications of its empirical side, and to the fine print of the thesis.

My mother and extended family (including Lubitsch) have given me much support and encouragement along the way, but without my Fania, who seduced me to come to Oxford in the first place rather than travel elsewhere, perhaps, read

dedicatedly every syllable I wrote, enriching my English and adding her wisdom, all this would have not happened.

General Overview

An inseparable part of any discussion on the judiciary is its characteristic (and degree) of independence. On a normative level of analysis we usually attribute a positive connotation to the judiciary's independence; we tend to criticize any measure which violates it and endorse measures which promote judicial independence. On a positive or descriptive level of analysis we usually ask: to what extent is a judiciary independent, and what measures can facilitate or strengthen such independence? This work is aimed at dealing with another positive-descriptive question, which seems to me to be an essential preliminary question for a comprehensive discussion of the independence of the judiciary and, more generally, of the doctrine of separation of powers. This is the question: why do we find an independent judiciary as an almost universal phenomenon in democratic countries? This work will deal with this question on the basis of the economic approach towards law.

Book I Will define the questions and set the analytical framework of this work. The first two chapters are intended to elaborate on the title of this thesis. **Chapter One** will discuss its methodological side - the law and economics approach and the way in which it will be applied to analyze the independence of the judiciary. **Chapter Two** will specify, in finer detail, the core question of the thesis - the phenomenon of the independence of the judiciary. However, the issue of the independence of the judiciary ought to be viewed also in the wider context of the institutional-structural principles of the 'state', and mainly the doctrine of separation of powers. **Chapters Three and Four** will focus on these broader perspectives.

Book II will proceed with theoretical discussion. **Chapter Five** will review the only attempt made so far to explain the independence of the judiciary from an economic analysis point of view - the Landes-Posner model of judicial independence. **Chapter Six** will attempt to develop an alternative model of the independence of the judiciary, based on 'weaker' law and economics assumptions and on the tools of public choice and especially social choice. The delegation of powers will be one of its main features.

Book III will put to empirical tests some of the points discussed in the theoretical part. **Chapter Seven** will deal with the English judiciary, focusing on the Judges of the Court of Appeal and their chances of promotion to the House of Lords. It will take a quantitative-statistical vantage point. **Chapter Eight**, which will

take a more 'literary' point of view, will tell the story of the Israeli judiciary and its interrelations with the other branches of government, trying to substantiate the model of the independence of the judiciary offered in Chapter Six.

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Book I

Defining the Questions and Setting the Analytical Framework

Chapter One

On the Economic Approach Towards Law and Its Application in this Study

This chapter will draw the general theoretical and methodological framework employed in this thesis. Our departure point will be a brief discussion of the "Economics" discipline in general. This will be followed by an introduction to the Economic Approach Towards Law, and an explication of the ways in which it will be employed in the thesis.

1. On the Science of Economics

From the perspective of hindsight the Law and Economics movement would probably not be viewed as an extraordinary phenomenon. We are in the midst of a new era in the social sciences in which a 'grand theory' of sorts is being developed: sociology, political science, psychology, as well as philosophy and law, are being influenced, in varying degrees, by an 'imperialism' of economics.¹ The economists' ways of thinking, analytical methods, empirical tools, even their philosophies, are being applied in each of these disciplines. A somewhat similar process is taking place in the humanities - in history, literature, and other areas. It is possible that in the future we will witness some kind of integration between these different developments, as already today such fields as moral philosophy and theories of interpretation are being influenced by both processes.²

Whenever 'economics' is mentioned one immediately thinks about markets, prices, inflation, growth, etc., and it is difficult to understand how sociology or psychology can use the language or discourse of economics. But as early as 1932 economics was defined much more broadly as "the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses".³ For many years this definition was interpreted as including only pecuniary resources and activities within (economic) markets, but the two elements of the definition - scarcity and choice - are not necessarily limited to markets and to the

¹ See: Boulding [1968]; Ordeshock in Alt & Shepsle [1990], pp. 9-26.

² On grand theories in the humanities see: Skinner [1985]. It is noteworthy that in the humanities (or the "human sciences", as Skinner prefers to dub them) the grand theory is a recurring phenomenon, and also that there are several such theories competing with each other.

³ Robbins [1932]. For other definitions see: Becker [1976], p. 3.

production and consumption of goods. Indeed, there are branches of economics, for example game theory, which have expanded beyond the boundaries of the market. It is possible that even the more recent definition, which views economics as "the science of choice under the conditions of scarcity", is not broad enough to encompass all the work being done under the umbrella of economics; some of the issues which are analyzed by game theory or public choice do not require a condition of scarcity (or, at least, scarcity in its classical meaning).

If we are left only with the element of 'choice' it might be more beneficial to describe economics not through its subject areas but through its methodology.⁴ This methodology can be characterized by the analysis of human behaviour in given situations through: 1) a simplified description of the analyzed situation (using simplifying assumptions); 2) the application of a mathematical model which enables us to hypothesize and prove various arguments as to the interrelations between the variables in this model; and 3) deriving conclusions about the real world based on the results of the model.

One of the major points of criticism against economics, and, by extension, against the economic approach towards law, is that the economic models are not realistic. This is not, in my view, a just criticism. Economic models are not attempting to describe in full the real world; they describe only limited components of this world. This is true even for the simplest model describing the relations between supply and demand: the model presupposes fixed tastes, fixed prices of other products and more. The results of a model are limited to the variables included in it, the conclusions as to the real world are not identical to these results, and they are not as absolute as some of the model results. (If this were not the case, economic models could have provided definitive advice for solving problems of inflation, unemployment etc.).

The major contribution of economics, therefore, is that it provides us with a common language and common bases for debate about various questions. When an economic model is presented we can debate the assumptions of the model - how far they are from reality, what is missing and how we can improve them in future extensions of the model. We can debate the model itself - its mathematical validity and its results; and we can debate the conclusions which can be drawn about the real world and about the real questions awaiting decision. On the basis of this

⁴ For a different, though related, approach see: Becker [1976], pp. 4-8.

debate we can build a better model which would bring us closer to the answers, and so on. In this sense economics is an evolutionary science; it enables continuous elaboration and improvement, it provides us with good reference points and common discourse, and it gives solutions even if they are partial. This can also explain the essence of the economic approach towards law.

2. The Economic Approach Towards Law

The definition and scope of the economic approach towards law, as those of the science of economics, are neither straightforward nor universally agreed upon. I would define the economic approach towards law in a manner similar to the methodological definition of economics. This is an analytical paradigm or way of thinking on legal issues. The economic approach tackles a legal question, be it a descriptive question, a positive question or a normative one, using an economic model or methodology. Instead of elaborating on this definition it may be more useful to provide several classifications, though not complete or exhaustive ones, of the work being done under the roof of this approach. This will also allow me to place the present study in the general context of law and economics.

2.1 Law and Economics - Old and New

The interaction between economics and law is not a new phenomenon. The legal system traditionally deals also with economic questions, and legal arrangements manifestly influence economic activity. The 'old' law and economics focuses on the legal fields which exercise influence over the economic markets. It examines the effects of legal arrangements on competition, prices, investment, productivity, profits, inflation, etc. Fields such as tax law, labour law and corporation law are concerned with these issues, and economic considerations - both normative and positive - are an inherent component of the legal analysis.

By contrast, the 'new' law and economics movement does not limit itself to these traditional legal fields; it views the legal system as a whole - private as well as public law, substantive as well as procedural law - as a ground for economic analysis.⁵ This movement is embedded in a different sort of interaction between economics and law. The classical theory of economics was developed very close to

⁵ For more on this distinction see: Veljanovski [1982], pp. 3-4.

the birth of utilitarianism, which had a great effect on legal theory.⁶ Although initially there was no direct connection between the two,⁷ links were established in the nineteenth century by the neoclassical economists, who adopted the utilitarian assumptions concerning the behaviour of individuals and the possibility of measuring and comparing their utility. The neoclassical economists created economic models that were aimed at maximizing the utility of market transactions.⁸ Since that time there have been strong connections between economic theory and political-legal philosophy. Thus, developments in economic theory were significantly influenced by a critique of utilitarianism. Vilfredo Pareto's ordinal approach in micro-economics and the new welfare economics advanced by Kaldor and Hicks were partly a response to this criticism.⁹ Major components of the new law and economics movement (and especially of the Chicago school) are based on these economic approaches, and incorporate the dialogue between them and political and moral theory.

The new law and economics, as a movement, can be traced back to the Sixties with the pioneering works of Coase and Calabresi in the field of the law of torts and Alchian on property law.¹⁰ These first publications were accompanied by the establishment of the *Journal of Law and Economics*, published by the University of Chicago School of Law. However, the big impetus to this field came in the Seventies with the famous book by Richard Posner (Professor in Chicago and now judge in the American Seventh Circuit Court of Appeals), *Economic Analysis of Law*,¹¹ which synthesized, popularized and publicized the movement as an important part of legal studies.

⁶ Jeremy Bentham wrote *An Introduction to the Principles of Morals and Legislation* in 1789. Adam Smith wrote his *Wealth of Nations* in 1776.

⁷ Bentham himself was an economist (he read and was influenced by Adam Smith's *Wealth of Nations*), but it seems that he did not strictly relate his philosophical ideas to his economic theory. One possible explanation for this gap is that the classical economic theory focussed on production values, while utilitarianism focussed (in economic terms) on consumption values. See: Backhouse [1987], p. 13; Morris [1971], pp. 262-288.

⁸ This was the cardinal approach that produced the famous demand and supply curves. See: Backhouse [1987], p. 94.

⁹ Both theories tried to overcome the measurement problems of the utility of an individual and the intracommensurability of distinct individuals. They also dealt with the ethical difficulties of utilitarianism. See: Kaldor [1939]; Hicks [1940]; Veljanovski [1982], pp. 34-37; Backhouse [1987], p. 202.

¹⁰ Coase [1960]; Calabresi [1961]; Alchian [1961].

¹¹ Posner [1986], first published in 1972.

2.2 Law and Economics - The Market Concept and the Non-Market Concept

Within the new economic approach towards law it is possible to distinguish between two major types of economic analysis, which correspond to the different definitions of economics. The more traditional approach, whose leading representatives are Posner and the Chicago school, tries to apply the traditional market analysis or micro-economic theory also to non-market activities. The basic elements of this approach, as Posner explains in his book, are: the law of demand, the opportunity costs approach and the principle according to which in voluntary exchange resources will gravitate towards their most valuable uses.¹² This approach is often associated also with the efficiency criterion.

The other type of economic analysis uses economic methodology to create models, which were not designed to operate within the framework of economic markets, to deal with questions from the legal world. The theory of public choice is one of the most significant examples for this type of work. It is rooted in the time-honoured interest in analyzing, with mathematical tools, the behaviour of individuals in a way applicable also to non-market activity. This interest goes two centuries back to Borda (1770) and Condorcet (1785) who analyzed problems of majority decision-making. The modern 'pioneers' of this field were Duncan Black and Kenneth Arrow, followed by many others,¹³ who developed these interests into an independent branch of economic theory which includes the public choice approach.¹⁴

During the period in which classical economic analysis of law established itself, public choice struck roots in political theory, beginning with the writings of Anthony Downs, James Buchanan and Gordon Tullock.¹⁵ This approach, which originally focussed on political and bureaucratic behaviour,¹⁶ has in the last decade gradually moved to deal also with legal issues, mainly in the fields of public law.¹⁷

¹² Posner [1986], pp. 3-10.

¹³ Black [1948]; Arrow [1951]. For a general survey of this approach see: Mueller [1979] & [1989].

¹⁴ For applications of game theory - a related economic field - to law see: Ayres [1990].

¹⁵ Downs [1957]; Buchanan & Tullock [1962]. For a recent survey see: Dunleavy [1991].

¹⁶ For a survey of the different approaches within public choice see: Mitchell [1988a], who distinguishes between the Rochester school, which uses tools mainly from game theory, the right-wing Virginia school, which uses Italian and Scandinavian economic theories, and the Bloomington School, which approaches public choice from the normative-philosophical direction.

¹⁷ See: Farber & Frickey [1991]; McAuslan [1988].

The two main foundations of public choice are the analysis of collective decision-making, or the theory of social choice, and the theory of interest-groups and their impact.¹⁸

In the last fifteen years we have been witnessing an integration between the two approaches, the market and the non-market, and an emergence of new theoretical branches which are based on both types of analysis and the comparison between the two. The new political economics of Chicago, the new institutional economics, positive political economy and the new economics of organisation are good examples.¹⁹ These branches provide us with new theoretical bases for analyzing legal and political questions,²⁰ of which the two most important cornerstones are transaction cost theory and the agency theory. The former analyzes costs of market transactions versus costs of non-market (inter-organisational) transactions, and hence provides explanations for the emergence and structure of institutions.²¹ The latter uses the framework of agency-principal relationship to describe and explain the variety of relationships between and within organizations, and institutional design in general.²²

2.3 Economic Analysis of Law - Dogmatic and Moderate

A different type of classification of law and economics focuses not on the types of economic theories being applied to legal questions, but on the 'ideology' behind the theories and the sort of assumptions which are in the basis of the analysis.²³ On the dogmatic edge of the spectrum, namely the 'strong' law and economics, we find the Chicago school, which uses very rigid assumptions as to the behaviour of individuals and the character of the firm, and draws on a conservative ideology.

¹⁸ See: Mashaw [1989], pp. 123-126; Buchanan in Gwartney & Wagner [1988]; Ordeshock in Alt & Shepsle [1990]; Rubin [1991].

¹⁹ See Mitchell [1989]; Williamson [1975] & [1979]; Langolis and Williamson in Langolis [1986]; Moe [1984]; Eggertson [1990]; Alt & Shepsle [1990]. The new *Journal of Law, Economics and Organization* represents this trend.

²⁰ For applications in political science and in law see: Moe [1984] and Macey [1988/89] respectively.

²¹ The path-breaking text, which dealt with the question why an organization such as the firm exists at all, is Coase [1937].

²² The seminal article on agency theory, which dealt with the separation of ownership and management in a corporation, is Jensen & Meckling [1976]. See also: Eggertson [1990], pp. 40-58.

²³ See: Eisenberg [1990], Ackerman [1986].

The Chicago models assume that all individuals are aiming solely to maximize their economic self-interest, i.e. wealth, that they always have the full information to choose the best option for themselves, and that they have a complete knowledge of the law so that liability rules provide incentives to behaviour. Similarly, the firm is viewed as an institution which operates solely to maximize profits. It is analyzed as a set of contracts ignoring the firm's governance structure and other institutional-organisational factors which affect its operation. The attitude which derives from these assumptions involves a strict preference for markets and contracts over legal rules and government intervention. The ideological dimension includes also a preference for efficiency, determined in terms of wealth, over distributive justice and other considerations as the normative goal of the legal system.

The moderate, or 'weak', law and economics has been associated with Yale Law school; but today, with the advancement of economic tools, it is popular in many other places as well. This approach also assumes that individuals are seeking to maximize their self interest, but the definition of self interest is not as narrow as Chicago's definition; it can include other goals beside economic wealth, and the object of the benefits can be other individuals, going beyond the immediate subject of the maximization. In other words, paraphrasing Amartya Sen,²⁴ the strong definition of Chicago includes three elements: self-goal choice - the behaviour of the individual is guided immediately by the pursuit of one's own goal; self-welfare goal - the individual's goal is to maximize his or her own welfare; and self-centred welfare - a person's welfare is dependent only on his or her own consumption. By contrast, the moderate approach to law and economics makes a weaker assumption comprising only two elements out of these three (either the first and the second or the first and the third).²⁵ In addition, these interests can differ with regard to activities in the private sphere and activities in the public sphere. Also, there is neither an absolute assumption according to which individuals have full information for their choices, nor that they have full knowledge of the law, or that liability rules solely direct their behaviour.

The moderate approach views the firm not as a nexus of contracts but as an enterprise of persons and assets organized by rules and operated by agents. The analysis of the firm, therefore, is dependent upon the theories of agency costs and

²⁴ Sen [1987], p. 80.

²⁵ See also: Moraeh in Moles [1988], pp. 47 ff.

transaction costs.²⁶ As to the preferred attitude, the moderate approach is also market-orientated, but it acknowledges, as derives from its assumptions, a greater variety of market failures which may justify the intervention of government or the legal system. The latter is perceived as strengthening the market activity rather than replacing it. Furthermore, on the normative level, efficiency is not the only legitimate or desirable goal; considerations of distributive and corrective justice have a place within the economic analysis as well.

The dogmatic approach of Chicago, because of its rigid assumptions, enables a relatively simple mathematical treatment of every legal question in any legal field. A model which is founded upon assumptions of full information, zero transaction costs, full knowledge of the law etc. is simple to construct, and its results and the derived conclusions are quite straightforward. This is the reason that some scholars view the moderate approach as an advanced evolutionary stage of the Chicago approach, where the latter serves as a research starting-point or a baseline case. The advanced stage is characterized, in addition to having more complicated assumptions, by a distinction between the validity of the underlying premises and the validity of hypotheses, which are constructed upon these basic premises and are the object of verification by empirical-quantitative methods.²⁷ I think that this evolutionary description of the two approaches is insufficient, mainly because it does not take on board the normative differences underpinning the two. It is for the sociologists to determine whether the rigid assumptions of the Chicago school have given rise to its conservative ideology, or vice versa.

2.4 The Level of Economic Analysis of Law

The law and economics literature can also be classified according to the level of its analysis - descriptive, positive or normative.²⁸ Descriptive analysis is aimed at describing legal rules, institutions and judicial decisions, using the language of economics. One of the more significant examples is the attempt to describe the Common Law as efficient, in the sense that the various rules developed by judges provided the most efficient solutions to the problems they faced.²⁹ Underlying this

²⁶ See: Eisenberg [1990], pp. 29-30.

²⁷ Ibid, pp. 32-35.

²⁸ See: Veljanovski [1982], pp. 21-26, and, for a different classification, Ogus in Moles [1988], p. 15.

²⁹ This theory was first offered by Posner [1972]. For a general discussion of this argument see: Coleman [1980].

project there is usually also a normative assumption according to which efficiency is a desirable goal, and a conclusion to the effect that economic analysis 'approves' the existing legal rules.³⁰ But this normative element is not an essential part of the examination whether legal rules are efficient.

On the positive level, the law and economics approach puts forward a set of hypotheses and predictions which can be tested by empirical tools. A positive economic model seeks to find connections between some of its variables while other variables are kept fixed. The connections between demand, supply and prices are the classic example of such a model. These are investigated while other variables, such as tastes, income, and other products' prices are held fixed. The predictions can be tested by using econometrics - another branch of economics - where the major statistical tool is the multi-variable regression. It ought to be remembered that positive economics, as well as positive economic analysis of law, provides only partial connections and explanations. Positive economics is applied in the economic analysis of law to find the various effects of legal rules, judicial decisions and institutions - real or hypothetical. For example, positive economic analysis of law can examine the effects of a strict liability rule versus a negligence rule on the rate of car accidents and the sum of damage caused by them,³¹ or probe the effects of different punishment methods on the level of crime,³² and more.³³

Normative economics is the branch of economics concerned with ethics. Normative economic analysis of law uses economic tools to evaluate legal rules and institutions and to suggest what legal changes ought to take place and how legal actors should perform. In other words, normative analysis tells us not what is the existing legal rule, not why it exists, but whether it is a 'good' rule and what is the desirable one. Economic theory has been strongly linked with utilitarianism and its critics, and thus the normative level of economics is as old as economics; the same applies to the economic analysis of law. But a major recent impetus to this branch in

³⁰ See: Ackerman [1986], pp. 934-940.

³¹ See, for example: the pioneering work of Calabresi [1970].

³² Ehrlich [1972].

³³ For a literature survey in this field see: Veljanovski [1982], pp. 21-24, 68-93; Bowles in Greenaway & Bleaney & Stewart [1991], pp 781-796.

the law and economics literature was given by the debate, opened by Richard Posner in the late Seventies, about the desirability of wealth maximization.³⁴

Indeed, the law and economics approach is usually identified with efficiency or wealth maximization as its normative goal, but this does not necessarily have to be the case. Although the methodology of economics, by its nature, cannot accommodate every normative criterion - thus, for example, it is not able to adopt natural law or Kantian approaches - there is still a wide range of moral principles which can be adopted by the economic approach. Very crudely it can be said that the economic approach can accommodate any criterion which is based upon the consequences of rules or upon the institutions and procedures which decide them (in contrast to criteria based on the substance of rules or the behaviour or intentions of individuals). Thus considerations of utility, efficiency and distribution can be part of normative economic analysis of law.

In contrast to the traditional dogmatic approach, which adopts wealth maximization as its sole normative goal, some of the moderate law and economics writings take into account considerations of justice or distribution, either through imposing constraints on wealth maximization or through the operation of a social welfare function.³⁵ The non-market law and economics, and especially the public choice branch, have a different normative discourse, which focuses more on decision-making rules as the evaluative criteria. This discourse is rooted in the social contract theories which preceded utilitarianism. Those theories stress social agreement as the source (and the evaluative criterion) of the law.³⁶ One of the modern followers and developers of this approach is James Buchanan,³⁷ who analyzes the justification of legal rules as depending neither on their contents nor on their consequences, but rather on the scope of agreement that the rules reflect.

³⁴ Posner [1979]. Major parts of the debate can be found in volume 9 of the *Journal of Legal Studies* (1980) and in volume 8 of *Hofstra Law Review* (1980).

³⁵ See, for example: Calabresi [1970].

³⁶ On a normative dichotomy line, whose polar ends are natural law and utilitarianism, contractarian theories can be located somewhere in the middle. Some of the contractarian philosophers, notably John Locke (1632-1704) and to some extent Jean-Jacques Rousseau (1712-1778), recognized the existence of natural law (or rights), and saw the social contract as aiming to accomplish it. Other philosophers, like Thomas Hobbes (1588-1679), rejected the view that such 'super-law' does exist. Hobbes can be seen as the main ancestor of the normative ideas of public choice.

³⁷ See Buchanan & Tullock [1962]; Buchanan [1975], Brennan & Buchanan [1985].

Unanimous decision-making, which is equivalent to the traditional market economics' Pareto principle, is the normatively preferred principle.³⁸

2.5 Two Gateways to Economic Analysis of Law

One can distinguish between two main gateways to the economic analysis of law: the jurisprudential gateway, which can also be called the substantive gateway, and the political science or theory of the state gateway, which can also be called the institutional gateway. In the jurisprudential gateway the economic analysis is structured upon the theory of law, and mainly upon the question 'what is law'. Although this question is a descriptive one, the answer to it leads also to normative issues, like the question how judges ought to decide.

The other source of discussion is through the theory of the state and the normative debate about the functions of state and government. These normative questions, which can be demonstrated by the debate in North America between pluralists and republicans, federalists and anti-federalists, breed also positive questions as to the behaviour of the legislature, the function of different types of separation of powers and more. A question such as how judges ought to decide can be discussed, still in the framework of the economic analysis of law, as proceeding from this gateway as well. I will elaborate on these two gateways in Chapter 3.

Although this classification according to the sources of the debate is not exclusive to law and economics, it is important for its broader context, and significant also because it can explain the long-lasting gap between (1) traditional law and economics, especially its normative level of analysis and the efficiency criterion, which relate mainly to the jurisprudential gateway, and (2) the public choice approach, which derives almost solely from the theory of state gateway. Only in recent years has a contact between the gates been established under the auspices of the economic analysis of law.

³⁸ See also: Whynes & Bowles [1981], chs. 1 & 3; Veljanovski [1982], pp. 100-102; Salzberger [1992].

3. The Use of Law and Economics in this Work

3.1 General

This thesis, as indicated by its title, will attempt to provide an economic analysis of law explanation for the phenomenon of the independence of the judiciary. Following the foregoing survey of the law and economics movement it will be useful to specify what kind of economic analysis will be applied in this thesis.

The analysis offered in this work will be primarily on the positive level, although various normative conclusions may be derived from it. The normative question whether it is desirable to have an independent judiciary will not be dealt with. I will, rather, address the positive question: why do we have an independent judiciary? This will be done after a brief description of the phenomenon itself. We will be working in the realm of the new law and economics approach. Constitutional law, in general, and the doctrine of separation of power, in particular, are outside the scope of the old law and economics.

The theoretical discussion will depart from the only comprehensive attempt so far to provide a complete positive analysis of the independence of the judiciary - the Landes-Posner model,³⁹ to be discussed in Chapter 5. This model can be classified as part of the dogmatic market approach. It is built on the basis of the neo-classical demand and supply model, applied to the 'commodity' of legislation, and it is founded upon rigid assumptions as to the behaviour of legislators on the supply side and of interest-groups on the demand side.

From the description and critique of this model I will move, in Chapter 6, to offer an alternative positive analysis of the independence of the judiciary. This alternative model will be based on a moderate non-market law and economics, which proceeds primarily from the political science - theory of state gateway. It relies, as will be specified below, upon weaker assumptions as to the behaviour of individuals, and especially of legislators. The model itself is constructed upon the main theorems of public choice, and especially upon the social choice literature, which analyzes collective decision-making.

³⁹ Landes & Posner [1975].

Chapters 7 and 8 will try to test empirically some predictions of both the Landes-Posner model and mine. Chapter 7, dealing with the English legal system, will take a more quantitative approach, trying to test the connection between relevant variables which influence the promotion of judges. Chapter 8, on the Israeli legal system, will take a more narrative approach; it will try to implement the theoretical discussion to the 'story' of the Israeli judiciary and its interrelations with the legislature and Government.

3.2 The Theoretical Framework

3.2.1 The Behaviour of Political Actors in the Political Arena

As I will try to offer an explanation for the phenomenon of the independence of the judiciary which is related to the motives and incentives of the other branches of government, it is necessary to spare a few words on the basic assumptions regarding the behaviour of the various actors taking part in the system under scrutiny.

The underlying assumption is that individuals are rational and are seeking to maximize their self interests. This assumption applies to all individuals both in their market and in their non-market behaviour. Thus we should expect politicians to maximize their interests while acting as rulers or legislators⁴⁰ (politicians are taken by public choice theorists to be seeking mainly the acquisition of more political power and the promotion of their re-election chances⁴¹); bureaucrats to maximize their interests while conducting bureaucratic activity,⁴² and even judges to act in the same manner when judging.

At a first glance this may seem a very rigid assumption,⁴³ but this, of course, depends upon the substance of one's concept of 'self interest'. While the Chicago school, including Landes and Posner in their model of the judiciary, relies on the strong, or narrow, definition of the term, comprising all three elements of Sen's

⁴⁰ See, for example: Macey [1987]; Tollison [1988].

⁴¹ The leading texts are: Stigler [1971]; Pletzman [1976].

⁴² See: Whynes & Bowles [1981], ch. 6; Rowley & Elgin in Greenaway [1985], pp. 31-49.

⁴³ Some scholars even criticised this assumption as immoral because it can encourage politicians and bureaucrats to act for their self interest. For a reply to this criticism see: Brennan & Buchanan [1988].

analysis,⁴⁴ my model relies on a weaker definition, which includes only the first and second, or the first and third components of the strong definition: it stipulates that peoples' self-goal choices are not necessarily only self-welfare goals or self-centred welfare. When I talk about politicians or judges who maximize their own self interests, these interests can include also the welfare or happiness of others - the electorate, the parties to the dispute or the general public. Indeed, politicians can be viewed as seeking re-election or greater political power in the framework of working to promote the welfare of society. Under these terms the self interest assumption should not be so easily discredited. This weak assumption can also be accommodated, at least in part, with other political philosophies including republican-civic virtue or communitarian approaches.

3.2.2 The Problems of Collective Decision-Making

The two major foundations of the public choice approach towards public law, which are constructed upon the basic assumptions about the behaviour of individuals, are the interest-group and rent-seeking model of legislation on the one hand, and the theory of collective decision-making process on the other hand.⁴⁵ I will elaborate on the interest-group theory later; in a nutshell, public choice theorists believe that despite the democratic way in which the legislature is elected, it does not represent the views of the general public or the median voter. Instead, it is captured by powerful interest-groups, which have an advantage over the general public due to organization costs, information costs and the 'free rider' problem.⁴⁶

More dogmatic scholars proceed to claim that politicians are actively shopping for such interest-groups and even help to form them,⁴⁷ and they describe the process of legislation as an exchange contract in market conditions, in which legislation is sold by the legislature and bought by interest-groups.⁴⁸ Indeed, the Landes-Posner model is constructed along these lines. The alternative model offered in the present study will not be based on this crude public choice perception.

⁴⁴ Sen [1987], p. 80, distinguishes, as we indicated above, between three components of 'self interest' - self-goal choice, self-welfare goal and self-centred welfare.

⁴⁵ See: Mashaw [1989].

⁴⁶ See: Stigler [1971]; Macey [1988/89], p. 47. On the organisation of interest groups and the way they operate see: Dunleavy [1991], chs. 2 & 3.

⁴⁷ See: Macey [1987], p. 63.

⁴⁸ See: Pletzman [1976]; Posner [1982], p. 265; Macey [1987], p. 62; Macey [1988], p. 474.

In fact, major parts of the interest-group view of legislation will not be a necessary premise for it.

The other important foundation of public choice is the analysis of collective decision-making, which has been traditionally treated as a distinct strand of literature, although it is an essential component in the modeling of public law and in the understanding of the interaction between interest-groups and the legislature. While interest-group theory is focused on the behaviour (or, in more technical terms, the utility function) of the individual actor - voter, legislator, bureaucrat etc. - collective decision-making theories analyze the aggregating outcome of individuals' preferences in terms of a group decision. Since most of the important decisions in the public arena are made by groups rather than individuals, this analysis is an essential part of an economic approach towards public law. Thus, the two theories should be seen as complementing each other, and ought to be integrated into a comprehensive explanation of the political process and of public law.

Collective decision-making analysis, sometimes called 'social choice theory', deals with the interaction of the three components of the collective decision-making process - the possibilities group (what are the possible decisions to be made), the decision-makers group (who makes the decision), and the decision-making rule (how the decision is reached). A collective, or social, decision is the outcome of a process in which the decision-makers, using the decision-making rule, choose one alternative from the possibilities group.

Social choice can be used at different levels of analysis. On a normative level it can offer, given a particular set of philosophical requirements, the 'best' decision-making rule for any given set of possibilities group and decision-makers group. It can suggest, for example, what is the best decision-making rule for a jury - a decision-makers group of twelve people which has to choose one of two possible alternatives, guilty or not guilty. On a positive level, it can try to explain why the simple majority rule is the most popular decision-making rule for collective decisions.⁴⁹ Our employment of this paradigm will be on yet another level. It will depart from a given set of a possibilities group, a decision-makers group and a decision-making rule; and it will try to examine the practical and normative problems which face this specific set. In other words, this study will apply social choice theory to examine the problems with the traditional form of legislation. In most cases, this is

⁴⁹ See the classical text of Buchanan & Tullock [1962], p. 81.

a process in which the decision-makers group - the legislators, usually comprising several hundreds of individuals - vote on several alternative bills - the possibilities group - using the simple majority decision-making rule.

Most of the social choice literature has focused on the analysis of decision-making rules, rather than the analysis of decision-makers or possibilities groups. Among the various decision-making rules the simple majority has attracted most attention. The core problem of simple majority rule, which was recognised over two hundred years ago, is the lack of consistency and coherency of its outcome; or, using a more technical term, the cycling problem. Since an essential part of my model of the independence of the judiciary is based on this problem, it merits elaboration.

Let us assume that two alternatives - A and B - for the legislation of a specific issue are placed on the legislature's agenda. Each legislator faces a choice among three options, as the status quo, S, is also a possibility. Let us also assume that there are three legislators, and each of them has a complete and a transitive order of preference among the three options.⁵⁰ Strikingly, in this simple situation, it cannot be guaranteed that majority voting would result in a stable and non-arbitrary winning option. For example, suppose that the preferences of the three legislators are as follows: legislator 1 prefers A to S, but S to B; legislator 2 prefers A and B to S, and B to A; and legislator 3 prefers S to A and B, and B to A (see figure 1a); in this case there will be no satisfactory winning solution. In a pairwise majority vote, A can defeat S (by the votes of 1 and 2), S can defeat B (by the votes of 1 and 3) and B can defeat A (by the votes of 2 and 3). Thus, a lack of agenda setting or procedural constraints will result in endless cycle voting, i.e. no solution. An agenda setting or procedural constraint (for instance a committee or some other mechanism for setting the order of voting) may prevent the cycling and lead to the acceptance of one of the options, but in this case the chosen option will be an arbitrary one.

This paradox of rational persons and irrational society bears grim implications as to collective decision-making in general (not only in legislation⁵¹), and what we can make of it.⁵² Moreover, as Kenneth Arrow has shown, these problems are by no

⁵⁰ A **complete** preference order means that for any given two alternatives the voter can point at the one which he or she prefers. A **transitive** preference order means that if A is preferred to B and B is preferred to C, then A is also preferred to C.

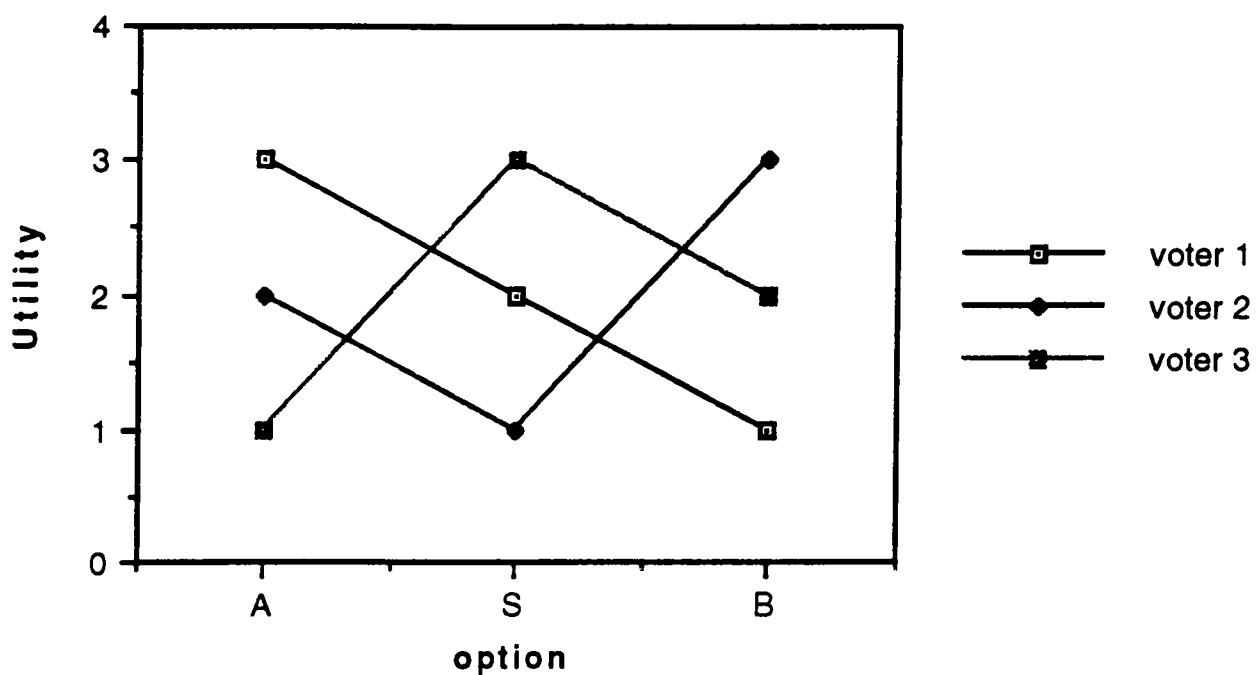
⁵¹ See, for example, Easterbrook's [1981] application of decision-making theories to judicial rulings.

⁵² See, for example: Riker & Weingast [1988] discussing the interpretation of legislation.

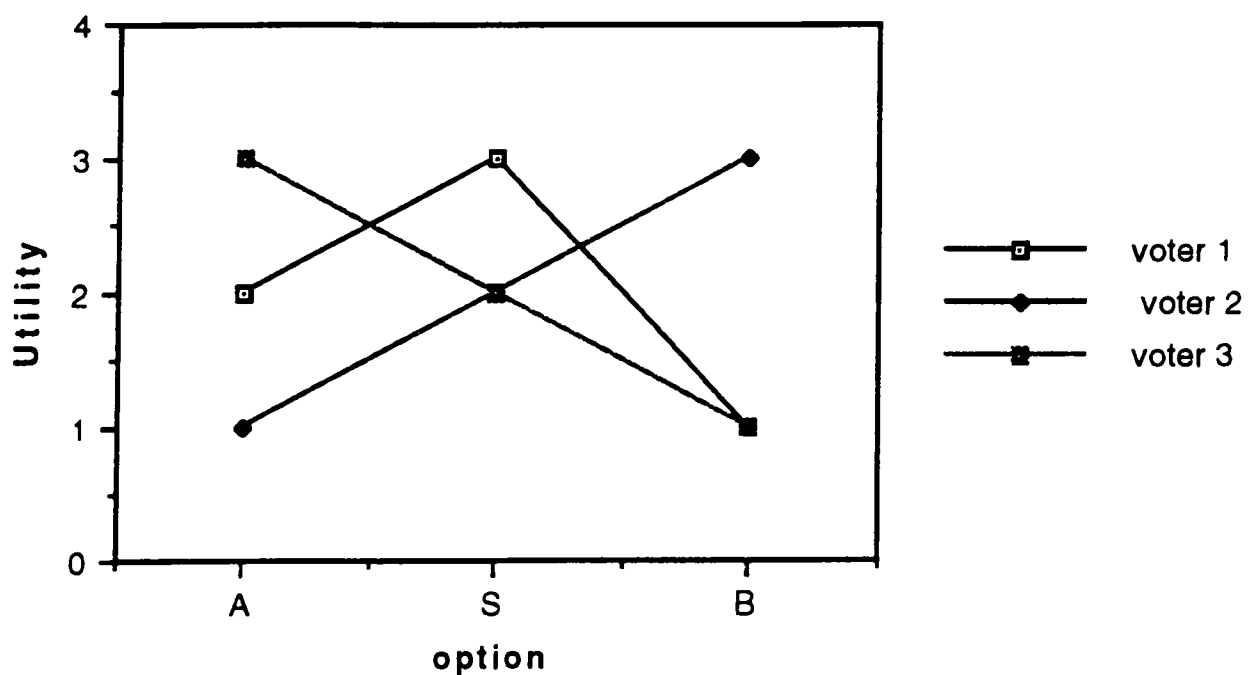
means limited to the simple majority decision-making rule.⁵³ We have to remember, though, that the cycling problem (as well as its generalization in Arrow's theorem), occurs only with some sets of individual preferences; other sets of individual preferences would not result in cycling.

Figure 1
Examples of simple majority voting

a. Non single peaked preference order



b. Single peaked preference order



⁵³ Arrow's impossibilities theorem [1951] and its revised version [1963] bear even grimmer conclusions. This theorem generalizes the cycling problem of simple majority decision rule by proving that there is **no** decision-making rule which fulfils five basic and reasonable requirements put to a decision-making process - transitivity, unrestricted domain (the procedure can be operated to decide between any pair of alternatives), independence from irrelevant alternatives (the choice between two alternatives is not dependent on the ordering of other alternatives), the Pareto postulate (if an individual preference is unopposed by any contrary preference of any other individual, this preference is preserved in the social ordering) and non-dictatorship (one decision-maker cannot dictate the collective preference order).

Duncan Black showed that majority rule produces an equilibrium outcome when the preferences of all the decision-makers are single-peaked.⁵⁴ If we locate the voting alternatives on a single-dimension dichotomous line, and depict the individuals' preferences along this line, and if the preference curves are single-peaked, majority voting will result in a stable and non-arbitrary outcome, which will be the preferred alternative (the peak preference) of the median voter. Figure 1 demonstrates a non single-peaked set of preferences (1a) matching the example given above and a single-peaked set of preferences (1b). In the former example while voters 1 and 3 have single peaked preferences, voter 2 does not. This is enough to result in a cycle.

Single-peakness is, actually, not an unlikely feature in a legislation type of decision-making process. It is natural for a legislator who believes in a certain arrangement, that his or her preferences for alternative arrangements diminish the further these alternatives are from his or her best solution. This is true especially with regard to matters of quantities, for example the level of public expenditure on different budget items such as defence or education. This description, however, presupposes a consensus on the location of the various proposals along the 'ideological' line, and such consensus does not always exist, especially when non-quantitative matters are being discussed. Furthermore, even with such a consensus, preferences might not be single-peaked. A recent example from British politics which comes to mind is the debate on local taxation.

We can describe the three recently discussed alternatives of local taxation - rates, poll tax and local income tax - as options S, A, and B in figure 1, respectively. These can be located on a line which represents the degree of progressiveness of the tax, whereas poll tax is on the regressive extreme (the left side of figure 1a) and local income tax is on the progressive extreme (the right side of figure 1a). The three parties' order of preferences with regard to these taxation methods can match the preference order described above, wherein the Conservatives are represented by voter 1 (poll tax preferred to rates but rates preferred to local income tax), the Liberal-Democrats by voter 2 (local income tax preferred to rates and poll tax but the latter is preferred to rates) and Labour by voter 3 (rates are preferred to local income tax but both are preferred to poll tax). If this is an accurate description of the preference

⁵⁴ Black [1958].

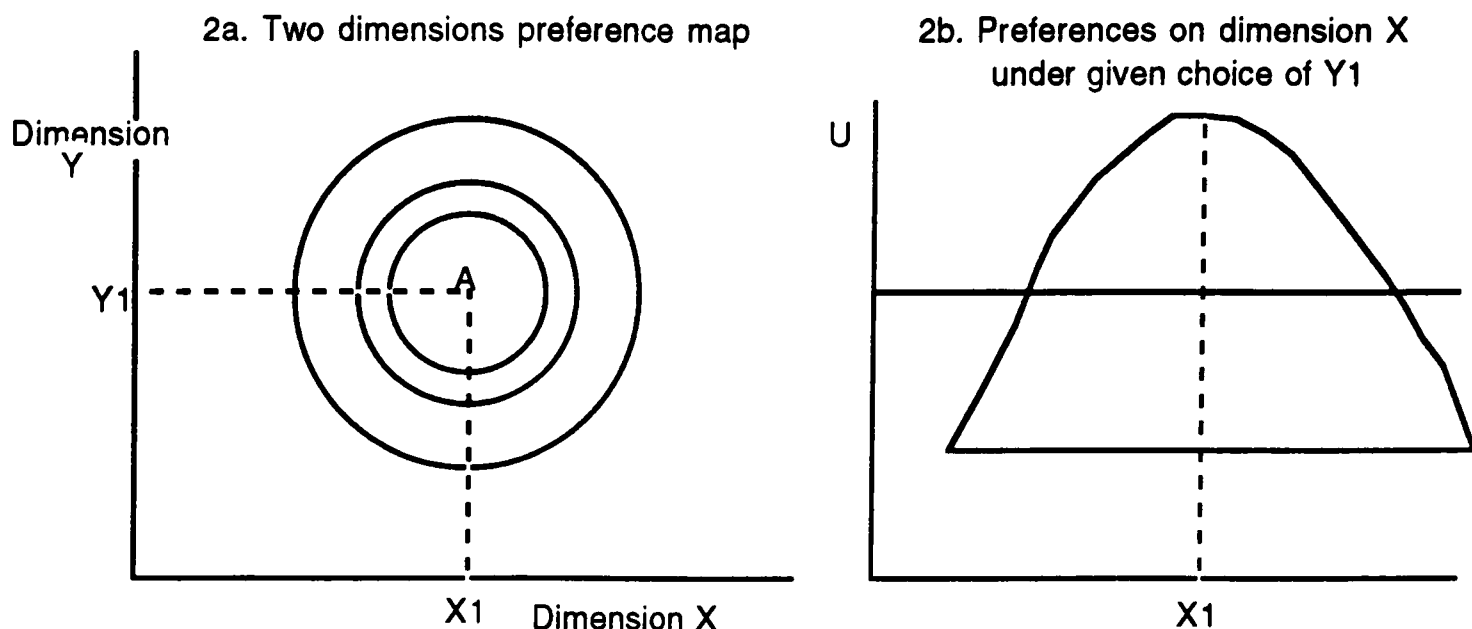
order of the three parties, and had the three parties been equal in size, there would have been no winning option.⁵⁵

Single-peakness is, unfortunately, not the end of the story. Bills put on the legislature's table usually encompass more than one issue, and even when they deal with one issue, it might have more than one ideological dimension. In the local tax example, the progressiveness of the tax might not be the only controversial ideological element. The accountability of local authorities to their voters, for example, might be another important dimension. In this case we would not be able to identify the voters' diverse ideal positions along a mono-dimensional line; we need to move to a multidimensional model. For simplicity's sake I will demonstrate the consequences of this alternation on a two-dimensional model, but in principle the same analysis is applicable also to models with more than two dimensions. In a model of two dimensions, X and Y , as in figure 2a, each point represents a stance which combines a location X_i in the first dimension and a location Y_i in the second dimension. Each legislator has a favourite (most preferred) alternative in this space, for instance point A for voter 1 (this point represents location X_1 in dimension X and location Y_1 in dimension Y).

Single-peakness in a two-dimensional model means that the voter prefers an alternative which is closer to his or her most preferred option to an alternative which is further away. Thus, we can draw circles (or other types of closed lines) around the ideal point; each of them connects all the alternatives which are in the same level of preference (or have the same degree of utility) in the voter's view. These circles are called 'indifference curves' (because the voter is indifferent as to choosing between any two points on the same circle). The single-peakness characteristic, in this context, means that indifference curves contain each other and that points on an inner indifference curve are preferred to points on an outer curve (as they are closer to the voter's ideal point). Now, if a decision in one of the dimensions is set in advance, or by another decision-making body, the legislator's preferences, under this set constraint, are back to the familiar form of a single peak. For example, in figure 2b we are presented with the voters' preferences in dimension X under a given decision, Y_1 , in dimension Y .

⁵⁵ The same analysis can be applied to the debate about the Maastricht Treaty, whereas the options are: A - the treaty with the Social Charter, B - the treaty without the Social Charter, and C - no treaty. The preferences can be described as $A > B > C$ for the Liberal-Democrats, $A > C > B$ for Labour, $B > C > A$ for the Conservatives and $C > A > B$ for the Tory rebels. Indeed, as these lines are written, it seems that the courts will be delegated the main powers to decide on pivotal questions concerning the applicability of the Social Charter in Britain and other's question with regard to the Treaty.

Figure 2
Preferences of a single voter on a two-dimension issue

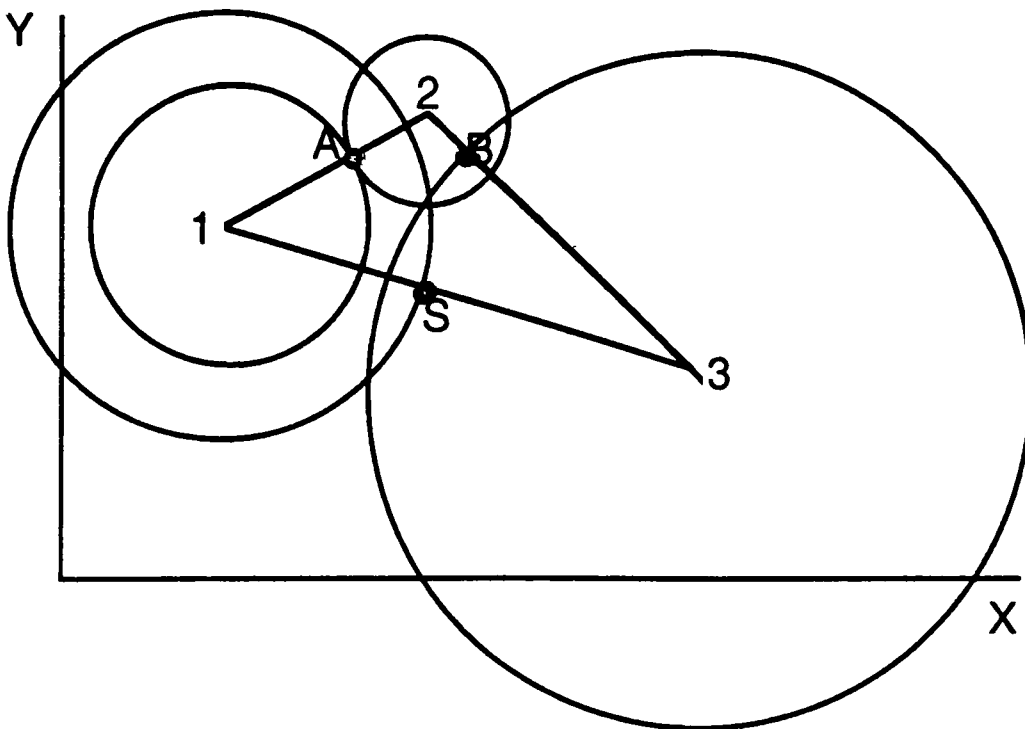


What should be noted here is that while in a one-dimensional decision-making process single-peakedness guarantees a simple majority equilibrium (which is the preferred point of the median voter), single-peakedness in multidimensional decision-making does not guarantee such an equilibrium. A demonstration of this point is provided in figure 3, in which there are three voters, 1, 2 and 3, with single-peaked preferences. There are two alternative bills, A and B, and the status quo, S. In a vote between A and S, the former will win (with the votes of 1 and 2 against 3); in a vote between A and B, the latter will win (with the votes of 2 and 3); and in a vote between B and S, the latter will win (with the votes of 1 and 3). There is no equilibrium, there is a cycle.

This is not yet the full picture; there are other complications in the operation of the simple majority rule, which will not be elaborated here. One of these additional factors is the **intensity** of preferences. So far we have discussed only simple preference orders and ignored their intensity; in reality, the intensity of preferences may play an important role in analyzing, predicting and reviewing collective decision-making. Legislators can support or oppose a bill at different levels of intensity, which depend on the shape of their utility function. The variation in the intensity of preferences is connected to another phenomenon in the decision-making process - the trade of votes, or 'logrolling', which has an additional effect on the cycling problem.⁵⁶

⁵⁶ For further analysis see: Mueller [1989], pp. 82-87.

Figure 3
Cycling in a majority rule decision-making on a two-dimensional issue



4. Conclusion

After a general survey of the economic approach to law this chapter has focused on the theoretical foundations of collective decision-making guided by the majority principle. As will be shown in Chapter 6, this analysis is very relevant to my explanation of the independence of the judiciary. In a nutshell: the discussion of collective decision-making problems is applicable, among many other institutions, to the legislature, and it portrays a picture of instability. In reality, however, a close look at the deliberations of legislatures and their outcomes does not reveal endless cycling, neither in the process of legislation itself, nor in the changes of the law over the years. Some may even find too much stability in the law-making system. This begs the question: why so much stability?⁵⁷ One of the reasons for this stability is linked, in my view, to the independence of the judiciary. It has to do with the desirability, from the legislature's viewpoint, of the delegation of legislative powers to independent courts, and this in turn requires the existence of such an institution. This is the crucial meeting point between the first part of the title of this thesis - economic analysis - with its second part - the independence of the judiciary. My next task, before asking why do we have an independent judiciary, is to describe the phenomenon of the independence of the judiciary. This is the topic of the next chapter.

⁵⁷ This question, as phrased here, was put forward by Tullock [1981].

Chapter Two

The Phenomenon of the Independence of the Judiciary

Introduction

The present chapter defines the phenomenon of the independence of the judiciary to be explored in this thesis - the gap between structural and substantive independence. The general observations made here will be complemented by parts of Chapter 7 (about the English Court of Appeal) and Chapter 8 (about the Israeli Supreme Court), which offer an empirical backing for our account of this phenomenon.

A great deal of literature has been written on the independence of the judiciary. Although most writers point to the desirability of judicial independence and attack measures which may curtail it, one hardly ever comes across an attempt to specify what exactly judicial independence is.¹ What follows is an attempt at a tentative definition (**section 2**), with the general term 'independence' as our departure point (**section 1**). The key phenomenon which is part of the notion of the independence of the judiciary and is the focus of this work - the gap between what I call the structural independence of the judiciary and its substantive independence - will be described in **section 3**.

One can argue, justifiably, that before defining the independence of the judiciary we ought to explain, not only what is independence but also what is the judiciary. The problem with this proposition is that it results in a cycle because independence is one of the major widely agreed upon components of the definition of the judiciary.² For the sake of this work's purpose, as will be apparent later, we can be content, therefore, with a tentative and general definition of the judiciary which includes two major elements - functional and structural. Thus the judiciary can be defined as a body of persons whose main function is dispute resolution by the application of primarily pre-set rules and principles.³ Structurally this body of persons is one of the state institutions or branches of government, but it is separated

¹ Some writers list the components of judicial independence without actually defining it. For one of the most elaborate enterprises see: Shetreet in Shetreet & Deschenes [1985], pp. 595 onwards.

² For various definitions of the judiciary, from different disciplines, all of them include independence as an essential component, see: Tate in Schmidhauser [1987], pp. 12-26.

³ Secondary functions of the judiciary are social control and law-making, See: Shapiro [1981], ch. 1.

from other parts of government and has distinct qualities of impartiality and independence.⁴ We can now focus our attention on independence and the independence of the judiciary.

1. The Notion of 'Independence'

The *American Macmillan Contemporary Dictionary* defines "independent" in the seven following ways:

- 1) Not influenced, guided, or determined by others.
- 2) Not subject to external control or rule; politically autonomous.
- 3) Not depending or contingent on something else.
- 4) Not connected with, derived from, or part of anything larger, as a chain or system.
- 5) Not affiliated with or regularly supporting any political party.
- 6) Self-willed; self-reliant.
- 7) Not relying on anyone for what is necessary or desirable.

The *Oxford English Dictionary* defines "independence" as "the condition of being independent; the fact of not depending on another; exemption from external control or support; individual liberty of thoughts or action. Rarely in bad sense: insubordination". "Independent" is defined there as:

- 1) Not depending upon the authority of another; not in a position of subordination; not subject to external control or rule; self governing; free.
- 2) Congregational.
- 3) Not contingent on, or conditioned by anything else; not depending on the existence or action of others or of each other.
- 4) Not depending on another for support or supplies.
- 5) Not influenced or biased by the opinions of others; thinking or acting for oneself.
- 6) (Math:) Not depending on another for its value.

An analysis of the various definitions of 'independence' yields three necessary components: the **subject** of independence, its **nature** and its **object**. The subject of independence can be either a person (or a group of persons) or an institution. Thus, when we say that Virginia is independent (or has independence), we may be referring to a specific person or to the American State. The object of independence, although not always mentioned explicitly, is an inherent part of the term. When we say that someone or something is independent, even if we do not

⁴ This definition is close to Becker's classical definition. See: Becker [1970], p. 13.

specify that it is independent from x or y, we always refer to the independence as related to an object. The meaning of the sentence 'Virginia is independent' is context-dependent. If Virginia is a six years old child the object may be her parents, her teachers etc.; if Virginia is a cabinet minister the object may be the prime minister, the party or the public; and if Virginia is the State the object can be the United States of America. The object of independence can be human (other person/s) or not human (institution, norm etc.) and, in a somewhat similar way to the distinction between a right in-rem and a right in-persona, it can be a specific person/s or institution/s, or the whole world.

The nature of independence can be of two kinds. It can be either the mere existence of the subject of independence, or it can be the behaviour, way of conduct or decision-making process of the subject of independence. In other words, the nature of independence can refer to what its subject **is**, or to what its subject **does**. I call the former type of independence 'fundamental' and the latter type 'dynamic'. The nature of independence, just like its object, although not always mentioned explicitly, is an inherent component of the term, and sometimes context-dependent. The term 'independence', therefore, describes the sort of causal connections, or rather a lack of such connections, either fundamental or dynamic, between its subject and its object.

Returning to the dictionary definitions, *Macmillan's* first, third, fifth, sixth and seventh meanings of the term 'independent' refer to a dynamic nature, while the second and fourth meanings refer to a fundamental nature. The subject of independence in the fifth, sixth and seventh meanings are human beings, the fourth meaning's subject is an institution, while the other meanings can refer to both institution/s and person/s. The *Oxford Dictionary's* third, fourth and fifth meanings for 'independence' are of fundamental nature, while the first and fifth are of dynamic nature. The fifth meaning refers to person/s both as subject and object of the term. Hence the dictionary definitions cover virtually all the possible combinations of these three components of the term 'independence'.

2. The Independence of the Judiciary

What do we mean by the term 'the independence of the judiciary'? A few scholars from different parts of the world offered their definition of the term. The definitions have common features but are not identical. Sir Ninian Stephen, for example, defines an independent judiciary as "a judiciary which dispenses justice

according to law without regard to the policies and inclinations of the government of the day".⁵ In our terminology the subject of independence, according to Stephen, is the judiciary, although it is not clear whether this refers to the judiciary as an institution or to judges as individuals. The object is the government of the day, and the independence of the judiciary is of dynamic nature because it deals with the decision-making of the judiciary rather than its mere existence. The Finnish scholar Erkki Juhani Taipale offers a similar definition with regard to the subject and nature of the independence, but with a much broader object. The independence of the judiciary, according to him, is "that the organs administering justice can only be subordinate to the law, and that only the law can influence the contents of the decisions made by these organs".⁶

A committee of experts on the independence of the judiciary⁷ defined judicial independence as follows: "1) that every judge is free to decide matters before him in accordance with his assessment of the facts and the understanding of the law without any improper influence, inducements, or pressure, direct or indirect, from any quarter or for any reason; and 2) that the judiciary is independent of the executive and legislature and has jurisdiction, directly or by way of review, over all issues of judicial nature". In our terminology, this definition includes the dynamic independence whose subject is the individual judge and whose object is the whole world, and the fundamental independence whose subject is the judiciary as an institution and whose objects are the other branches of government.⁸

One of the most elaborate attempts to define the independence of the judiciary was made by the Israeli scholar Shimon Shetreet.⁹ He distinguishes between four elements which comprise the independence of the judiciary: (1) substantive independence, which means that in his decision-making the individual judge is subject to no other authority but the law, (2) personal independence, which means that judicial terms of office and tenure are adequately secured, (3) collective independence, namely the participation of the judiciary in the central administration

⁵ Quoted in Shetreet [1985], p. 594.

⁶ Ibid, p. 595.

⁷ The International Association of Penal Law, the ICJ and the Centre for the Independence of Judges and Lawyers [1981].

⁸ For a similar definition by an American scholar see: Becker [1970], p. 144. For other definitions see: Green [1976]; Shapiro [1981].

⁹ Shetreet in Shetreet & Deschenes [1985], pp. 595 ff.

of the courts, and (4) internal independence, which means that the individual judge is independent also of his judicial superiors and colleagues.

Shetreet goes further and gives a detailed account of each of these components, and here his analysis becomes more problematic and vague. The 'personal independence' seems to be the most straightforward element. It consists in securing the tenure of judges (judges should not be removed during good behaviour), safeguarding judicial remuneration (judges' salaries and other working conditions cannot be changed for the worse), and especially the exclusion of the executive from controlling the judges' terms of service. The 'collective independence' consists of shared responsibility of judges with regard to the budget and administration of the courts. Thus, for example, the executive should not have the power to transfer judges from court to court, nor to assign cases to a specific judge or panel of judges. As to the 'internal independence', Shetreet holds that the effects of hierarchical patterns ought to be toned down, but we are left without a clear notion of what this means in practice. His detailed account of 'substantive independence' is even vaguer. It includes impartiality, the curbing of judges' political activity and the need for the judiciary to reflect society fairly. Shetreet adds further components to the concept of the independence of the judiciary without assigning them to any of the four categories of the term. These are the rule against ad-hoc tribunals, the prohibition of diverting cases from the ordinary courts or the closure of courts, and safeguards to prevent pre-emption and frustration of judicial decisions (for example, by retroactive legislation or the granting of pardon).

Shetreet's analytical attempt to define the independence of the judiciary as comprising the four aforementioned elements is, in my view, problematic. He confuses two separate realms: the first is the definition and scope of judicial independence; the second is the institutional arrangement designed to achieve this independence. Thus, for example, what Shetreet calls 'personal independence' are the arrangements necessary to achieve what he calls 'substantive independence'. For what are judicial tenure, the special arrangements for judicial appointments, and the securing of judges' salaries - all listed under 'personal independence' - supposed to guarantee, other than decisions which are subjected to no other authority but the law, i.e. Shetreet's 'substantive independence'? And what about 'internal independence' - is it not aimed at the same goal? Instead of providing an analytical definition of judicial independence Shetreet seems to be offering a 'grocery list' of ingredients which are to be included in the cake of judicial independence.

I will try to use this list, though, together with the definition of the term 'independence' proposed in section 1, as bases for a more analytical definition of the 'independence of the judiciary'. This definition will distinguish between the expression of independence by judges - which I call 'substantive independence' - and the institutional arrangements intended to secure this behaviour - which I call 'structural independence'. The usefulness of this distinction will emerge in the description of the phenomenon researched in this work.

The 'independence of the judiciary' is constructed from several layers or circles, which involve several objects (the litigants, other judges, the government, the general public) in both types of relations (dynamic and fundamental). The first two inner circles comprise the dynamic independence whose subject is the individual judge and whose objects are (1) the litigants, and (2) the government. The latter circle is, more or less, the equivalent of Sir Ninian Stephen's definition. It means that a judge, when delivering a judgment, is not influenced by the desires of the government with regard to the case being decided.

As to the former circle, some scholars consider the independence whose objects are the litigants as a separate notion of 'impartiality'.¹⁰ I will not take a firm stance on this; but it is worthwhile to acknowledge, on the one hand, that the sources of the concept of impartiality are different from those of the concept of independence whose object is the government: while the latter derives from the doctrine of separation of powers, the former derives from concept of justice. On the other hand, the same components of structural independence are designed to achieve both circles. Indeed, most of the components of Shetreet's 'personal independence', as well as some components of his 'collective independence', are among these structural measures. Moreover, it seems that in the sphere of public law the two circles (independence from the other branches of government and independence from the litigating parties) are shrunk into one.

The next circle of judicial independence is the dynamic independence whose subject is the individual judge and whose objects are his or her colleagues. This is the equivalent of Shetreet's 'internal independence'. The rationale for this circle is yet again different from the rationales for the inner circles, which derive from the

¹⁰ See, for example: Becker [1970], pp. 140-145; but for a different view see: Eckhoff [1965], pp. 11, 33 ff; Thompson [1986], p. 828.

doctrine of separations of powers and concepts of justice. This circle's rationale comes from social choice analysis, according to which the quality of a decision can be improved by creating independence between the decisions of the different decision-makers who take part in the decision-making process.

Another circle of the independence of the judiciary is the dynamic independence whose subject is the individual judge and whose object is the general public. The rationale here is connected to concepts of justice as in the impartiality circle, but it is also related to the jurisprudential questions: what is 'the law', and how judges ought to decide hard cases. The desirable degree of independence in this circle is disputed. In some legal systems, for example several states in the U.S.A, it is stipulated that judges be elected by (and therefore dependent upon) the general public. Hence the rationale of impartiality might conflict with other ideals related to the judiciary, which may even be perceived as part of the notion of the independence of the judiciary (such as Shetreet's 'substantive independence', which includes the idea that judges should reflect the society fairly).¹¹

All the aforementioned circles of judicial independence can be contained in a larger circle: the dynamic independence of the individual judge, whose object is everything except the law. This may be seen as the equivalent of Taipale's definition of judicial independence, according to which an independent judge is a judge whose decisions are subordinate only to the law. But the independence of the judiciary can also be portrayed by two additional circles, referring to subjects other than the individual judge, and to a nature other than dynamic.

One of these circles is the fundamental independence whose subject is the judiciary as an institution and whose objects are the other branches of government. In other words, part of the notion of the independence of the judiciary is the government's lack of power to abolish this institution, replace it or make significant changes in its structure. Some of the components which Shetreet adds to his four elements of the independence of the judiciary, such as the rule against ad hoc tribunals, belong to this circle.

The last circle of the independence of the judiciary is the fundamental independence whose subject is the judicial decision and whose object is the government. It is not sufficient that the process of judicial decision-making is free of

¹¹ About the rationales of popular accountability of judges see: Thompson [1986].

external influences; the notion of an independent judiciary requires also that these decisions, once given, would not be altered or ignored by the government (which is responsible for enforcing them). This circle is the equivalent of Shetreet's additional components which include the safeguards designed to prevent pre-emption and frustration of judicial decisions (for example, by retroactive legislation or the granting of pardon). The rationale of these two circles is actually a combination of the rationales of the previous circles, but the doctrine of separation of powers is its prime mover.

The definition of judicial independence has not been fully explored. We have not discussed, for example, the dichotomous character of each of the circles, the interrelations between them or their normative analysis (their desirable degree). Notwithstanding, we can stop here as the phenomenon under scrutiny in this study, which will be described in more detail in the rest of this chapter, should be perceived as only a part of the general concept of judicial independence. Since the present work approaches the issue through the theory of the state gateway, focussing mainly on the doctrine of separation of powers, it will concentrate on the part of judicial independence which is related to this viewpoint. From now on I will refer to the independence of judges or the judiciary as an institution, both dynamic and fundamental, whose object is the government, whereas the term 'government' includes the branches of government other than the judiciary, i.e. the legislature and the executive.¹² We will be looking, therefore, at the independence of the judiciary, or of individual judges, from the legislature and the executive.

3. The Independence of the Judiciary in the Context of the Present Study

Many scholars will probably argue that the question being addressed in this work - why do we have an independent judiciary - cannot be dealt with on an abstract level of analysis, and that it should be tailored to fit the different specific constitutional structures of the political and legal systems under scrutiny. Thus, an American will be likely to reply: we have an independent judiciary because we have a written constitution, in which judicial independence is guaranteed, and hence the question should focus on the framers of the constitution, asking why did the framers create such an arrangement in which judges have independence. In contrast, a Briton or an Israeli will have to aim the analysis more at the existing political powers

¹² The term 'government' has at least two meanings: (1) the general authority in a country which includes the legislature, the executive and the judiciary, and (2) one of the branches of this general authority - the executive. Subsequent usages of the term should be apparent from the context.

(of the present), asking why Parliament (or, more accurately, Parliament and the Government), to whom the judiciary is firmly subordinated due to constitutional structures, maintains the judiciary as a separate, and to some degree independent, branch.

From the above description it seems that we ought to talk about at least two distinct questions, which are difficult to handle within a unified model. I would nevertheless like to argue that there is a common phenomenon which can be accommodated widely (at least among a vast majority of democratic regimes), and gives rise to interesting queries. This common phenomenon is twofold: on the one hand, there is no constitutional system in which a full structural judicial independence has been created, and, on the other hand, there is usually a gap between the degree of structural dependency and the degree of substantive independence of the judiciary, in favour of the latter. In our context **substantive judicial independence**, as we defined before, is judicial decision-making which is not dependent on the views of the other branches of government, i.e. judges do not decide individual cases according to the government's or the legislature's will; **structural judicial independence** is the institutional arrangements which enable the existence of substantive independence (tenure, method of appointments, etc.).

The first part of this observation indicates that there is no legal system which guarantees full structural independence.¹³ Its second part implies that despite being capable of doing so, governments do not fully exercise their powers to limit the substantive independence of the judiciary. In other words, the legislature and the executive allow a certain degree of judicial independence which exceeds the structural provisions. I will try to demonstrate this with two different forms of constitutional structure - the British and the American.

Although the texts that I came across assert, confidently, that in Britain there is certain degree of separation of powers between the judiciary and the other branches of government, and that the independence of the judiciary does indeed exist,¹⁴ this is a somewhat problematic description, to say the least.¹⁵ The judiciary is

¹³ The lack of full structural independence derives partly from the perception of judicial accountability. See: Cappelletti in Shetreet & Deschenes [1985], pp. 550 ff. But I think that not every component of this dependency can be explained by the need for accountability.

¹⁴ See, for example: de Smith [1989], pp. 368-381; Wade & Bradley [1985], pp. 47-59, 332-342; Phillips & Jackson [1978], pp. 30-31, 381-387; Marshall [1971], pp. 103-104.

¹⁵ A more detailed analysis of the British system will be provided in Chapter 7.

structurally dependent upon Parliament simply because there are no restrictions on the legislative powers of Parliament.¹⁶ It is true that legislation, part of which dates back to the 1701 *Act of Settlement*, guarantees some components of what I called structural judicial independence, such as tenure and fixed salaries. But since there is no written constitution and Parliament may do whatever it pleases, these arrangements can be changed from one day to the next.¹⁷ Furthermore, because of the unique parliamentary structure according to which the Government (i.e. the executive) has an almost full control of Parliament, the status of the judiciary is even more fragile. Hence the judiciary does not enjoy a structural judicial independence whose object is Parliament; its life and death are in the hands of the present Parliament.

Moreover, the judiciary is also structurally dependent upon the Government - the executive - through the powers of appointments and promotions, and other administrative components, including pay rises and fixing the number of judges in the various courts. But this structural dependency is not exercised, or at least not fully exercised, by either the legislature or the executive. Parliament refrains from legislation which can be perceived as curtailing judicial independence, and, as we shall see in Chapter 7, even the Government does not use its powers to limit judicial independence. All this should be viewed in the light of a certain degree of substantive independence which is being exercised by the courts, and has been increasing with the years.¹⁸ This independence is expressed in various forms, of which the most common is the delivery of particular judgments which do not necessarily conform to the wishes of the current Government or legislature.

The structural independence of the American federal judiciary is more solid than its British counterpart. The foundation of the Supreme Court is based on the Constitution, which also guarantees all Federal judges tenure during good behaviour and immunity from wage cuts.¹⁹ However, this structural independence is not a complete one. The structure and jurisdiction of inferior Federal courts were left

¹⁶ There are possible qualifications connected to the EEC treaties, which, nevertheless, hardly affect directly the structural independence of the British judiciary.

¹⁷ Conventions might make such an event unlikely, but it is formally possible.

¹⁸ See: Jowell [1988], pp. 409-412.

¹⁹ *The Constitution of the United States*, Article 3, section 1. It ought to be noted, though, that Congress controls the rise of judicial salaries. This may create significant dependency, especially in times of inflation. See: Toma [1991].

to the discretion of the legislature.²⁰ The same applies to the appellate jurisdiction of the Supreme Court. In fact, the legislature was given the powers to modify the judicial process whenever it thinks it is advisable to do so, and in any way it deems suitable.²¹ The budget of the Federal courts is in the hands of Congress.²² In addition, the procedure for appointments and promotions of Federal judges creates a significant dependency of the judiciary upon the President - the executive - and upon the Senate - a branch of the legislature, especially with regard to District and Court of Appeals judges.²³ Even judicial immunity from removal from office is not fully guaranteed.²⁴ Some scholars put forward an even more extreme proposition, according to which there are no significant differences between the structural independence of judges and legislators.²⁵

Madison's and Jefferson's "Federalist", which reflects the constitutional debate of the founding fathers, teaches us that the structure of powers in the U.S.A was carefully designed to create a system of checks and balances which would not allow any abuse of powers. Thus, an independent Federal judiciary was created to serve as an "excellent barrier to the encroachments and oppressions of the representative body" and as "the bulwarks of limited constitution against legislative encroachments".²⁶ On the other hand, the framers realised that the powers of the judiciary also ought to be controlled and balanced "to avoid an arbitrary discretion in the courts".²⁷ Thus Congress was empowered to make exceptions to the appellate jurisdiction of the Supreme Court, and to regulate, as Congress thinks best serves

²⁰ Article 3, section 1 of the Constitution. For a general survey of the Federal courts see: Bator et al. [1988]; ch. 4 deals with the Congressional control over the jurisdiction of the courts.

²¹ Article 3, section 2[2] of the Constitution. See: Choper [1980], pp. 47-55.

²² Toma [1991] views the budget as the least politically costly tool for creating judicial dependency.

²³ Article 2, section 2[2] of the Constitution. For studies on the influences of political appointments of judges on their judicial decision-making see: Nagel [1960]; Schubert [1974]; Rohde & Speath [1976], ch. 5. On the confirmation process by Senate and judicial independence see: Rader [1987].

²⁴ According to recent rulings, judges can be indicted prior to an impeachment procedure, and some argue that they can even be removed from office without an impeachment. For a critical view of these decisions see: Catz [1987], pp. 316 ff. For a general account on the independence of the American judiciary see McKay & Parkinson in Shetreet & Deschenes [1985], pp. 358 ff.

²⁵ Tushnet, Schneider & Kovner [1988].

²⁶ *The Federalist*, No. 78, pp. 522, 526, respectively.

²⁷ *The Federalist*, No. 80, p. 541.

the objects of the Constitution, the exercise of the jurisdiction granted.²⁸ The result is that the question of the substantive independence of the judiciary is, as Gary McDowell puts it, not only "one of constitutional legitimacy but [also - E.S] of political prudence".²⁹

It seems that there is a wide consensus among scholars that Congress and President have hardly used their Article Three powers to curtail judicial independence.³⁰ The same applies to other constitutionally legitimate methods of influence, such as 'packing' the courts.³¹ In the course of the Thirties and Forties Congress even worked actively to remove procedural barriers which limited the courts' involvement in policy issues, and it actually delegated some of these procedural powers to the courts.³² Congress declined, despite the growing activism of the courts in the last thirty years, to reinstate those barriers. Bearing in mind the fact that the American Federal judiciary shows a significant degree of substantive independence,³³ it seems that in the United States, as in England, a gap between the structural dependency of the judiciary and its substantive independence indeed exists.³⁴

One of the most interesting examples of the phenomenon of the independence of the judiciary is the Israeli one; it will be discussed in more detail in Chapter 8. In a nutshell, the Israeli system is constitutionally similar to the British: a lack of a written constitution, which implies a strong structural dependency of the judiciary upon the legislature - the Knesset. The structural independence of the Israeli judiciary vis-à-vis the executive - the Government - is firmer than in Britain,

²⁸ Article 3, section 2[2] of the Constitution.

²⁹ McDowell [1988], p. 130 and see chapter 4 for the founding fathers' debate on the roles of the judiciary.

³⁰ In 1978, however, the Senate passed a bill which established a procedure for removal and other disciplinary measures against Federal judges below the Supreme Court. Kaufman [1979], pp. 682-683, views this bill as a threat to judicial independence.

³¹ On the sporadic attempts to use institutional measures to influence judicial independence (mainly in the mid-nineteenth century and in the New Deal period) see: Bator et al [1988], pp. 30-45. But see Gely's and Spiller's analysis [1989] as to the real factors that brought to a change in the Supreme Court's stance towards the New Deal.

³² This included allowing class actions, declaratory judgements and more. See McDowell [1988], pp. 4-10; Shapiro [1988]; Mashaw [1990], pp. 290-294.

³³ See, for example, Neely [1981], who entitled his book "How Courts Govern America".

³⁴ Atkins [1988/89] found that despite the different appointment and promotion mechanisms, and despite the different backgrounds of American Federal judges and English judges, the success rate of the government in civil cases and the rate of disagreement among judges in the two systems are surprisingly similar.

mainly due to a more independence-orientated procedure for appointments and promotions of judges. This is especially noteworthy when one considers that, as in Britain, the Israeli Government has a very tight control over the Knesset, yet unlike Britain, the Israeli arrangements are recent, and not the result of a history of constitutional power clashes like the *Act of Settlement*. Against this background it is surprising to find in Israel an 'American style' Supreme Court, with extensive and ever-increasing activism in the affairs of the Government and even of Parliament, a Court whose independence has been sustained and even strengthened over the years.³⁵

4. Conclusion

The phenomenon of the independence of the judiciary, defined in this chapter as the gap between structural and substantive judicial independence, will be further explored in the empirical part of this thesis - Book III. Chapter 7 will try to show that English Governments have not used their politically almost cost-free structural dependency tool - decisions regarding appointment and promotion of judges - to curtail substantive judicial independence. In Chapter 8 I will attempt to demonstrate how the Israeli legislature and Government have actually created, and indeed increased with the years, the structural independence of the judiciary, despite assertions of substantive independence by the judges. These two examples, together with the American example on which we elaborated in this chapter, hark back to our initial query: the executive, and especially the legislature, due to the lack of full structural independence of the judiciary, have the power to limit judicial independence; yet they do not exercise this power fully in spite of manifestations of independence by judges, which are at times clearly against the interests of the other branches of government. In other words, politicians do hold the power to limit judicial substantive independence, but they refrain, at least partly, from using this power. In our law and economics world, in which politicians, as other individuals, aim at maximizing their self-interest, this phenomenon deserves an explanation. But before proceeding to offer such an explanation it would be useful to view this question in the broader context of the doctrine of separation of powers. This is the topic of the next chapter.

³⁵ A somewhat similar process took place in Canada. The adoption of the 1982 Constitution strengthened the powers of the judiciary at the expense of the legislature. See: Strayer [1988].

Chapter Three

The Independence of the Judiciary in Context: the Doctrine of Separation of Powers

Questions around the independence of the judiciary are closely related to the doctrine of separation of powers. On the normative level, the doctrine of separation of powers is one of the major rationales for judicial independence, although different versions of the doctrine emphasize, or even assign, different contents to judicial independence.¹ Positive analysis of the independence of the judiciary is strongly connected to the judiciary's interrelations with the other branches of government - the legislature and the executive. This is, in turn, part of the positive analysis of the doctrine of separation of powers, which tackles the question: why do we find in so many countries some form or another of separation of powers?

I will not pretend to provide, in one chapter, a full account of a doctrine which dates back to classical antiquity and was much discussed by many political philosophers.² Instead, after a very brief historical survey of the doctrine, which will demonstrate its variations, its equivocal nature and its main applications, I will focus on an analytical exploration of separation of powers stressing the viewpoint of the economic analysis of law, which seems to be (at least on the positive level of analysis) a neglected field of application of the economic approach. This, I hope, will facilitate the main project of this work - the economic analysis of the independence of the judiciary.

1. The Doctrine of Separation of Powers and the Judiciary - A Historical Perspective

The doctrine of separation of powers finds its roots in the ancient world, long before the ideas of constitution and constitutional law were born, with the writings of Aristotle. In the modern context, it was in seventeenth-century England that the doctrine emerged for the first time as a coherent theory of state. It grew against the background of power struggles between King and Parliament and the change of the medieval and early modern view of government as fulfilling primarily one function - a judicial one.³ The legislative and executive powers were first seen as a sub-division

¹ For an example, with regard to the desirability and nature of judicial review, see: Marshall [1971], pp. 103-113.

² For a comprehensive survey of the doctrine see: Vile [1967].

³ This view is strongly connected to Natural Law perceptions, which began to change in the same period. See: Vile [1967], p. 24.

of the judicial function; ironically, the emergence of a judiciary as a separate third branch of government came much later.⁴

Some components of the 'pure' doctrine of separation of powers were shaped by supporters of Parliament who wanted to restrict the King's powers, and as a response to the King's **mixed government** doctrine, in which the main emphasis was the sharing of power between the estates. England's first written constitution - the 1653 *Instrument of Government* - was based on essential elements of separation of powers.⁵ However, with the end of the Civil War the doctrine gave way to a new doctrine - of a **balanced government** - which better suited the restored monarchy. One of its important contributors, who is also considered as one of the founders of the doctrine of separation of powers, was John Locke.

Locke wrote in his *Two Treatises of Civil Government* (1690) about separation between two branches of government - the legislature and the executive - ignoring altogether the judiciary, although he saw, like many of his predecessors, the main function of the state as essentially judicial. The major reasoning given by Locke for the separation of the two branches was efficiency and division of labour, rather than limiting the powers of the rulers. He advocated, in contrast to the pure doctrine of separation of power, the supremacy of the legislature, but he also argued in favour of checks and balances between the branches.⁶ These constituted the main elements of the doctrine of balanced government, as implemented in early eighteenth-century Britain.⁷ During the course of the following half century, however, there was a retreat towards the doctrine of mixed government.

But the ideas of the doctrine of separation of powers travelled abroad to France and North America. The name most associated with the doctrine is that of Montesquieu, whose mature ideas are best expressed in *The Spirit of the Laws* (1748). His starting point is, similar to Thomas Hobbes, scepticism about human benevolence, and hence the main aim of the separation of powers - to control power or to curtail the abuse of power. Montesquieu defined three types of government -

⁴ An exceptional 'modern' model of division into the three branches of government can be found in *The Royalists Defence* (1648), attributed to Charles Dallison, Recorder of Lincoln.

⁵ See: Vile [1967], pp. 35-50.

⁶ Locke (ed. by Peardon) [1952], book II, chs. 9-15, 19.

⁷ For more on Locke and his English impact see: Vile [1967], pp. 53-75; Marshall [1971], p. 102.

republican, despotic and monarchical - and generally inclined in favour of the last. He meant, however, a government by law in which the power is divided into four functions - legislative, executive, prerogative and judicial - exercised by different bodies. Combining the executive and prerogative functions, as Montesquieu actually did later, results in the modern definition of the three branches of government.

Montesquieu's originality was in the definition of the functions of government, and especially his view of the judicial branch and the need for its independence. He believed that judges ought to be appointed by lottery for a fixed term of office; that they should not be professionals and ought to have no discretionary powers.⁸ His ideas evoked a constitutional debate in Britain and were much cited by Blackstone, de Lolme and Paley.⁹ But the more interesting developments of the doctrine evolved across the Atlantic.

The rejection of the English model of government and the adoption of the doctrine of separation of powers in America were a direct result of the criticism of and conflict with the British colonial regime. The first States' constitutions drafted in 1776, and especially those of Virginia, Maryland and Pennsylvania, represented a revolutionary acceptance of the doctrine of separation of powers, rejecting any form of shared powers or checks and balances. This was also the height of the 'pure' doctrine, as the 1777 New York constitution already retreated from a full rejection of checks and balances, and this trend continued towards the shaping of the Federal constitution.¹⁰ In the meeting of the Federal convention in 1787 most of the participants already held the view that separation of powers ought to be combined with checks and balances, because pure separation would lead to a dictatorship of the legislature. The two practical consequences of this view were the presidential veto power and the role prescribed to the judiciary, especially the idea of judicial review of legislation put forward by James Madison and James Wilson.¹¹ The Constitution, which was ratified between 1787 and 1790, reflects these ideas.

⁸ Montesquieu (trans. Nugent) [1949], especially books 1,3, 4, 10-16, 24, 26, 29. See also: Vile [1967], pp. 76-97; Marshal [1971], pp. 97-103.

⁹ See: Vile [1967], pp. 98-112.

¹⁰ Ibid. 119-151.

¹¹ *The Federalist Papers*, especially no. 47 & 48. See also: Bator et al. [1988], pp. 1-29.

The American debate on separation of powers continued long after the ratification of the Constitution. In his later years Jefferson, for example, shifted to argue vigorously on behalf of the 'pure' doctrine of separation of powers, and Woodrow Wilson, years before becoming President, proposed a shift towards the British system of government.¹² Questions touching on the doctrine of separation of powers have been placed on the American agenda every now and again. The New Deal and the establishment of regulatory commissions, the emergence of administrative agencies, the debate on the non-delegation doctrine, the role of Congressional committees and the debate on item veto are only some of the examples.¹³ Nevertheless, unlike the French experience, the American debates and their resolutions remained within the framework of the original constitutional order. In this sense the American model can be seen as an efficacious one.

In France separation of powers took a different direction. The philosopher who had an important impact on this direction was Jean-Jacques Rousseau. He distinguished between the legislative and the executive functions of government, ignoring the judiciary; but, unlike Montesquieu, who wanted to separate powers in order to limit potential abuses, Rousseau believed in indivisible sovereignty belonging to the people and entrusted to or represented by the legislature. For him the division of powers was merely an organisational, rather than ideological, task.¹⁴ The political debate in revolutionary France was framed around the conflicting views of Montesquieu and Rousseau.¹⁵ The 1791 constitution was more along the lines of Montesquieu, with a full separation of powers between the National Assembly, the King and a potent elected judiciary with impeachment but not judicial review powers. But it did not work, partly because the National Assembly gradually took over all major powers. The theorists who advocated a new constitution, among them Condorcet, tended towards the philosophy of Rousseau, but the constitution which was enacted in 1795 retained a Montesquieu-style separation of powers without checks and balances. This resulted in bitter conflicts between the branches of government, which paved the way to Napoleon.

¹² See: Vile [1967], pp. 160-175, 263-271.

¹³ See: Aranson et al. [1982/83].

¹⁴ Rousseau's main ideas were conveyed in the book *The Social Contract*, (1762) of which books II & III are dealing with the division of powers. See extracts from the book in Morris [1971], pp. 215-236.

¹⁵ See: Vile [1967], pp. 182- 200.

The constant struggle between King, ministers and the Assembly, in the period between 1815 and 1848, culminated in the implementation of a mixed style of government. Following the 1848 revolution the doctrine of separation of powers was summoned again, but by that time there were fewer theorists who advocated its 'pure' form. This is reflected in the constitutions of the Third, Fourth and Fifth Republics in France: in all three constitutions there was an attempt to build a balanced government (or, rather, a balanced parliamentary government), in which the powers are divided between the legislature and the executive, although the checks or control measures of each branch over the other fell short of the American model. The constitutional instability in France (major constitutional changes were made even in the course of the Fifth Republic) demonstrate how difficult it has been to reach the desirable balance. One of the reasons for these difficulties is that the success of constitutional structures depends not only on formal arrangements but also on informal elements, like the organization of political parties and the political and social culture in general. Although the French experience will not be further explored in this work, it ought to prompt us, when trying to analyze the phenomenon of the independence of the judiciary, not to forget these non-formal elements.

We can end our historical tour in the place where we have started it, Britain, which witnessed not only the rise of the doctrine of separation of powers but also its fall. The diminishing role of the monarchy, together with the emergence of parliamentary government with increasingly strong parties and ministerial responsibility meant the end of separation of powers or balanced constitution and the formulation of what we may call a fusion of powers. The doctrine of separation of powers not only disappeared but was also discredited by political-legal philosophers such as Walter Bagehot and later A.V. Dicey, who put forward his ideas of the rule of law at the expense of the doctrine of separation of powers.¹⁶

2. The Doctrine of Separation of Power - an Analytical Perspective

The doctrine of separation of powers is one possible component of a theory of state, but it is not sufficient for a comprehensive theory, because, together with other principles such as the rule of law, it deals only with the structural aspects of the state. In order to present a complete theory one needs to spell out 'substantive' principles as well (e.g. democratic and liberal concepts, concepts of justice, etc.). To put this more accurately: a comprehensive theory of state must be based first upon

¹⁶ See: Jowell in Jowell & Oliver [1989], pp. 4-5; Vile [1967], pp. 212-232.

'substantive' principles, but it would not be complete until 'structural' ideas are included.¹⁷

The reflection of this in the law, and more specifically in constitutional law - the intersection between law and political philosophy - is that modern constitutions usually include a part dealing with the substantive foundations of the state, most often a bill of rights, and a part dealing with its structural elements - the organization of its government. It is noteworthy, however, that when the American Bill of Rights, in the form of the first ten amendments to the Constitution, was under discussion, James Madison, one of the major architects of the Constitution, opposed it. He argued that the structural elements of the Constitution - separation of powers and mechanisms of checks and balances - are so elaborate and balanced that they alone prevent the government from denying liberties.¹⁸ Gordon Tullock writes along the same lines:

The view that government can be bound by specific provisions is naive. Something must enforce these provisions and whatever it is that enforces them is itself unbound... The comparative freedom and efficiency with which Americans were governed in the first century and a half of the Constitution depended on the structural characteristic of the Constitution, not on the bill of rights.¹⁹

We need not take sides in this debate about bills of rights, because even the adoption of the Madison-Tullock position does not deny the substantive foundations of the theory of state or constitution. On the contrary, their argument is that the right structure achieves the desirable substance. Indeed, the structural side of a theory of state usually reflects to a great extent the substantial moral-ethical foundations of the theory.²⁰ In this compressed analysis of the doctrine of separation of powers I will have to restrict myself to the structural elements of the theory of state, ignoring the substantive foundations, but remaining aware of the vague boundaries between substance and structure. This will be done by a step-by-step analysis, from an economic approach, of the main structural themes common to many theories of state.

¹⁷ It is noteworthy that ever since the doctrine of separation of powers was put forward, every theory of state has taken account of this principle or its competitors, i.e. the theories of mixed government, checks and balances or partial separation of powers.

¹⁸ See: Wagner [1988], pp. 82 ff; Gwartney & Wagner [1988], pp. 44-49.

¹⁹ Tullock in Gwartney & Wagner [1988], pp. 142-143. But see: Wagner [1988] for a different view.

²⁰ It is interesting to compare this distinction between structure and substance with Atiyah's and Summers' [1987] distinction between form and substance in Anglo-American law, and with Kahn's [1989] distinction between reason and will in the context of the American constitution.

Our departure point, however, can be located on the boundaries between substance and structure: the emergence of the state.

2.1 The Emergence of the State

The common theme of most theorists who discuss the creation of the state is that it can benefit the individuals who are party to it.²¹ This idea of transformation from a state of anarchy to a centrally governed society, which was put forward by Thomas Hobbes in *Leviathan* (1651), was rephrased in economic language in the second half of this century.²² There are different variations of this idea: some theorists stress that the establishment of state, or any political society, enables the production and consumption of public goods (protection and justice are two of the more important examples of such goods), which are impossible in the state of nature.²³ Other thinkers view the emergence of states in a way similar to the emergence of firms - as the result of vertical integration. This is caused by transaction and information costs associated with contracting within markets which force production and exchange out of the markets and into organizations such as the firm or the state.²⁴ A related view portrays the state as a framework for providing institutional arrangements alternative to contracts in the free market, which cannot be negotiated due to high transaction costs.²⁵ In addition, the state by providing enforcement mechanisms, can lower contractual transaction costs altogether. Yet another, though related, perspective is the desirability of rules, which are most typically the product of the state. The emphasis here is that rules are advantageous as such, even without regard to their actual content, because they can improve the individuals' welfare.²⁶

²¹ The meaning of 'benefit' is, of course, dependent upon the substantive-normative foundations adopted by each theorist. But these foundations are not limited to a consequentialist sort of morality such as utilitarianism (as it is expressed in my phrasing of the sentence preceding the footnote). Locke and Rousseau, for example, based their theory of state on the foundations of natural law. See also: Whynes & Bowles [1981], chs. 1&2.

²² See: Buchanan [1975]; North in Elster [1986]; Eggertson [1990]; Downs [1957]; Buchanan & Tullock [1962]; Whynes & Bowles [1981], chs. 1&2; Epstein [1987].

²³ See: Buchanan [1975], pp. 35-52; Silver [1977], p. 95; North in Elster [1986], p. 250. The emergence of the modern nation state in early modern Europe can be seen as the result of the growing demand for public goods, which was influenced by technological improvements. See: North [1981]; Eggertson [1990], pp. 341-348.

²⁴ The basic theory of firms vs. markets was put forward by Coase [1937]. For applications to the analysis of the state see: Macey [1988/89]; Silver [1977].

²⁵ See, for example: Tullock [1982].

²⁶ See: Brennan & Buchanan [1985], ch. 1; Wagner [1988], p. 75.

Beyond these different perspectives there are also different normative foundations and, therefore, different conclusions as to the roles of the state - what it should do, and in what areas it should not intervene. We will not delve here into these differences; the major point is the common theme - the desirability of the emergence of the state.

The formation of the state is often viewed as the result of a contract, to which all individuals who are its future citizens are parties.²⁷ In political or legal terms this contract is dubbed 'constitution'. Underlying the contractual view of the state there are, again, divergent normative assumptions, which are not limited to consequential moral theories, this time as to the desirability of collective actions agreed upon by everyone. (This should not be confused with the desirability of collective actions *per se*). In the Buchanan-Tullock language, unanimous decision-making bears zero 'external costs', i.e. no losses to any individual as a result of the decision.²⁸

2.2 The Rise of Central Government

The contract, or the constitution, ought to lay down the basic principles guiding the interactions of individuals - the **protective role** of the state - and the basic principles dealing with collective action - its **productive role**. In its protective role the state serves merely as an enforcement mechanism, making no 'choices' in the strict meaning of the term. In its productive role the state serves as an agency through which individuals provide themselves with 'public goods'.²⁹ But, obviously, this initial contract cannot foresee every potential problem in both domains. In the lines of the contractual rationale the solution for this would have been to gather everyone whenever a new problem arises, and to decide upon it unanimously. But such a solution would involve immense decision-making costs, or 'internal costs', in the language of Buchanan and Tullock.³⁰ This is the major justification, given by most scholars, for the need to have a central government in which the powers to

²⁷ See: Wagner [1988], p. 74; Wagner & Gwartney [1988], pp. 29-39; Eggertson [1990], pp. 59-69; Brennan & Buchanan [1985], ch. 2; Posner [1987], pp. 6-11. North in Elster [1986], pp. 249-250 reconciles between the contractual theory of the state and the predatory or exploitationary theory; see also: Whynes & Bowles [1981], p. 4.

²⁸ Buchanan & Tullock [1962], pp. 63-84.

²⁹ See: Buchanan [1975], pp. 68-69; Gwartney & Wagner [1988], ch. 1.

³⁰ Buchanan & Tullock [1962], pp. 63-84.

protect and produce are deposited, or, rather, entrusted; it is intended to represent the will of the people.³¹

But central government is manned by individuals, and the main assumption of the economic approach (and not only the economic approach) is that individuals are seeking to promote their self interests. That is one of the main reasons for placing the government under the control of the people - one of the basic notions of democracy.³² However, even this control cannot be exercised unanimously, and we usually compromise on some type of majority control or another.³³ Hence the distinction between the constitutional sphere, which reflects unanimous consent, and the post-constitutional sphere which is governed by majority rule, but ought to remain within the limits of the original contract. The story of central government can be retold using two of the more important foundations of the integrated economic approach towards law - transaction cost theory and agency theory.³⁴ While the basic need for a central government derives from transaction costs analysis, the need to place it under the control of the people derives from agency theory. The nature of this control is determined by both.

2.3 The Separation of Functions

We have distinguished between the protective function of the state and its productive function. The former is connected mainly, but not exclusively, to the constitutional stage and the binding force it exercises upon the post-constitutional stage; the latter is related mainly to the post-constitutional stage.³⁵ The second functional division is between rule-making, rule-application and rule-adjudication, or, as they are more commonly called - legislation, administration and adjudication. History reveals that this functional division has always existed, regardless of the era

³¹ The 'will of the people' is, of course, a vague term open to many interpretations; to elaborate on this point would be beyond our present context. See also: Whyne & Bowles [1981], ch. 4.

³² See: Buchanan [1975], pp. 83, 91-106. Even under an alternative assumption, according to which the central government personnel selflessly work to satisfy the will of the citizens, without some sort of popular control they would lack the relevant information as to this will.

³³ See: Buchanan in Gwartney & Wagner [1988], ch.6.

³⁴ See: Chapter 1, section 2.2

³⁵ See: Buchanan [1975], pp. 68-70.

(or at least long before separation of powers was under discussion) and type of regime.³⁶

This phenomenon also has an 'economic' logic: governing according to rules, their application and their enforcement, rather than making each decision individually and independently, is more efficient. It minimizes transaction costs from the point of view of the government or of the decision-makers as it is cheaper to apply a rule than to deliberate every question from first principles. It also minimizes agency costs from the viewpoint of the citizens, namely the exercise of individual control over the government, by providing certainty and predictability.³⁷

2.4 Separation of Agencies

There is a long way, both historically and conceptually, between mere separation of functions and the separation of agencies. The latter principle has a significant effect on government structure because, according to it, not only do the three functions - legislative, executive and judicial - exist, but they ought to be carried out by separate institutions or branches of government. Before discussing this separation of agencies, however, let us spare a few words on the separation of agencies aspect of the earlier distinction between the protective and productive functions of the state.³⁸

A careful look at the role definition of the protective and the productive functions will result in the conclusion that a separation of agencies is necessary due to the conflict that arises between the two functions. While the protective state is aimed at enforcing the initial contract - the constitution, the productive state is engaged in activities involving production of public goods for which the costs are shared by the individuals, and hence involving re-allocation of resources. There are, naturally, conflicting desires within the productive state, but their resolution cannot be based on unanimity (as we have explained, the optimal decision-making rule which takes into account also the excessive costs of the decision-making

³⁶ Such an observation was made by Montesquieu [1748], Book I, section 3.

³⁷ See also: Brennan & Buchanan [1985], chs. 6-8, analyzing the desirability of a system based on rules and their application.

³⁸ A parallel distinction, relevant in this context, is Yasky's [1989], pp. 438 ff distinction between operational power and ultimate power.

process will depart from unanimity). Conflicts between the outcomes of the productive state and the basic contract are, therefore, to be expected.

The productive state will tend to overstep the boundaries of the initial contract, aiming to reach its 'technical productive frontier'.³⁹ This may be worsened by principal-agent problems between the government and the people, interest-group politics and rent-seeking activities.⁴⁰ The protective state will not take into account the benefits of any one alternative against its opportunity costs, and its outcomes will not necessarily be the set of results which best represent some balance of opposing interests.⁴¹ For these reasons it would be desirable to separate the agencies assigned to fulfil the protective and the productive functions.⁴² The protective function is of judicial nature, and in most Common Law countries it is indeed assigned to the judiciary; but it is distinguishable from the role of the judiciary within the productive state. Indeed, in many Civil Law countries the protective function is assigned to a body such as a constitutional court, which is not perceived to be part of the ordinary judiciary.

Let us return to the more familiar separation of agencies between the legislature, executive and judiciary, which can be seen as a division of powers within the productive state. The productive state can be perceived, from a microeconomics perspective, as a micro-decision unit (like a firm) or perhaps as a set of micro-decision units (like an industry), producing primarily public goods. In this context separation of agencies is connected to the monopoly problem.⁴³ The concentration of all governing powers in the grasp of one authority creates a vertically integrated state which has monopoly powers, or even discriminating monopoly powers. Monopolies cause inefficiency and a distorted division of wealth between the producers and the consumers.

There are several possible ways to promote competition in the case of the state as a monopoly: the existence of other states, to which it would be possible to

³⁹ See: North in Elster [1986]; Eggertson [1990], pp. 319-328.

⁴⁰ See: Gwartney & Wagner [1988], pp. 17-23; Eggertson [1990], pp. 350-353.

⁴¹ See: Buchanan [1975], pp. 68-70.

⁴² On this type of considerations in the context of the American Constitution see: Macey [1986], pp. 242-250.

⁴³ See: Silver [1977]; North in Elster [1986]; Whynes & Bowles [1981], ch. 5.

emigrate, namely the 'exit' option;⁴⁴ a federal structure,⁴⁵ and separation of agencies. Since we have already concluded that the state has several different functions to fulfil, it can be argued that the de-monopolization through separation of agencies assigned to carry out the various functions (every agency performing a different function), or a vertical disintegration of the state, would be efficient as derived from a basic rule of economics - the rule of specialization and trade. But separation of powers can also increase the production costs due to a combination of higher communication costs and reduced costs of non-optimal operation.⁴⁶ The efficacy of separation of agencies, therefore, will depend also on the size of the society or jurisdiction.⁴⁷ It can be argued, for example, that American-style separation of powers does not suit smaller countries. This may be one explanatory factor for differences in government structures.

There is another important rationale for separation of agencies - diminishing agency costs. As we have seen above, the democratic system is a kind of a compromise or a second best, which is the result of the need to transfer powers from the people to a central government, and at the same time place the government under the control of the people in a way which would not be too costly. In this sense it was probably appropriate to describe democracy as the least bad system of government. The main problem of the transmission of power to a central government with periodical control is agency costs, which are caused by the differences between the incentives of the agents and the incentives of the principals.

There are three typical categories of costs involved in a principal-agent relationship: bonding costs, monitoring costs and residual loss.⁴⁸ In the case of central government (agent) and citizens (principals) the residual loss is the dominant element. This loss is created by the mere fact that the rulers-politicians seek to maximize their own utility by gaining more powers instead of maximizing the population's well-being.⁴⁹ One way to reduce these agency costs is to divide the

⁴⁴ See: Hirschman [1970], who writes about exit, voice and loyalty; Whynes & Bowles [1981], ch. 7; North in Elster [1986], p. 251.

⁴⁵ See: Tullock [1969]; Posner [1987].

⁴⁶ See: Posner [1987], pp. 11-14.

⁴⁷ For further analysis see: Silver [1977].

⁴⁸ Jensen & Meckling [1976].

⁴⁹ See, for example: Michelman [1980]; Backhaus [1983].

agency into separate sub-agencies, creating different incentives for each. In that way, while legislators act to maximize their political powers and chances of re-election, administrators and judges have different incentives, as a result of different institutional arrangements.⁵⁰ (We will elaborate on this point in the next chapter). If this is the case, the reduction of agency costs would be more significant if the division of powers would not only be by separation of agencies but also by assigning each agency a different governing function.⁵¹ Here we are getting closer to the classical idea of separation of powers.⁵²

The economic history explanation to the political changes in seventeenth and eighteenth-century Europe, among them the emergence of separation of power, is a particular example related to the theoretical explanation above. In a nutshell, this explanation focuses on the financial crises of the early nation states, which brought the rulers (the monarches) to seek loans from the public. One of the methods to gain the confidence of the lenders in the government's commitment to honour its credit was the creation of other governmental agencies, including an independent judiciary, which were to enforce these contracts in an impartial manner. The emergence of representative government is also associated with this explanation.⁵³

2.5 Separation of Persons

Separation of persons is considered to be the third fundamental element in the pure doctrine of separation of powers (together with separation of functions and separation of agencies) and the most dramatic characteristic of it.⁵⁴ This element was, in fact, already incorporated into our analysis of separation of agencies, because economic analysis is based on individuals and their rational-personal choice. This choice (or the utility function) is crucially dependent upon exogenous

⁵⁰ On judges see: Landes & Posner [1975]; Michelman [1980]. On bureaucrats see: Rowley & Elgin in Greenaway [1985]; Whynes & Bowles [1981], ch. 6. For the American context see: Aranson et al. [1982/3], pp. 37-55.

⁵¹ See: Macey [1988].

⁵² An additional remark should be made here: one of the claims against the traditional doctrine of separation of powers is that this separation might prevent monopolistic power but it does not prevent an oligarchic conspiracy. See, for example: Calvert [1985], p. 16. We will discuss this claim in detail in the next chapter. It should be pointed out, however, that the finding according to which every branch of government has a different maximization object is a sufficient reply to this claim, since this diversity prevents (or at least reduces significantly the chances of) such oligarchic structure.

⁵³ One of the major contributors to this historical explanation is Douglass North [1981]. See also: Eggertson [1990], p. 348.

⁵⁴ See: Marshall [1971], pp. 97-100.

conditions. Thus, choices made by government personnel are dependent upon the branch of government in which they work. In other words, in the economic analysis context there is no meaning to establishments and institutions without their human operators; as there is no meaning to the analysis of individuals' behaviour without the examination of the institutional arrangement and incentive mechanism to which they are part. Thus separation of agencies is meaningless unless separation of personnel is an integral component of it.

What we have just said does not mean that only lawyers should be part of the judiciary and that only bureaucrats should work in the executive. There are legal systems (especially on the Continent) in which a mixture of professionals in the different branches of government is encouraged, and in our perspective this indeed might even be more efficient. Separation of persons merely means that no one should be part of more than one branch of government at the same time.

We noted before that separation of agencies can reduce the agency costs which are the result of the government-citizens (agent-principals) relationship. One way of achieving this is different representation structures for each of the branches,⁵⁵ which can increase the people's control over the government and the interplay between particularist and general issues on the public agenda.⁵⁶ Without separation of persons a significant share of these advantages would fade away. The desirability of separation of persons is further derived from the optimal relationships between the powers, as will be explained below.

2.6 The Relationships Between the Powers

The most controversial element in doctrines dealing with the structure of government is the issue of the desirable relationships between the separated powers.⁵⁷ There are at least two distinct, though interrelated, questions here: 1) to what degree separation of powers is advantageous (this question involves the issue of delegation of powers⁵⁸); and 2) what is the degree of freedom or independence

⁵⁵ This is similar to different representation structures within the legislature, which are achieved by bicameralism. For other such arrangements see: Epstein [1987]; Macey [1987] & [1988].

⁵⁶ For an analysis of separation of powers and particularist versus general issues controlled by the voters see: Noll in McCubbins & Sullivan [1987].

⁵⁷ For the recent debate in the context of the American constitution see: Krent [1988]; Yasky [1989].

⁵⁸ For a comprehensive study of delegation of powers in the context of separation of powers see: Aranson et al. [1982/3]. See also: Marshall [1971], pp. 113-117.

that we ought to assign each of the branches. These questions are strongly interrelated in the sense that there could be a great deal of trade off in different combined solutions to them.

Judicial review can serve as a good example. The conventional debate concerning judicial review is usually within the boundaries of the second question: should the legislature and the executive be controlled by the judiciary, and if so, to what extent? But this issue could also be raised in the framework of the first question. In this context we would first ask whether judicial review is part of the legislative or the judicial function. If it is seen as part of the legislative function, we will have to ask whether the delegation of judicial review powers to the judiciary is legitimate.⁵⁹

The two extreme approaches to the second question are the independence approach or the pure doctrine of separation of powers, on the one hand, and the checks and balances approach, on the other hand.⁶⁰ Analytically these two approaches can refer to the functional level, which is directly related to the first question about sharing powers, or to the personal level, i.e. the accountability of agents in each branch to those in the other branches, or to both.⁶¹ It is possible, for example, to argue that an optimal structure of separation of powers would adopt the checks and balances doctrine with respect to the functional level, and the independence doctrine with regard to the personal level. The theoretical framework for analyzing these questions is, again, transaction costs and decision-making costs on the one hand, and agency costs on the other hand. A smaller degree of independence is inclined to raise the former costs but reduce the latter ones, and the optimal level may depend on variables such as the size of the jurisdiction,⁶² the representation structure of each branch,⁶³ and more.

As to the first question about the degree and rigour of the desired separation, the solution might be a result of a cost-benefit analysis, or, more accurately, a

⁵⁹ On judicial review and the doctrine of separation of powers see: Marshall [1971], pp. 103-113.

⁶⁰ See: Yasky [1989]; Vile [1967], ch. 1; Marshall [1971], pp. 100-103.

⁶¹ See: Marshall [1971], pp. 98-100, who compares the American and the French models using similar terms.

⁶² See: Silver [1977].

⁶³ An attempt to construct an ideal type of separation of powers based on different representation structures is made by Hayek [1973], pp. 107-125.

comparison of costs analysis. This analysis is the second stage in a theoretical hierarchical decision-making model. Let us take for example the function of rule-making. In the first stage of this model we have to decide on the merits of the issue - whether a certain rule is desirable at all. In the second stage we have to decide which of the three branches of government can enact this rule most cheaply. The costs include both transaction costs (the costs of the decision-making process) and agency costs.⁶⁴ In making general rules we may expect that the legislature would be the most expensive with respect to the transaction costs, but the least expensive with respect to agency costs. This might not be the case with minor or more particular rules, and if this is the case it is possible to conclude that separation of powers (or, rather, separation of functions) should not be absolute.

Another consideration, connected to transaction costs of decision-making as well as to agency costs, which ought to be taken on board when deciding the degree of separation or the degree of functional independence, is the theory of collective decision-making. As we have seen in Chapter 1, majority rule, which is usually employed by legislatures, might bear grim results of cycling or arbitrariness. One method for ameliorating this situation is to allow additional bodies to take part in the decision-making, bodies which have different decision-making processes, incentives and representation structures. The legislative veto and judicial review in the American system can be seen as performing this task,⁶⁵ and indeed some scholars argue that they were designed for this purpose.⁶⁶

The conclusion drawn from this consideration is, again, the rejection of the 'pure' doctrine of separation of powers, in favour of some degree of power-sharing and functional dependency. It is important that the institutional structure and division of powers would be specified in the constitution; otherwise they would be subject to the same problems of cycling and arbitrariness and thus unstable. A constitution reflects unanimous decisions, and therefore is not subject to the problems of majority rule.⁶⁷

⁶⁴ See also: Aranson et al. [1982/3], pp. 17-21.

⁶⁵ See: Tullock [1981]; Aranson et al [1982/3]; Mayton [1986]; Moe [1990]. But for a different conclusion see the fourth model of Fitts [1990], pp. 966 ff.

⁶⁶ According to Mayton [1986] the founding fathers of the American Constitution took the collective choice consideration into account when they shaped the structure of the American government.

⁶⁷ See: Eggertson [1990], pp. 70-74.

One last remark: The interrelations between the branches of government can digress from the protective function to the productive function of the state. It is possible to advocate, for example, as some do, checks and balances within the protective state or with regard to 'ultimate power', and independence or pure separation within the productive state, or with regard to 'operational power'.⁶⁸ In other words, it can be suggested that the checks and balances model be employed to enforce the initial contract, but within this contract each power would be given full autonomy.

2.7 Some Thoughts on the Roles of the Judiciary

The analysis of the structural elements of the state and the doctrine of separation of powers can lead us to the role definition of the judicial branch of government. The judiciary has tasks within the protective state and within the productive state, and the latter can be divided into a fundamental role and an institutional one.⁶⁹

The fundamental role of the judiciary is derived from the analysis according to which adjudication is one of the services which the productive state should supply, and the best way to supply it is by a distinctive branch of government. Moreover, a rejection of the pure form of separation of powers means that the judiciary should also take part in performing small portions of the legislative and the administrative functions, just as it does not exclude the other branches from taking up some of the adjudication function as well.⁷⁰

The institutional role of the judiciary within the productive state is derived from the analysis of the desirable degree of separation of powers and the interrelations between them. A concept of checks and balances leads to a view of the judiciary, in this role, as equal to the other two branches in the task of controlling each other. In other words, while the fundamental role of the judiciary originates from the primary need of society for public goods, the institutional role derives from a secondary need - to control governmental bodies which had been created to meet the primary needs.

⁶⁸ See: Krent's [1988] and Yasky's [1989] attempts to theorize recent decisions of the American Supreme Court with regard to separation of powers.

⁶⁹ A similar division is made by Macey [1986], who criticises Easterbrook's role definition of the judiciary. I will elaborate on this debate in the next chapter.

⁷⁰ See also: Marshall [1971], pp. 117-123.

The scope of this role is dependent upon the degree of separation between the legislature and the executive.⁷¹ Within the protective state the judiciary has a similar institutional role, together with the other branches, to enforce the initial contract - the constitution.⁷²

There are some connections between the suggested role definition and the traditional division of the legal branches into private and public law (in this context I adopt the division which does not ascribe criminal law to public law). Private law represents the fundamental role of the judiciary: to decide disputes between conflicting individual parties. It is probably a fact of human nature that in every group of individuals, regardless of its structural organization, disputes will occur and arbiters will be nominated to solve them;⁷³ the existence of arbiters (and the development of legal rules) far preceded the creation of the state.

In contrast to private law, public law is a by-product of the state. Although public law can be described, in a way parallel to the description of private law, as aimed at deciding disputes between the state and its inhabitants, this description is inaccurate, and so is the description which is based on 'the rights against the state' theory. The state is the creation of its citizens, and in theory it is supposed to act only in the benefit of all of them. Therefore, while disputes and clashes of interests between individuals are to be expected whether a state exists or not, in a utopian state such clashes of interests between the state and its citizens do not exist. Unfortunately, there is no such ideal state and the second best is a state in which agency costs between rulers and citizens do exist. An efficient way to diminish these costs is separation of powers and a mechanism of checks and balances between them. The consequent goal of public law is to minimize those agency costs. The division within public law between constitutional law and administrative law can correspond to the institutional roles of the judiciary within the protective state and the productive state respectively.

This definition of the roles of the judiciary, and especially its tasks in the field of public law, gives rise to important questions regarding both its optimal organization (i.e. the way the courts are structured, method of judicial appointments,

⁷¹ See: Eckhoff [1965], pp. 30-32.

⁷² See: Macey [1986].

⁷³ See: Posner [1981], pp. 174-179; Shapiro [1981], ch. 1.

the desirable degree of judges' independence and accountability and the ways to achieve them) and the guidelines for its operation (i.e. judicial discretion and the substantive law of judicial review). I am unable to elaborate here on these questions, but it may be worthwhile to make one point, which is significant to the core analysis of this thesis.

There is no direct analytical nexus between the fundamental role and the institutional role of the judiciary except the causal one. Indeed, in many Civil legal systems these roles are assigned to totally distinct bodies, and the institutional role (of both the protective and productive states) is carried out by bodies which are not perceived to be part of the judiciary.⁷⁴ By contrast, in Anglo-American systems the final say in all these roles is usually assigned to one general courts system.⁷⁵ It is beyond the boundaries of this work to assess the various institutional arrangements of different constitutional systems, since it focuses only on the institutional roles of the judicial branch and on its independence whose objects are the other branches of government. The main perspective and legal terminology of this work is of Common Law countries, and it would have to be further adjusted to fit the institutional structure and legal language of Civil Law systems.

3. Conclusion

It is difficult to provide in an introductory chapter a full account of the economic analysis of the structure of the state and of the doctrine of separation of powers. This remains a challenge for future study. What I have tried to do in this chapter is to specify the main economic analysis considerations and create a framework for discussion of this issues, in order to provide points of reference in our discussion of the independence of the judiciary and a broader perspective of it in both scope and methodology. A more detailed account will have to address the distinctions between the different schools within the economic approach, and between the different levels of analysis.

The next chapter will be more focused in its scope - dealing with the judiciary, the legislature, and the interrelations between them - and in its level of analysis, which will be a descriptive-positive level, leaving aside the normative one. It will

⁷⁴ See: Shapiro [1981], ch. 3; Cappelletti [1989], pp. 46-56.

⁷⁵ It is interesting that the classification of countries according to the structure of their judiciaries does not correspond to the classification of countries according to their type of separation of powers or general government structure. This discrepancy deserves further research.

begin with a broader perspective on the basic questions, transcending the borders of the economic approach, and proceed to focus on the non-market economic analysis of law.

Chapter Four

The Independence of the Judiciary in Context: Theories of Legislation, Adjudication and Positive Analysis of the Judiciary

Introduction

The aim of this chapter is to complete the survey of literature pertinent to the analysis of the independence of the judiciary, using a perspective somewhat different from that of previous chapters. The independence of the judiciary and its interrelations with the legislature and government are naturally dependent on the questions: what are legislators, or legislatures, doing, and how do judges decide. These questions of positive analysis, which are distinct from the normative questions: what ought to be the law and how judges should decide, as well as from the descriptive analysis of the written law or of judicial decisions, will be the focus of this chapter.¹ It will give special attention to a debate within the law and economics movement with regard to the positive analysis of separation of powers and the independence of the judiciary. The phenomenon of the independence of the judiciary (specified in Chapter 2), and its explanations (offered in Chapter 6), which are the main interest of this work, have interesting bearings on this debate.

The three levels of analysis, though distinct, are interrelated, and positive analysis of the legislature and the judiciary ought to interest also normative theorists and descriptive ones. The normative theorist is concerned with how judges ought to decide, but the possibility of implementing such a theory, and its successful implementation, are dependent upon understanding the current legislative and judicial decision-making process. It is therefore not surprising that, as we shall see later, many writers focusing mainly on normative questions tend to deal, incidentally, with positive analysis. Moreover, as some critics suggest, they often tend to link or even fuse their normative and positive analyses by way of theoretical rhetoric.² The descriptive theorist or the black-letter lawyer may well find interest in positive analysis, especially when he or she comes across different patterns of judicial behaviour in different countries or periods. In such cases it is difficult to ignore the questions - why do judges decide differently in different legal systems, and why do they change from time to time their patterns of decision? An answer to these questions can be provided by the positive analyst.

¹ On the distinctions between normative, positive and descriptive analyses see: Chapter 1, section 2.4.

² See: Gavison [1988], pp. 1636-7.

Section 1 of this chapter will provide a brief simplified typology of current positive analyses of the judiciary. As we shall see, many of the writers who will be mentioned have not approached the discussion of the legislature and the judiciary within the framework offered in this work, and some of them treated the positive questions merely as incidental (usually to their normative analysis of the law or of judicial decision-making). One of our main tasks, therefore, will be to present the various approaches within one framework. This typology will bring us to **section 2**, in which I will try to present the positive analysis of the judiciary in a broader context of two paradigms - a legal philosophy paradigm and a political philosophy one. The general paradigm which will be used throughout this thesis to explore the phenomenon of the independence of the judiciary is the latter. **Section 3**, therefore, will focus on theories of legislation and adjudication within the political philosophy paradigm, and, more specifically, on the debate within law and economics - public choice on the positive analysis of legislation and adjudication.

1. Typology of Positive Theories of Adjudication

1.1 The Object of the Analysis - the Individual Judge or the Judicial Outcome.

The question how judicial decisions are made has been addressed by many scholars from different disciplines and vantage points. One interesting classification of positive analyses of the judiciary is according to the object in focus, which can be either the individual judge or the collective judicial decision-making process.

Most of the important judicial decisions, those which involve more than a trivial application of written law, those that entice us to ask how judges do decide, are an outcome of a joint decision of several judges. This fact can shift the interest of positive analysis of adjudication from the individual judge to the collegial decision-making process. Although the traditional types of positive theories of adjudication, which focus on the individual judge, are still dominant, we can see more and more writers who focus their positive analysis of adjudication on these collegial factors, especially since some analytical tools for dealing with such committee-type decisions were introduced by the social choice theorists.³

³ See the discussion and references in Chapter 1, sections 2.2 and 3.2.2.

An example of an analysis which focuses only on the collegial factors is Frank Easterbrook's discussion of the American Supreme Court, which is based on the core of the social choice theory - Arrow's impossibilities theorem.⁴ Easterbrook presents adjudication as a set of inconsistent decisions that are the result of cycling problems, worsened by the use of the doctrine of stare decisis. This positive description is followed by a discussion as to the possibilities of solving the inconsistencies by giving up one of the essential four remaining requirements from a collective decision-making process.⁵ His conclusions are pessimistic, as he views three of these four requirements - the Pareto optimality condition, no dictatorship and the independence from irrelevant alternatives - as essential particularly to judicial decisions, while giving up the fourth requirement - universality - is, according to Easterbrook, inapplicable.⁶ Along the same lines of the social choice theory Levine and Plott analyze the crucial influence of agenda on the final outcome of a decision-making process, and apply this general analysis, among other institutions, also to appellate courts.⁷

Some theories of adjudication, albeit focusing on the individual judge, do take into account the fact that the final decision is a joint product of several judges. Teger, for example, includes a factor of collegiality in the utility function of the individual judge.⁸ He claims (writing on the American judiciary) that judges prefer to be in the majority to being part of the dissenting opinion, and that in any case (either as part of the majority or as dissenters) they prefer not to write a separate opinion. These preferences have an influence on judges' opinion to the merits of the case. A somewhat similar attitude, though using different analytical tools, is taken by Allan Paterson, who considers the interaction among the Law Lords as a major influential factor on the opinion given by each of them.⁹

A different way of taking into account the fact that a court decision comprises several individual opinions is reflected by some of the traditional theorists of

⁴ Easterbrook [1982].

⁵ For the five requirements from a collective decision-making process and Arrow's impossibilities theorem see: footnote 53 in Chapter 1.

⁶ Easterbrook [1982], pp. 823-826.

⁷ Levine & Plott [1977].

⁸ Teger [1977].

⁹ Paterson [1982], pp. 32-34, 89-99.

adjudication.¹⁰ Their main theme is that judges usually apply or declare the law without exercising any subjective discretion. In rare cases they do jump on the wild mare of the public interest, but in those cases the subjective-independent discretion of one judge will write off the discretion of another judge. Consequently the judicial outcome will be clean of subjective elements.

The vast majority of positive analyses of adjudication belong to a third group of theories which do not take at all into account collegial factors as factors that influence judicial decision-making, and rather concentrate on the individual judge as the object of analysis. This group can be divided again into two sub-categories according to the importance that is being attributed to external factors as influencing the judicial outcome.

1.2 Adjudication Theories and Dependency Upon External Factors

One can make a 'broad brush' distinction between adjudication theories which analyze the behaviour of judges as dependent upon factors exogenous to the judiciary (factors from other components of the constitutional-legal system or external to the legal system as a whole), and theories that view the judicial way of behaving as an integral, unchangeable part of the role definition of judges as judges. I think that this classification is especially important when the positive theory is the base for suggested reforms or normative conclusions as to the structure of the judiciary or other legal and political institutions.

There are several types of writings in which external factors are specified as the dominant factors influencing the judiciary. One type of such literature is the comparative one. Here the starting point is a description which shows different ways of behaviour by judiciaries across various legal systems; the analysis which follows emphasizes distinct political, social, philosophical and institutional developments as the sources of these differences. Cappelletti, for example, draws a distinction as to the positive analysis of the judicial conduct between the Common Law and the Civil Law legal systems.¹¹ He argues that the differences between the way a Common Law judge acts and the way a Civil Law judge acts (differences expressed in the degree of activism, judicial law-making etc.) are the result of dissimilar developments of institutional and procedural elements in the two archetypical systems (the

¹⁰ See: Robertson [1982], pp. 2-3.

¹¹ Cappelletti [1981], pp. 60 ff & Cappelletti [1989].

existence or absence of **one** supreme court, the right of a court to choose its cases, the doctrine of stare decisis and more).

Vile, in his book on the doctrine of separation of powers,¹² conveys a similar, though more historically orientated, approach. He describes the historical developments in England, France and the United States which resulted in differences of institutional structures, including differences of the judiciary and its self role perception. Other examples of this type of literature are somewhat more limited in scope as they emphasize one factor as the dominant influential element upon the judiciary. Rasmussen, emphasizes, in his essay on the European Court of Justice, the character and the quality of the other powers of government as the factor that determines the way in which the judiciary behaves;¹³ Atkins, in his comparative research of English and American judges, focuses on the influence of the different social backgrounds upon judges' decision-making patterns, especially in terms of loyalty to the government and the measure of disagreement among judges.¹⁴ Aranson bases his analysis of judicial decision-making on the application of the Coase theorem to courts' procedural rules.¹⁵ He distinguishes between decisions which are rule-governed and those which are not rule-governed, and argues that usually (but not always) judicial decisions are of the former type, i.e. procedural rules (which are fixed by the legislature) can determine their outcome.

In the public choice context, the writings of Gely and Spiller can be associated with this category of theories as well. They analyze the decision-making of the American Supreme Court in constitutional law¹⁶ and administrative law¹⁷ as deriving from a rational choice / game theory study of the constitutional-institutional structure of the American government. More specifically, Spiller and Gely assume that the Supreme Court at any given time has a preferred ideological stance, which is the view of the median judge in the Court (they do not specify what are the origins of the views of individual judges). However, the Court cannot employ this stance in

¹² Vile [1967].

¹³ Rasmussen [1986], pp. 53-71.

¹⁴ Atkins [1988/9], pp. 579 ff.

¹⁵ Aranson [1989], pp. 444 ff.

¹⁶ Gely & Spiller [1989] & [1990b] and Spiller [1990a].

¹⁷ Gely & Spiller [1991] and Spiller [1990b].

its decisions due to structural constraints. The decisions of the Court are the closest possible to this ideological stance in such a way that they are immune (because of social choice factors) from reversal by the other players - the two houses of Congress and the President. The Court's degree of activism and loyalty to its precedents, therefore, are dependent more on its stance relative to the stances of the other players than on ideological changes in judges' views.¹⁸ My analysis of the independence of the judiciary, which will be developed in Chapter 6, accepts the basic assumptions, attitudes and analytical tools of Gely and Spiller, but, taking their findings into account, it will probe the institutional structure and especially the independence of the judiciary, which are taken as exogenous factors by their model.

On the other side of the scale, according to this classification, we find adjudication theories that do not attribute importance to external factors as having an impact on the way in which judges decide, perceiving judicial behaviour as an integral constituent of the judicial role.¹⁹ This compartment consists of the traditional positive debate on adjudication that finds its roots in the classical literature on natural law versus positivism. In the present context it can only receive a brief and simplified mention.

Dworkin's 'Hercules' is one extreme of this debate.²⁰ Taking into account his positive vision of the law, according to which there is one exclusive answer for every legal problem, and the ensuing trivial normative analysis of the judiciary as aimed at applying this answer, and in order to present an overall coherent theory, Dworkin seems to suggest that judges do attempt to apply this sole right answer for every legal problem. Since this right answer comprises not only written law but also background norms (super rules or principles) of the legal system, the judge, while applying the law, can be seen as acting to promote the public interest.

The other extreme of this debate consists of those who, based on the positivist view of the law, believe that judges do have discretion of their own and that they exercise this discretion in a way that maximizes their self-interest. In this group we

¹⁸ See especially: Gely and Spiller [1991].

¹⁹ In a way I am probably doing some injustice to these theories. It is very likely that had I asked such a theorist specifically: "if we change this factor or another in the legal system, the political system or tradition, the social structure etc., wouldn't this influence the way judges make their decisions?" - the answer would not be negative. But if this is the case, then the theories in this group are not comprehensive, especially for those who want to derive from the analysis of adjudication some conclusions regarding the structure of the judiciary and other legal and political institutions.

²⁰ Dworkin [1986], pp. 313-354, 400-412.

find on the one hand most of the economic analysts of law, and especially the public choice theorists.²¹ On the other hand, a variant of this view is adopted also by the critical legal studies scholars.²²

Posner and other law and economics adherents can be located close to the pure self-interest extreme. In one place Posner argues that judicial decision-making is dominated by judges' aim to maximize their own power,²³ though in other writings he argues that judges are seeking to maximize the approbation of the public, and since the public's goal is efficiency, judges are deciding in the way which maximizes wealth.²⁴ Michelman accepts this description with regard to common law adjudication, but argues that when statutory interpretation is involved judges primarily try to satisfy the legislature and only secondarily decide according to efficiency.²⁵ (Posner's theory concerning the independence of the judiciary, which will be explored in the next chapter, actually resembles Michelman's approach more than his own approach mentioned here). Freer views the judge as seeking to minimize his workload and deciding cases accordingly.²⁶

Hart, Raz, Holmes and other leading realists and positivists argue that judges almost always have discretion and that they exercise it, imposing, under certain constraints, their own beliefs regarding the desirable solution.²⁷ Gavison and Lee make a distinction between easy cases, in which they accept Dworkin's model of adjudication (judges do not have discretion, they simply apply the law), and hard cases in which they accept the positivists' model, according to which judges have discretion which they exercise subjectively.²⁸

Griffith's description of the judiciary can be also located somewhere between the Dworkinian and the law and economics extremes of the map. Although he tends

²¹ See, for a survey: McAuslan [1988], p. 692; Tollison [1988], p. 345.

²² For a survey see: Tushnet [1988], pp. 969 ff; Eskridge & Frickey [1987], pp. 710-712.

²³ Posner [1987], p. 32.

²⁴ Posner [1977], p. 415.

²⁵ Michelman [1980], pp. 431, 441-444.

²⁶ Freer [1987], pp. 44-49.

²⁷ See, for example: Hart [1961], ch. 7; and for a general survey: Gavison [1988], p. 1638.

²⁸ Lee [1988], pp. 195 ff; Gavison [1988], pp. 1632, 1638.

to accept that judges have discretion, he also believes that in exercising it they are striving to maximize what they view as the 'public interest'. But Griffith argues that the judicial perception of public interest is crucially influenced by the judges' social backgrounds; judges can never be totally independent. Thus, in England, the uniform and homogeneous social background of judges brings them to identify public interest with the interests and morality of the (Tory) government, the defence of property rights and the promotion of conservative political opinions.²⁹

The existence of judicial discretion is also acknowledged by the consensus model, but the supporters of this model (Lord Devlin, for example) argue that judges exercise this discretion in accordance with the consensus in society or its positive morality.³⁰ The closest to the Dworkinian model is the orthodox model which, while acknowledging the existence of a certain minimal degree of discretion, argues that judges write off one another's personal impacts.³¹

2. A Positive Analysis of the Judiciary: Two Paradigms

So far we have sought to identify positive analyses of the judiciary of different scholars, many of whom treated the question within a much broader context. This section will attempt to focus on these more general theoretical contexts. I propose to distinguish between two main gateways to the question how do judges decide. One is the jurisprudential (or the 'substantive') gateway, the other is the theory of state (or the 'institutional') gateway. Positive analysis of adjudication can be seen either as analytically subordinate to an analysis of the law or of the jurisprudential question 'what is law' - what I dub the substantive gateway, or as analytically subordinate to an analysis of the state, namely the institutional gateway. After surveying these two paradigms, I will abandon the jurisprudential one, as the framework of my analysis of the independence of the judiciary will be within the institutional paradigm.

2.1 Theories of Adjudication as Derived from Theories of Law

Within the substantive hierarchy the theorist analyzes the judiciary, or adjudication, in a way derived from his theory about the law. 'What is law' is the core

²⁹ Griffith [1985]. See also: Lee [1988], pp. 3, 33-40; Harlow in Harlow [1986], p. 182; Robertson [1982], pp. 1-4.

³⁰ See: Gavison [1988], p. 1636; Bell [1983], pp. 10-14.

³¹ See: Robertson [1982], p. 3.

question of jurisprudence; it is answered by the classical conflicting approaches of natural law and positivism. One of the main modern debates within this realm is the Dworkin-Hart debate. Both scholars have positive theories as to what is law. Within this question both relate to the sub-question: is there one, definite answer to every legal problem? Dworkin, who has a broad perception of 'the law', answers in the affirmative - there is one genuine solution for every legal question. Hart takes the extreme opposite view, claiming that there is no one exclusive answer for any legal problem.³²

From this level of analyzing the law both writers move to the subordinate level of analyzing adjudication. Here we find, at least with Dworkin's application of his theory of law, some perplexity as to the positive and normative levels of analysis. Dworkin makes the trivial normative claim that judges ought to apply the exclusive 'right' answer provided to them by the law, but it is unclear to me whether he also claims, on the positive level, that judges do apply (or, rather, make an attempt to apply) this correct solution, i.e. that they do what they ought to do.³³ From Hart's theory of law we can infer that judges have discretion. Hart claims that judges operate within this discretion by using their own insights, under certain constraints, as to the desirable solution. However, it is not clear whether Hart views this model only as a positive one, or whether he makes a parallel claim on the normative level.

Both approaches draw connections between analysis of the law and analysis of adjudication. In both cases these connections are problematic. But the problems are on different levels in the two doctrines. Based on Dworkin's theory of law, the normative analysis of adjudication is trivial: if you claim that there is only one right answer to every legal question, it is natural to claim further that judges ought to apply this answer. But the positive side of this theory is not straightforward at all: the doctrine can still be coherent if you claim that judges do not necessarily apply this right answer, because, for example, they tend to apply the solution which is desirable in their own view, or the solution which is held in consensus by society, and so forth. From Hart's analysis of the law the positive conclusion regarding adjudication - that judges have discretion - is trivial (though this is not a complete positive analysis, and the question as to the way they exercise this discretion is still an open one). But the normative level of the theory of adjudication is not so obvious. It is possible, for example, to argue, on the basis of Hart's theory of law, in favour of the consensus

³² See: Dworkin [1978] & [1986]; Gavison [1988], p. 1630.

³³ As, for example, Simon Lee [1988] interprets him; see pp. 3-12, 20-33.

model or the Dworkinian rights-based theory of adjudication.³⁴ Be that as it may, the Dworkin-Hart debate demonstrates how positive analysis of adjudication can be derived from (or attached to) theories of law.

2.2 Theories of Adjudication as Derived from Theories of State

Another case of oscillation between normative and positive analyses is found in the presentation of theories of adjudication as derived from theories of state or of government. The modern source of these positive theories of government lies in the normative debate in eighteenth-century North America between Pluralists and Republicans, Federalists (or Madisonians) and Anti-Federalists.³⁵ The Pluralists and Federalists argued that governments ought to represent the diverse interests in society, while the Republicans and Anti-Federalists argued that governments ought to represent the ultimate values of society, its civic virtues.³⁶

In light of this normative debate one can distinguish between three archetype positive models as to the behaviour of government (focusing especially on its legislative branch): 1) the pluralist model - which sees the legislature as a loyal representative of the different views and balance of powers in society; 2) the transactional model or pessimistic pluralism (the public choice model) - that views the legislature as representing only the powerful interest-groups in society; and 3) the autonomous model - perceiving the legislature as being able to manoeuvre independently of those who elect it. This model encompasses the republican vision.³⁷ A variety of theories concerning adjudication - both positive and normative - is derived from these three positive models of legislation.

³⁴ The three theories of adjudication mentioned here - the consensus or social mores model, the rights model and the interstitial legislator model - are presented by John Bell [1983], as an exhaustive list of theories of adjudication (pp. 9 ff). In the lines of what I wrote in the text above, it is problematic to present those theories together because they are dealing with different levels of analysis (positive / normative). Moreover, as we have seen in the previous section, there are many more theories of the behaviour of the judiciary.

³⁵ See: Sunstein [1985], pp. 31 ff; Eskridge & Frickey [1988], pp. 37-55.

³⁶ For accounts of the subtler differences between Madisonians and Pluralists (the former can be seen as combining Pluralist and Republican ideas), and between Republicans and Anti-Federalists, see: Froomkin [1988], p. 1075; Eskridge & Frickey [1988], pp. 46-65; Michelman [1988], Sunstein [1988]. For similar distinctions in the context of American administrative law see: Shapiro [1988], chs. 1-2.

³⁷ For slightly different classifications see: Rodriguez [1989], pp. 921-928; Froomkin [1988], pp. 1076-1079; Demsetz in Alt & Shepsle [1990], pp. 144 ff. For a related account of theories explaining the administrative process see: Mashaw [1990]; Sunstein [1990].

The 1950s Legal Process approach, best represented by the writings of Hart and Sacks, can be seen as originating from the pluralist model. This approach views legislation as a product of interaction between the three powers of government, and as representing the popular opinion. The legislature is perceived as "reasonable persons pursuing reasonable purposes reasonably".³⁸ Hence it assigns to the judiciary the role of applying legislation according to its creators' original, or 'real', meaning.³⁹ When applied to adjudication, the legal process approach involves both positive elements (judges take part in the process of pluralist legislation) and normative elements (judges should apply the law according to the original meaning of its creators), though, again, the distinction between the positive claims and the normative ones is not crystal clear.

Most of the law and economics literature (in its widest definition) accepts the transactional positive model of legislation, but from this common starting point different theories of adjudication have been developed. Posner and Easterbrook, for example, view most of the legislation as sets of contracts between powerful interest-groups and the legislature. From this positive analysis of the legislature they turn to the judiciary, and claim that its role is to enforce these contracts with minimal intervention.⁴⁰ It is quite clear that this claim is made on the normative level of analysis, but it seems that at least Posner thinks that this is really the case, i.e. that this claim is valid also on the positive level.⁴¹

Accepting the same positive analysis of legislation, Richard Epstein and Jerry Mashaw advocate the opposite normative approach concerning adjudication. They call for activist judges who should correct the rent-seeking legislation.⁴² A middle-way normative approach is offered by John Ely, Jonathan Macey and Susan Rose-Ackerman. They claim that judges ought neither to enforce the deals between the legislature and interest-groups nor to intervene in invalidating these contracts. The

³⁸ Hart & Sacks [1958], p. 1415.

³⁹ See also: Eskridge & Frickey [1987], pp. 684-700 & [1988], pp. 245- 321.

⁴⁰ See: Posner [1985], pp. 286-287; Easterbrook [1983] & [1984]; Fox [1986]; Eskridge & Frickey [1987], pp. 701-710; Rose-Ackerman [1988], p. 350; Rodriguez [1989], pp. 933-936. Easterbrook argues that when legislation is enacted to benefit a specific interest group, the court ought to enforce it as a loyal agent. Only when legislation is public-regarding should the court apply a creative interpretation to maximize the social well-being.

⁴¹ See: Landes & Posner [1975].

⁴² See: Epstein [1985]; Mashaw [1980]; and also: Hirshman [1988], p. 648; Farber & Frickey [1987], pp. 875 ff; Eskridge & Frickey [1987], p. 709.

judiciary has a duty, according to this approach, to provide relevant information to the parties and to others affected by these contracts, to publicize their real impact, and by this to hinder implicit hidden legislation.⁴³

The third model of legislation sees the legislature as able to manoeuvre independently. This description begs the question as to the character of this manoeuvring. Hence we come across, on the one hand, the Critical Legisprudence, which attributes a negative (normative) value to this manoeuvring due to its (positive) perception as subjective and irrational. On the other hand we find the New Legal Process, which rejects the pluralist view of law-making, adopting a republican view as its positive analysis of the legislature, arguing that law-making is a process of value creation informed by theories of justice and fairness.⁴⁴

The critical legisprudence extends its pessimistic view of the legislature also to the judiciary. This is not a necessary, logically derived, analysis; it is an independent, though related, one. Judges as legislators, it is claimed, decide subjectively, illogically, and politically.⁴⁵ The new legal process approach has tended so far to neglect the positive analysis of the judiciary and to concentrate on the normative side, on which we find differing views, especially with regard to the desirable degree of judicial activism. It seems, though, that most of the adherents of this approach believe that creative law-making by the courts is needed to ensure rationality and justice in the law,⁴⁶ and some of them are confident that judges armed with scholarly insights would be superior contributors to this progressive, fair and just law.⁴⁷

2.3 Other Interactions Between Positive and Normative Analyses.

To end this section, I will just mention that the interaction between positive and normative analyses of the judiciary is not restricted to multi-layer analysis (law-adjudication, or legislature-judiciary). This interaction also exists in writings which

⁴³ Ely [1980]; Macey [1986], especially pp. 250-266; Rose-Ackerman [1987], p. 351.

⁴⁴ See: Eskridge & Frickey [1988], pp. 322-333; Michelman [1988]; Sunstein [1988].

⁴⁵ Kelman [1987], pp. 186-212; Tushnet [1980]; Eskridge & Frickey [1988], pp. 326-330.

⁴⁶ Eskridge & Frickey [1987], p. 717 & [1988], pp. 330-331; Rodriguez [1989], pp. 936-939; Froomkin [1988], pp. 1088-1091.

⁴⁷ See: Rodriguez [1989], pp. 949-951.

focus primarily on adjudication. There is, for example, a group of scholars whose positive analysis of the judiciary suggests that judges accept a specific normative theory of adjudication. Such an approach can be found in Cass Sunstein's analysis of the judiciary.⁴⁸ Sunstein argues that American judges have been shifting from adopting a Pluralist vision to a Madisonian vision of politics, and they decide accordingly. In a somewhat similar way Allan Paterson, in his analysis of the Law Lords, concludes that they reject Dworkin's theory of adjudication and adopt Hart's rival theory.⁴⁹

A rather sophisticated example of this interaction can be found in Patrick Atiyah's view of adjudication.⁵⁰ Atiyah thinks that the Realist model of adjudication, according to which judges exercise subjective discretion, is the true description of reality. He also claims that judges are aware of what they are doing and, moreover, choose to act as they do, although they do not want the general public to know about the way in which they are operating. Thus the judges present themselves to the public as acting in accordance with the declaratory theory of adjudication (judges only declare the law, they do not have any discretion).

In the final section of this chapter, and from now on, we will concentrate on positive theories of adjudication or on positive analyses of the judiciary within the context of the 'institutional' - theory of state methodological framework.

3. Positive Theories of Adjudication Within the Realm of Public Choice

The public choice approach tries to apply economic models and tools to deal with non-market issues.⁵¹ In its modern version it began forty years ago with a general analysis of collective (committee type) decision-making,⁵² continued with the construction of an original political theory,⁵³ and lately shifted to deal also with legal issues.⁵⁴ Public choice analysis of the judiciary can be regarded as the seam

⁴⁸ Sunstein [1985], pp. 54-55, 68.

⁴⁹ Paterson [1982], pp. 190 ff.

⁵⁰ Atiyah [1980], p. 355 ff.

⁵¹ On public choice see: Chapter 1, sections 2.2 and 3.2.2.

⁵² Black [1948]; Arrow [1951].

⁵³ Downs [1957]; Buchanan & Tullock [1962]; Buchanan [1975].

⁵⁴ For recent surveys see: McAuslan [1988]; Farber & Frickey [1991].

between its political theory and its legal theory. The impetus for public choice literature on this issue was given by Richard Posner and William Landes, who are not recognized necessarily as indubitable public-choice theorists, in their article on the independence of the judiciary.⁵⁵ This article framed the current debate, within the realm of public choice, on the positive analysis of the judiciary; a debate which will be discussed in this section.

3.1 The Public Choice Theory of Legislation as the Common Point of Departure

Interestingly, the different public choice models concerning the judiciary (positive as well as normative) originate from an almost consensual positive description of legislation and of the legislature. When we climb one step higher, to the analysis of the constitution, we find, as with regard to the analysis of the judiciary, contradicting positive theories which are constructed upon this common view of legislation. It seems, therefore, that this consensus regarding legislation should be the natural starting point for our discussion.

The public choice school views legislation as a set of contracts between the legislature and powerful interest-groups.⁵⁶ Since it tends to accept a modern version of Hobbes' justification for the existence of the state and its central government,⁵⁷ and since it regards the democratic system as the optimal, or rather as the least evil system of government,⁵⁸ this view of legislation is regarded as a basic, unavoidable and immutable foundation of public choice theory. This model of the legislature as seeking to maximize its profits (profits in a broad sense, which include gaining more powers and increasing chances of re-election) by selling legislation to the interest-group offering the best price, contests both the pluralist model and the republican model of legislation, mentioned above. The differences between public choice and the republican approach derive mainly from the former's view of legislators as self-maximizers. The differences between public choice and

⁵⁵ Landes & Posner [1975].

⁵⁶ This view was suggested initially by Stigler [1971] and Pletzman [1976] with regard to government regulations. It was applied to legislation and further developed by both sides of the debate on the roles of the judiciary and the roles of constitutions. See, on the one hand: Landes & Posner [1975], pp. 875-877; Tollison [1988], p. 339; and, on the other hand: Macey [1986], pp. 227-233 & [1987], pp. 62-72 & [1988], pp. 474-475 & [1988/89], pp. 45-51; Epstein [1987].

⁵⁷ See: Buchanan [1975] and my discussion in the previous chapter.

⁵⁸ See: Buchanan & Tullock [1962]; Posner [1987], pp. 22-23.

the pluralist approach originate mainly from the analysis of rent-seeking activity which is a key component in the former's theory.⁵⁹

There are some secondary disagreements within this public choice view of legislation. One of them concerns the 'totality' of interest-group legislation: a few writers tend to acknowledge the fact that some legislation is after all public-regarding, rather than private-regarding.⁶⁰ Still, most of the writers, even if they acknowledge the existence of public-regarding legislation, present, or rather presuppose, in their models private-interest legislation without any exceptions. Another discrepancy hinges on whether legislation is being sold to one specific interest-group at the expense of other groups, or whether legislation is bought by several interest-groups together. The former view, sometimes dubbed 'capture theory' is based on the original regulatory literature,⁶¹ and is being applied, for example, by the Landes-Posner model of the judiciary. The latter approach views legislation as a compromise in which politicians try to alienate as few interest-groups as possible in order to achieve the most effective strategy for maximizing political support.⁶² My model of the independence of the judiciary will be based on this more refined approach towards legislation.

3.2 The Debate Within Public Choice on the Analysis of the Judiciary.

So much for the general grounds of agreement. Disagreements begin as soon as we turn from the positive analysis of legislation to the evaluation of this analysis. The division between the two camps concerning the normative analysis of legislation matches the parties in the debate around positive and normative analysis of the judiciary, and is almost parallel to the disagreement concerning the role of constitutions. In one camp we can find writers such as Landes, Posner, Easterbrook, Tollison and Crain. The opposing party includes Epstein, Mashaw, and Macey.

Three possible positive theories of the judiciary can be derived from the public choice description of legislation:

⁵⁹ For a critical account of the public choice view of legislation see: Rubin [1991]; Eskridge & Frickey [1988], pp. 56-65.

⁶⁰ See, for example: Buchanan [1975b], pp. 903-905, in response to the Posner-Landes model of the judiciary; Fox [1986], p. 559, writing on Easterbrook's model of the judiciary.

⁶¹ Stigler [1971]; Pletzman [1976].

⁶² See, for example: Macey [1988/89], pp. 45-46.

- 1) the way in which the judiciary acts is not affected by the interest- group character of legislation;
- 2) the judiciary, in the way it acts, creates obstacles to the fulfilment of the deals between the legislature and the interest-groups;
- 3) the judiciary, in the way that it acts, helps the interest-groups and the legislature to maximize the profits from their deals.

The debate within public choice is between the second approach and the third.⁶³

Landes and Posner are the pioneers of the third approach.⁶⁴ They argue that the legislature maintains an independent judiciary because such a judiciary increases the profits that the legislature and interest-groups make from the deals between them, through strengthening the durability of such deals. They describe the role of the judiciary as equivalent to parliamentary procedural rules which are supposed to make changes in legislation more difficult and costly. Both mechanisms, according to this model, are working on behalf of powerful interest-groups.⁶⁵

Robert Tollison and Mark Crain accept Posner's and Landes' theory concerning the judiciary, but they go even further with their interest-group perspective. They argue that the presidential veto, on the level of the American Federal legislature, and gubernatorial veto, on the level of states' legislatures, play the same role as the judiciary; they are designed to increase the profits of the legislature and the interest-groups.⁶⁶ Thus, Tollison and Crain cover all three branches of government and claim that all of them are joining forces to benefit powerful interest-groups. Instead of separation of powers we actually have collusion of powers. The last nail in the constitutional coffin is hammered in by Tollison and Crain when they argue that the mere existence of a constitution, and the mechanism by which it works, are also part of this interest-group vision of the state.⁶⁷

⁶³ For a critical view as to the public choice nexus between the theory of legislation and the theory of adjudication see: Rubin [1991], pp. 45-55; Mashaw [1989], especially pp. 150 ff.

⁶⁴ Landes & Posner [1975].

⁶⁵ For a similar view see: Aranson et al. [1982], pp. 52-55.

⁶⁶ Crain & Tollison [1979b].

⁶⁷ Crain & Tollison [1979a].

From this positive analysis of the judiciary two possible normative approaches may ensue:

- 1) an approach which condemns the described existing situation and suggests reforms to change it;
 - 2) an approach which approves of the described way of the judiciary's behaviour.
- It is interesting to note that all the writers who hold the positive theory of adjudication mentioned above either ignore the normative level of analysis (Crain and Tollison) or support the described existing situation.

Landes and Posner tend to approve of the judiciary's conduct (as described by them). They argue that courts should not act as a general brake on special interest legislation because they are not outside the structure of interest-group politics.⁶⁸ It seems that an even more extreme approach is adopted by Easterbrook, who, accepting the interest-group description of legislation, argues positively (rather than negatively) that the 'good' judge interprets the law according to the 'real' intention of the enacting legislature, as he or she would do when dealing with contracts in private law.⁶⁹

The opposing approach to the positive analysis of the judiciary views separation of powers, including the roles of the judiciary, as monopolizing factors and as methods of increasing the costs of rent-seeking activity and decreasing the profits of interest-groups. This approach is older, and can in fact be seen as part of the original literature of public choice.⁷⁰ However, its specific application to the judiciary regained attention only following Landes' and Posner's 1975 article. This approach is also popular among writers outside the public choice realm.

In the framework of the interest-group legislation theory the 'obstacle' approach to the judiciary can vary in form and presentation. Some of its adherents present the judiciary as acting on behalf of the public interest or as acting to balance the other powers of government. The judiciary is viewed by other theorists as a representative of the unrepresented or under-represented (vis-à-vis the legislature).

⁶⁸ Landes & Posner [1975], p. 894. In more recent writings Posner distinguishes between various types of legislation and different degrees of clarity of the legislature's intent, arguing for varying methods of implementation and interpretation. For more see: Mashaw [1989], pp. 152-156; Eskridge [1989], pp. 322 ff; Eskridge & Frickey [1988], pp. 597-602.

⁶⁹ Easterbrook [1983] & [1984]. See also: Macey [1986], p. 235; Fox [1986], p. 559; Katzman [1988], pp. 16 ff; Eskridge & Frickey [1988], pp. 602-609.

⁷⁰ See: Downs [1957]; Buchanan & Tullock [1962]; Buchanan [1975].

Yet another group views it as acting to increase the costs of rent-seeking activity or the prices of the contracts between the legislature and interest-groups.⁷¹

Epstein's theory of the judiciary might be regarded as the most extreme among the 'obstacle' theories.⁷² He claims that the judiciary (especially when exercising judicial review) is part of several mechanisms which act to control and balance the power of the legislature. Bicameralism, the intermittent turnover of the two Houses of Congress and the presidential veto are some of the equivalent mechanisms.

Cass Sunstein can be seen as the most moderate 'obstacle' theorist.⁷³ His theory is based on a survey of the American Supreme Court's constitutional and administrative law decisions.⁷⁴ From this survey he concludes that the Court has developed an approach according to which the representative nature of political power (as derives from the pluralist approach to the state) is not a sufficient justification for legislation; rationality in legislation ought to be postulated as well. More specifically, after abandoning the *Lochner* decision, the Court has adopted a policy according to which legislation (or administrative decisions) based solely on 'raw power' should be invalidated, although it adopted a narrow definition of 'raw power'. Thus, for example, redistribution is not included in 'raw power' and is seen as a legitimate social goal to be achieved by legislation. Sunstein concludes that the judiciary has adopted a Madisonian understanding of representation and a republican normative understanding of politics.⁷⁵

A similar analysis, though from a point of view differing from mainstream public choice, is offered by Stewart Sterk,⁷⁶ who deals with the question: can we regard legislation as a contract? Sterk examines whether the American Supreme Court perceives legislation as a contract which should be enforced. He finds that in

⁷¹ See: Anderson, Shughart and Tollison [1989], p. 215.

⁷² Epstein [1987], pp. 167-169 & [1985]. See also: Macey [1986], pp. 225-226; Katzman [1988], pp. 16-17.

⁷³ Sunstein may not classify himself as a public choice theorist at all (see: Sunstein [1988]), but since he deals with the judiciary using public choice tools, accepting the public choice view of the legislature, he ought to be mentioned in this context.

⁷⁴ Sunstein [1985], pp. 45-68.

⁷⁵ Ibid, p. 59

⁷⁶ Sterk [1988], pp. 647 ff.

Marshall's period the Court held an extreme view of legislation as a contract. The civil war period was characterized by more doubts as to the supremacy of the contractual view of legislation. During the great depression the opposing view of discontinuity was adopted. But in 1977 the Court returned to the contractual view of legislation. The overall conclusion of Sterk is that the Court rejects the 'pure' contractual model of strict continuity of the legislature. This conclusion is somewhat equivalent to the 'obstacle' positive approach to adjudication.

Jonathan Macey is in the mainstream of, and the main spokesman for, the 'obstacle' approach in recent years.⁷⁷ He rejects both the Landes-Posner model of the judiciary as an enforcer of the deals between the legislature and interest-groups,⁷⁸ and Epstein's view of the judiciary as an invalidator of interest-group legislation.⁷⁹ Macey views the (American) judiciary in the context of a constitution which is built and operated to render rent-seeking activity and interest-group legislation more difficult. An independent judiciary is a component of separation of powers, which increases the operating costs of interest-groups. Other constitutional mechanisms serving the same purpose are the federal structure, the institutional structure of the legislature and the process in which substantive constitutional principles were enacted (as part of the constitution) and are being amended. The constitution is structured in a way that brings about an equilibrium between the gains from reductions in rent-seeking activity and the costs of achieving these reductions.

The judiciary's contribution to the increase in costs of rent-seeking and interest-group legislation is made in the following ways:

- 1) The judiciary publicizes information on the legislature, its products and whom they benefit.
- 2) It forces the legislature to enact open-explicit statutes rather than hidden-implicit ones where those statutes are aimed to benefit interest-groups. Interpretation of hidden-implicit statutes is likely to be inconsistent (according to Arrow's theorem), and this will decrease the value of such legislation for interest-groups. Open-explicit statutes are more costly; they will result, therefore, in a decrease in interest-group legislation.

⁷⁷ Macey [1986]; [1987] & [1988].

⁷⁸ See: Macey [1987], pp. 68-71. Elsewhere - Macey & Miller [1987], pp. 498-502 - it is argued (in the context of the Delaware corporations law) that the validity of Landes' and Posner's view of the judiciary and its effect on interest-group legislation is heavily dependent upon the particular structure of the legislature.

⁷⁹ Macey [1986], p. 241.

3) A public-regarding (partly unconscious) attitude of judges.

When we turn from the positive analysis of the judiciary by this group of writers to their normative analysis there are no surprises. Each theorist advocates the desirability of his positive description. Thus, Epstein argues for judicial activism and for the invalidation of interest-group legislation by judges.⁸⁰ Macey rejects Epstein's approach and argues for the traditional approach to interpretation, which ignores hidden-implicit goals and is capable of transforming interest-group legislation into public-regarding legislation without interfering with the allocation of the legislative function to the legislature.⁸¹ Sunstein approves of the trend in the judiciary from the pluralist approach towards the Madisonian approach, but warns against an overall adoption of the latter by the judiciary.⁸²

4. Conclusion

I will not attempt to claim that this short chapter covered the vast literature dealing with positive analysis of the judiciary. I hope, though, that it did manage to illustrate the distinction between the levels of positive and normative analysis, and to present two main theoretical frameworks to deal with positive analysis of adjudication. The theory of state or the institutional gateway was emphasized, as it is the framework employed in the rest of the thesis. In its next part I will elaborate on the Landes-Posner model of the independence of the judiciary and offer an alternative model, both relating to the debate within public choice, discussed above, about the positive analysis of the judiciary.

⁸⁰ Epstein [1985].

⁸¹ Macey [1986], pp. 226, 261-266.

⁸² Sunstein [1985], pp. 68-85. Sunstein is the only writer of the three mentioned here who distinguishes clearly between the positive and the normative levels of analysis.

Book II

Theoretical Discussion

Chapter Five

The Landes-Posner Model of the Independence of the Judiciary and its Criticism

William Landes' and Richard Posner's 1975 article on the judiciary framed the current debate, which we have surveyed in the previous chapter, within the law and economics - public choice domain about the doctrine of separation of powers and the positive analysis of the judiciary. This article is still one of the very few attempts to establish a comprehensive economic model for analyzing the judiciary and its relations with the other branches of government. It is also an important bridge between the traditional market-orientated law and economics movement and the non-market public choice school, as its suggested model is constructed with micro-economic tools using public choice behavioural assumptions. This chapter will offer a critical discussion of the Landes-Posner model, paving the way for an alternative model which will be offered in the next chapter.

The main argument of Landes and Posner can be summarized as follows:

- 1) Legislation is a commodity which is sold (in market conditions) by the legislature and bought by beneficiary interest-groups. Each piece of legislation is bought by one specific interest-group.
- 2) The demand for legislation, and therefore its market price and profits (for both parties to the deal), is dependent upon its durability. A long-term contract will be to the benefit of both the sellers and buyers. But this durability is not guaranteed, due to the fact that, unlike contracts in private law, here there is no external enforcing mechanism. The same legislature or future legislatures (legislators may change frequently) can change their minds and sell alternative legislation to a competing interest-group.
- 3) There are two mechanisms for extending the duration of these contracts:
 - a) procedural rules of the legislature which obstruct or hinder a speedy enactment of new laws or the repeal of old ones;
 - b) an independent judiciary.
- 4) A dependent judiciary acts as an agent of the current legislature and utilizes its considerable interpretative leeway to rewrite the legislation in conformity with the views of the current, rather than the enacting, legislature. It may thereby impair the contract between the enacting legislature and the interest-group. An independent judiciary, by contrast, interprets and applies legislation in accordance with the original legislature's intention and, therefore, helps to enforce the contract.

- 5) It is in the interests of the legislature, therefore, to maintain an independent judiciary, because such a judiciary, by helping to enforce the contract, increases the legislature's profits from legislation.

In order to analyze the Landes-Posner model in more detail I will distinguish between elements 1-3, which compose the economic model (analysed in **section 1** below), and element 4 which might be regarded as the most important exogenous assumption of this model (discussed in **section 2**). The last point, 5, is merely the conclusion drawn from the combination of the previous elements.

1. Landes' and Posner's Economic Model of Legislation

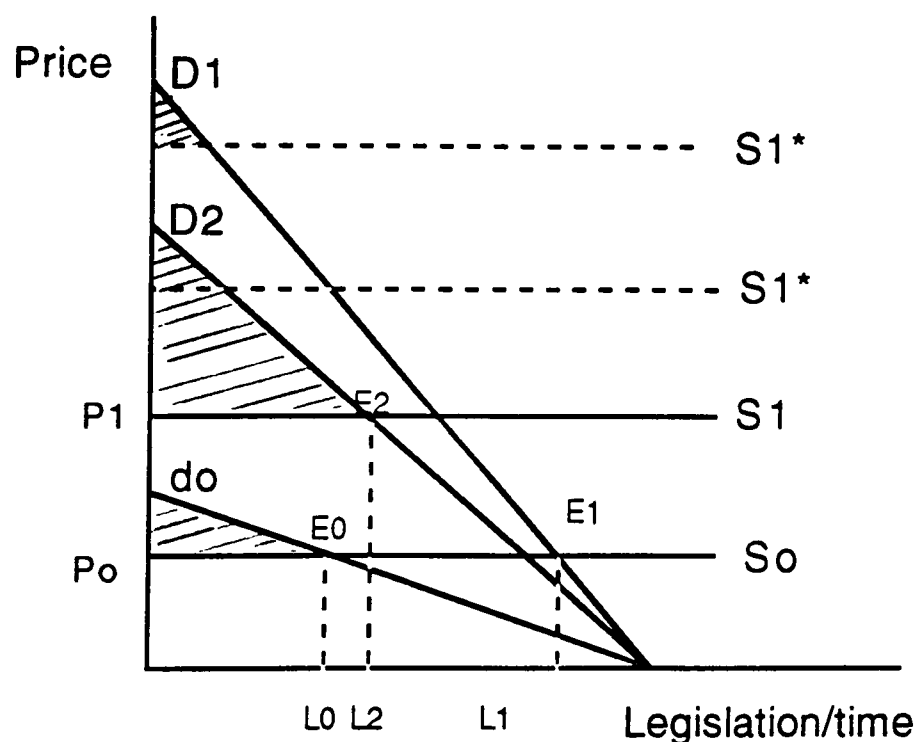
Landes and Posner present the demand curve for legislation, under the assumption that this legislation will remain in force (only) during the term of office of the current legislature, as d_0 in figure 1. This demand curve is negatively sloped because "some groups will obtain greater benefits from protective legislation and accordingly will offer a higher price".¹ The supply curve is represented by S_0 which is the marginal costs of the legislature in obtaining the required legislation. These costs are assumed to be constant, as represented by the horizontal curve in figure 1. It seems that a more realistic assumption would be a slightly positively sloped curve as more legislation consumes increasing marginal costs in the shape of more of the legislators' time which can be translated into pecuniary terms or opportunity costs. Nevertheless, Landes and Posner argue that this assumption - the shape of the supply curve - is not relevant to the predictions of the model. The equilibrium is in point E_0 , in which L_0 units of legislation are produced and sold for the price of p_0 .

This deal results with a 'surplus' that equals the triangle circumscribed by curves S_0 , d_0 and the price axis. Landes and Posner assume that this surplus is distributed between the legislature and the interest-groups proportionally. This assumption is somewhat problematic in the context of the suggested economic model. E_0 would be the equilibrium point if we assume either a competitive market or a market in which the legislature is a perfect discriminating monopoly. Under the former proposition the entire surplus is to be gained by the interest-groups (unless we assume a positively sloped supply curve), while under the latter the entire surplus is to be gained by the legislature. A third possibility is that the surplus is shared, but this would happen only if the supply curve is positively sloped. The fourth possibility

¹ Landes & Posner [1975], p. 880.

- under the assumption that the legislature is a simple monopoly - would not bring the market to clear at E_0 but at a point in which a smaller quantity of legislation is produced. The writers claim that the results of their model are unaffected by the assumption taken,² but it is difficult to agree with them: if, for example, the legislature does not make any profits (as ought to be concluded from Landes' and Posner's presentation, demonstrated in figure 1), it will not have any incentives to maintain an independent judiciary as expected on point 2 and integrated on point 5 of the model's outline.

Figure 1
The Landes-Posner model: the market for legislation



Let us set aside the minor deficiencies specified so far (by assuming, for example, a non-monopolistic legislature with a positively sloped supply curve), and proceed with Landes' and Posner's line of argument. Their next claim is that if the offered legislation could be guaranteed not to be limited to the term of office of the current legislature, or could be guaranteed to last an unlimited time (no risk of repeal of sold legislation), then the demand for it would reflect the present value of the multi-period profits from such legislation. This new demand curve, D_1 in figure 1, will be a vertical multiple of the single-period demand curve. If we further assume no changes in the costs of producing such legislation (i.e. the same supply curve) the equilibrium shifts to E_1 , in which more legislation is produced (L_1 instead of L_0), and the profits (for both parties, according to the authors) increase to the triangle circumscribed by the curves D_1 , S_0 and the prices axis.

² Ibid, footnote 13 on p. 880.

The main problem with this description is that the writers do not take into account the fact that selling long-term legislation will reduce the potential legislation to be sold by future legislatures. In other words, previous legislatures will have exploited opportunities which the current legislature will not be able to resell again. Therefore the multi-period demand curve, D_1 , represents a vertical multiple of the single-period demand curve in a world in which multi-period deals are possible, rather than a vertical multiple of d_0 . Taking this factor into account will result in ambiguity as to whether the multi-period demand curve, D_1 , is in fact higher than the original one-period demand curve, d_0 , a crucial component in the Landes-Posner model.³

Let us assume, for the sake of exhausting the Landes-Posner argument, that D_1 is higher than d_0 . Still, the possibility of offering durable-long term legislation is not cost free. One way to achieve this durability, according to the writers, is to complicate the procedure for enacting legislation in a way which will increase the costs of repealing it. But this procedure will inevitably increase also the costs of the original legislation itself. Thus the supply curve (i.e. the marginal costs of legislation) will shift upwards to S_1 . Landes and Posner assume that the equilibrium of the new supply curve and the new demand curve will result in a point such as E_2 in figure 1, in which the gains (according to the writers, for both the interest-groups and the legislature) are higher from those of the original equilibrium. But this is not necessarily the case. If the new supply curve is, for example, S_1^* , the gains will actually be lower than in E_0 . The Landes-Posner model must assume, therefore, that the legislature can complicate the legislation process in a flexible way, just until the additional benefits of the legislature are equal to the additional procedural costs.⁴ This is another restricting and problematic assumption.

The second way to increase the durability of legislation is an independent judiciary. Landes and Posner argue that an independent judiciary is not only a substitute method for complicating the legislative procedure, but that it is essential for the purpose of durability. A dependent judiciary, no matter how cumbersome the

³ Posner and Landes do mention this problem (in footnote 14 of their article), but they do not provide a real solution for it. They change the assumption regarding the one-period demand curve, d_0 , as if it were a demand curve in a world in which a multi-period legislation is possible. But by doing so they disregard the comparison which is relevant to the core question - the desirability of having an independent judiciary - between a world in which it is not possible to guarantee durable legislation and a world in which such durability is available.

⁴ See: Landes & Posner [1975], p. 882.

legislative procedure is, will decide according to the wishes of the current legislature, and this may involve frustration of the original deals between the enacting legislature and interest-groups. The result would be that the demand curve will shift back to the single-period model, d_0 . In order to secure durable legislation, therefore, an independent judiciary is essential.

But maintaining an independent judiciary bears some costs as well. Such a judiciary is likely, from time to time, to decide not to enforce a deal worked out by the legislature - to declare it unconstitutional or not to interpret it according to the creators' meaning. This factor is likely to shift the multi-period demand curve downwards according to the probability that deals would not be enforced. The result is a new demand curve such as D_2 in figure 1. Landes and Posner assume this demand curve to be above the single-period one, d_0 . This assumption is based on a statistical analysis according to which, within probability of 10-30% of judicial nullification (and interest rates of 0.05-0.2%), the multi-period demand curve is always above the single-period demand curve, and on empirical findings according to which the rate of acts of Congress declared unconstitutional is insignificant.⁵ These findings, however, does not take into account nullification through other methods such as unfavourable interpretation, which might be of more significance. Hence the conclusion as to the relations between the one-period demand curve, d_0 , and the adjusted multi-period demand curve, D_2 , is not a firm one.

According to the Landes-Posner model the equilibrium, taking into account both measures for increasing the durability of legislation, is point E_2 in figure 1, where L_2 units of legislation are produced and the benefits for both sides are equal to the area circumscribed by curves S_1 , D_2 and the prices axis. These benefits, according to the way the model is constructed, are greater than those obtained originally - without an independent judiciary, and hence the explanation for its existence.

To summarize, the main problem of the Landes-Posner model, besides the assumption as to the behaviour of an independent judiciary which will be discussed below, is the description of the demand side of legislation, and more specifically, the comparison between short-term and long-term contracts and the inclusion of the costs of an independent judiciary in the demand curves.

⁵ Ibid, pp. 883-884, 895-901.

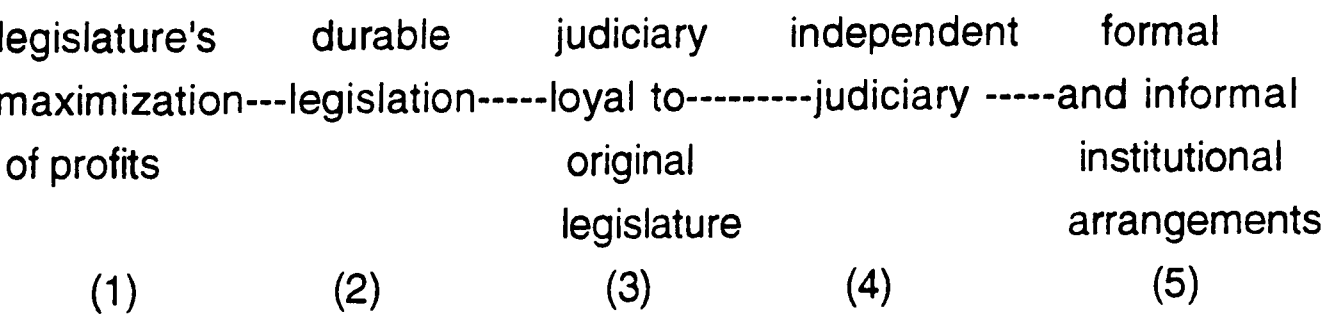
2. The Independence of the Judiciary and the Broader Context of the Landes-Posner Model

The crucial component of the Landes-Posner model, one on which the validity of the model is actually contingent, is the assumption mentioned in our introduction as point 4. This is the assumption concerning the patterns of behaviour of a dependent judiciary versus the patterns of behaviour of an independent judiciary. But before examining this assumption we have to consider a preliminary question, namely: what exactly do the authors mean in this context by the term 'independence'? The reply to this question will indicate what kind of assumption the authors make and whether it is exogenous to their economic model as we presumed before.

In the context of the suggested model we can distinguish between two possible answers to this preliminary question:

- 1) It is in the interests of the current legislature that judges will be loyal to the original legislature. This loyalty, or the measures taken to secure its achievement, constitute 'independence'. In other words, the independence of the judiciary is defined as giving judgments that are loyal to the original legislature.
- 2) There is an 'objective' definition of 'independence' which is external to the Landes-Posner model, and the legislature is trying to make the judiciary independent because (it thinks that) the judiciary, granted independence, will be loyal to the original legislature and thus increase the profits of the current legislature from the sale of legislation.

We can sketch Landes-Posner argument as the following causal chain:



According to the first proposition, the independence of the judiciary is the third link in this chain. In this case there is no external assumption to the model examined above; the economic analysis provides a complete picture. This picture, however, is a limited one. It comprises only the connections between links 1, 2, and 3 (and thus ought to be evaluated by both theoretical analysis and empirical findings

accordingly). The questions which should be asked, under this proposition, are: does durable legislation maximize the self-interests of the legislature? can it really be achieved by a judiciary that is loyal to the enacting legislature? etc. Under this proposition there is no point in using the Landes-Posner model to question the term 'the independence of the judiciary' in its ordinary, everyday meaning, or indeed in the context of this study. In fact, the model in this case does not deal with the judiciary at all; it focuses only on the legislature. If this is the case then the title of the Landes-Posner article is misleading.

According to the second proposition, the independence of the judiciary is the fourth link in the chain, which can be brought about by the fifth link. In this case the writers' theory includes examination of the connections between the third and the fourth and fifth links. Under this proposition the Landes-Posner model covers a broader range of issues, including an analysis of the behaviour of the judiciary and its inter-relations with the other branches of government. Here, however, the analysis of the Landes-Posner economic model is not sufficient because its conclusions are heavily dependent on an external assumption as to the nature of the judiciary's behaviour.

As a matter of fact the authors provide in the introduction to their article a definition of an independent judiciary as:

one that does not make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body such as the U.S. Congress.⁶

The article later discusses also issues such as tenure, salaries etc., which are regarded by the authors as components of the independence of the judiciary.⁷ In our terminology Landes' and Posner's definition of the independence of the judiciary refers to dynamic independence (as they are writing about decision-making), but it is not clear whether the subject of it is the individual judge or the judiciary as an institution. As to its object, it seems that the writers' definition refers to the general public, and implicitly to interest-groups, which, according to the underlying assumption of the general law and economics approach have a significant influence and even control over the legislature. However, it seems that Landes and Posner

⁶ Ibid, footnote 1 on p. 875.

⁷ Ibid, pp. 885-887, 891.

are ambiguous or unclear as to the object of the independence, because later in the article they refer to Congress and President (p. 876), the political branches of government (p. 885) and the legislature (p. 886) as this object. If this is the case, their definition of independent judiciary is not very satisfactory. Be that as it may, it appears, though not clearly stated, that the intention of the writers is closer to our second proposition than to the first, i.e. that the independence of the judiciary is external to the economic model.

We can now restate the fourth element of the model - the exogenous assumption which lies in the basis of the economic model analyzed above - as comprising the following two sub-elements:

- (1) If we provide the judiciary with certain institutional factors such as high salaries, tenure, immunities, public respect etc., we will have an independent judiciary, i.e. a judiciary that does not make decisions on the basis of the sort of political factors that would influence, and in most cases control, the decision were it to be made by the legislative body.
- (2) Such an independent judiciary will make its decisions in accordance with the intentions of the original legislature.

Although the writers state that "to develop this or any other theory of judicial behaviour would carry us far beyond the scope of this paper, and is we believe unnecessary to it" (p. 887), the model they offer in fact includes such an analysis of judicial behaviour, an analysis which in my view does not carry sufficient persuasive power. It is quite straightforward to see why an independent judiciary (according to the definition of Landes and Posner) does not decide necessarily according to the wishes of the current legislature or government. But that does not mean that such a judiciary decides according to the intentions of the original legislature, as they claim. A mere logical reasoning cannot work here. The fact that a dependent judiciary (dependent upon the legislature or government) decides according to the desires of the current legislature does not mean that its antithesis, an independent judiciary, decides according to the desires of the original legislature. A more substantial explanation is required to support this conclusion.

Landes and Posner are aware of the need for an explanation, but they merely acknowledge it in a short note.⁸ They grant that in practice it is unrealistic to suppose that the judiciary is wholly independent of the current desires of the political

⁸ Ibid, p. 885.

branches. There are several measures which can be employed by the legislature to influence the judiciary, such as refusal to enforce judgments, refusal to appropriate funds to pay judges' wages, and other changes in jurisdiction, budget and the size of the courts. These measures are not being taken because their benefits are outweighed by potentially high costs for all those who use the courts (including the government and interest-groups). But the result of this cost-benefit analysis would have been different had the judiciary not been valued so highly by the public. It is valued highly because of the high predictability of its decisions, which is a direct result of the loyalty to the original intention of the legislature (rather than shifting loyalty according to the preferences of the current legislature). Thus, the judiciary, as a self-interested behaviour and in order to maintain its independence, has to act in accordance with the intentions of the original legislature and to enforce its contracts. In Landes' and Posner's words:

The ability of courts to maintain their independence from the political branches may depend at least in part on their willingness to enforce the 'contracts' of earlier legislatures according to the original understanding of the 'contract'.⁹

This explanation can be questioned on two different levels. It can be examined vis-à-vis the internal validity of the proposed causal chain: is it true that the appreciation of the judiciary by the public is dependent upon its loyalty to the original legislature? does the result of the cost-benefit analysis, as to the operation of influence measures by the legislature, really depends upon the degree to which the judiciary is valued by the public? - and more. But we do not need to examine these links, since this explanation fails on a prior level of analysis, when it is examined in the context of the object which it is meant to explain - the independence of the judiciary. This explanation of the behaviour of an independent judiciary is inconsistent with its object. Landes' and Posner's explanation can be paraphrased thus: independent judiciary is loyal to the original legislature because it is not independent. This explanation for the independence of the judiciary in fact claims that the judiciary is dependent directly upon the current government and indirectly upon the general public, that plays a role in determining the efficacy of operating the dependency measures by the current government.¹⁰

⁹ Ibid.

¹⁰ Along the same lines of criticism see: Macey [1986], p. 235.

This incongruity of Landes' and Posner's model is verified amply, if unintentionally, by Robert Tollison. Tollison, who belongs to the same stream of thought as Landes and Posner, touches upon the independence of the judiciary and the Landes-Posner description of it as loyal to the enacting legislature incidentally when he focuses on positive analysis of legislation and on the question: why legislation is so stable and not repealed or modified every time a new legislature is elected to office.¹¹ But he is aware that Posner and Landes do not provide satisfactory reasoning for this behaviour of independent judiciary, and he offers his own reasoning, ignoring the very purpose of the Landes-Posner model - the positive analysis of the independence of the judiciary. According to Tollison the judges, who are self-interested, behave as they do because they are dependent, at least in terms of their budget, upon the legislature. In order to maximize their salaries and budget, therefore, they act to sustain the durability of interest-groups legislation.¹²

This harks back to the beginning of this section and our enquiry as to Landes' and Posner's understanding of the term 'the independence of the judiciary'. It seems that their analysis, despite the declaration of intent, is after all closer to the first proposition offered in the beginning of the section. The core of their argument is that the current government or legislature prefers a judiciary loyal to the original-enacting legislature, in order to enhance the durability of legislation, which in turn increases the profits of the legislature and interest-groups from legislation. The government, therefore, tries to force the judiciary to decide according to the original contract. This proposition is different from the one according to which the current government maintains an independent judiciary because such a judiciary is loyal to the enacting legislature. The conclusion is that the Landes-Posner theory does not really provide us with a positive analysis of the independence of the judiciary.

3. Conclusion

In this chapter we analyzed the theoretical side of the Landes-Posner model of the independence of the judiciary. Some empirical tests intended to verify the predictions of their theory were conducted by the authors themselves, by Mark Crain and Robert Tollison, and by Gary Anderson, William Shughart and Robert Tollison. These findings are reported in detail and analyzed in Appendix 1. However, it

¹¹ Tollison [1988].

¹² Ibid, p. 345. See also: Anderson, Shughart & Tollison [1989] whose empirical findings are brought in Appendix 1. For additional criticism of Tollison's model see: Macey [1988], pp. 496-499.

transpires that they do not lend support to the model either. Posner and Landes, for example, examine whether the age of judges, their seniority and the degree of disagreement between President and Congress are explanatory factors for the rate of statutes' nullifications by the Supreme Court. They find that only the age of judges has a significant positive correlation with the rate of nullification.¹³ Neither the tested hypotheses nor the findings can help to support the model or shed light on its problematic points.

Likewise, Crain and Tollison, in an attempt to broaden the interest-group view of the doctrine of separation of powers, try to show that the executive veto and constitutional amendments play the same role as an independent judiciary in enhancing the durability of interest-group legislation. But their findings cannot support the original argument of Landes and Posner. The proxy for the degree of judicial independence, for example, is found to be negatively correlated to constitutional amendments and positively correlated to executive vetoes. These mutually contradicting findings can fit into the traditional approach towards separation of powers at the same degree of persuasion as to the collusion approach.¹⁴

Anderson, Shughart and Tollison design their empirical test specifically to examine the weakest component of the Landes-Posner model - the question why an independent judiciary is loyal to the enacting legislature. However, they fall into the same trap as Landes and Posner by using the substantive independence of the judiciary (measured in their test by the degree of substantive due process constitutional review of legislation) to explain its structural independence (measured in their test by the salary level of the States' chief justices). They indeed find that the degree of substantive due process is positively correlated to the level of salaries, but this finding cannot solve the questions with regard to the Landes-Posner model or serve as a proof to its accuracy.¹⁵

To sum up, the Landes-Posner theory of the independence of the judiciary is problematic from the point of view of the economic modelling on which it is based, as well as from the point of view of the pivotal underlying assumption regarding the behaviour of an independent judiciary. Chapter 7, which focuses on the decision-

¹³ For a full account see: section 1 of Appendix 1.

¹⁴ A full account of the findings is given in section 2 of Appendix 1.

¹⁵ For the rest of their findings see: section 3 of Appendix 1.

making characteristics of the English Court of Appeal, will offer a further examination of this assumption, comparing judicial loyalty to the Government between the first term in office of British Governments and their second and third terms. The findings, as we shall observe, tend to undermine the premises of the Landes-Posner model. In addition to this problematic assumption, one has to remember that the Landes-Posner theory rests upon a rather dogmatic public choice portrayal of the political arena and of the process of legislation. All these factors make the theory unattractive. In the next chapter I will try to offer an alternative explanation for the independence of the judiciary.

Chapter Six

The Delegation of Legislative Powers to the Courts and the Independence of the Judiciary

...[T]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

John Locke¹

Introduction

Previous chapters explored several theories which address the phenomenon of the independence of the judiciary. We paid special attention to the Landes-Posner model, which can be regarded as the most comprehensive so far, in trying to explain why one finds, across so many legal systems, judiciaries which have some degree of independence from the other branches of government. I have tried to show the weakness of this model and why it cannot be accepted as a complete positive explanation for the independence of the judiciary. In this chapter an alternative explanation will be offered. This attempt, however, should be regarded more as a proposed direction for future enquiry, rather than a complete formal model. I hope it can open a new window for further theoretical and empirical research in this field.

The main ideas presented in this chapter are based on the observations made in Chapter 2 and outlined as propositions one and two below. They will be further explored, and, hopefully substantiated, in the empirical part of the thesis - Chapters 7 and 8. These, together with the theoretical framework on which we elaborated in

¹ John Locke, *The Second Treatise of Government*, (published in 1690), edited by T. Pearson, USA: Bobbs-Merrill Educational Publishing, 1977, Section 141.

Chapter 1, lead to propositions three and four. Hence, the outline of my main ideas is as follows:

1. The judiciary in most legal system has some degree of **structural** independence. Institutional arrangements allow the judges a certain degree of freedom in making judicial decisions. The other side of this coin is that no judiciary has a complete structural independence; more specifically, the judiciary is always institutionally partly dependent upon the other powers of government - the legislature and the executive.
2. There is usually a gap between the **structural** degree of the judiciary's independence and its **substantive** degree of independence, in favour of the latter. Thus the other powers of government - the legislature and the executive - allow a degree of judicial independence which exceeds the structural provisions. This is done consciously.
3. The individual legislator, or, rather, the nucleus political decision-making unit, is interested to maintain a judiciary which has some degree of independence, because it views as beneficial the delegation of some of the legislative powers to an independent judiciary. Such a judiciary is one of several mechanisms for shifting responsibility and solving problems of uncertainty and lack of information. Thus it helps legislators (or parties) to promote their goals of gaining more political power and enhancing their chances of re-election.
4. Delegation of legislative power to an independent judiciary is also a solution to problems of collective decision-making, which are the result of the mere fact that legislatures are multi-member bodies reaching decisions through the operation of (simple) majority rule, and that legislation, in some systems, is the result of a multi-body decision-making process.

The argument will be developed as follows: **section 1** will deal with propositions one and two, consolidating also what was already discussed in previous chapters. **Section 2** will focus on the delegation of law-making powers, which is a key element in my explanation of the independence of the judiciary. **Sections 3 and 4**, the heart of this chapter, will explore propositions three and four respectively; the former will depict the perspective of the nucleus political decision-making unit and the latter will discuss the delegation of law-making powers as a solution for collective decision-making problems. They will be followed by **section 5**, a conclusion.

1. The Phenomenon of the Independence of the Judiciary Revisited

1.1 The Gap Between Structural and Substantive Independence

Chapter 2 outlined my definitions of 'independence' and the 'independence of the judiciary'. A distinction was also made between **substantive judicial independence** and **structural judicial independence**. The former was defined as decision-making which is not dependent on the views of the other branches of government, i.e. that judges do not decide individual cases according to the executive's or the legislature's will. The latter was defined as the institutional arrangements (such as tenure, method of appointments etc.) which enable the existence of substantive independence.

The phenomenon of the independence of the judiciary, which is at the heart of this research, is the observed gap between structural and substantive independence.² In many legal systems, and especially in the vast majority of western democracies, we may see a judicial branch which, despite structural dependency, has some degree of substantive independence. This independence is expressed in various forms, the most common of which is the delivery of particular judgments which do not conform with the wishes of the current government or legislature. Why does this come about?

This question can be located on the border between two major endeavours which dominate the positive analysis of the new non-market law and economics in recent years. One of these popular strands of literature is the analysis of decision-making, especially, but not only, judicial, within the given institutional framework of government. The other strand of literature deals with the emergence and design of institutional structures.

The former type of work takes the institutional structure of government as an exogenous factor and uses mainly the tools of social choice to analyze the decision-making process within this structure. This type of work can provide us with predictions as to administrative decisions, judicial decisions, legislation and even constitutional amendments. Recent examples of this kind of literature are the works of John Ferejohn and Charles Shipan, comparing agencies' decision-making in the contexts of a parliamentary model, a system with judicial review and a system with

² On this gap see the discussion in Chapter 2, section 3.

presidential veto,³ and the works of Rafael Gely and Pablo Spiller on the American Supreme Court's constitutional and statutory decision-making.⁴

However, these works leave us wondering why it is that we find diverse institutional structures over different periods and in different jurisdictions, and why, within a given institutional structure, those who hold political power are not working to change this structure for their own benefit.⁵ The first set of questions is being addressed by the other stream of positive analysis which we touched upon in Chapter 3. The names of James Buchanan, Gordon Tullock and Douglass North are associated with it.⁶ The main difference in the analytical framework of this stream of literature is that, unlike the first strand which focuses on collective decision-making based on majority rule, this stream focuses on collective decision-making based on unanimity rule or on the original social contract relationships.⁷ This difference can also explain why institutional structures remain more stable and are not amended whenever politicians feel that they do not maximize their interests.

My project can be located on the boundary between these two enterprises. On the one hand it is not going to deal with the basic questions of institutional structure. Questions such as: why do we have a judicial function at all, or: why do we find in some jurisdictions a strict separation between the legislature and the executive and in others no such separation, will not be considered. The core institutional structure or the original social contract will be taken as given. On the other hand, as we saw in Chapter 2, institutional choices and not only political choices do exist within given constitutional systems, indeed within each and every

³ Ferejohn & Shipan [1990]. See also the extension of the model by Spitzer [1990] and comments by Rose-Ackerman [1990]; Other related articles are: Spiller [1990c]&[1991]; Weingast & Moran [1983].

⁴ On constitutional decision-making see: Gely & Spiller [1989], Spiller [1990a]; on administrative decision-making see: Gely & Spiller [1990]&[1991], Spiller [1990b]. Other examples for this line of literature include the pioneering work of Dahl [1957] on the American Supreme Court, and the work of McCubbins and Sullivan [1987] on the American Congress (especially part III).

⁵ In the introduction to their model Ferejohn and Shipan [1990], for example, admit that:

In the present context, however, there is a 'natural' sequence induced by the constitutional structure of American government and organizational practices of Congress: specifically, the congressional delegation of power to agencies, and the delegation of monitoring power to committees. Obviously, each of these features can be thought of as endogenously determined in more complete model, but in the present context we take them as predetermined (pp. 2-3).

⁶ See, for example: Buchanan & Tullock [1962], Buchanan [1975], North [1981]&[1990]. See also: Moe [1990] who writes about the connections between the two endeavours. For additional references see: Chapter 3, especially section 2.

⁷ See: Eggertson [1990], pp. 70 ff.

constitutional system. The relevant example for our purpose is that politicians do hold the power to influence, enhance or limit judicial independence. The explanation of judicial and political decision-making, therefore, cannot be a complete one unless these institutional choices are incorporated as well. The question why current holders of political power maintain an independent judiciary is a relevant question for both enterprises of positive economic analysis.

1.2 The Behaviour of Actors in the Political Arena and its Consequences for the Independence of the Judiciary

We have outlined in Chapter 4 three basic theories of the process of legislation - the pluralist, the republican and the economic approach. The schools of legal process, new legal process, and public choice are derived from these three basic notions of the legislative process respectively. In fact, these three basic models can be reduced into two when we focus on the behaviour of the political actors, because the differences between the pluralists and the economists derives mainly from their analyses of the **process** of legislation, and less from their analyses of the incentives of legislators (and other actors in the political arena). The republicans assume that legislators are motivated by some pursuit of communal, national or public virtues or goods. The economists and the pluralists assume that politicians, like other human beings, are seeking to maximise their own self-goal choices,⁸ which in the political arena are mainly the gaining of more political power and promoting the chances of re-election.

The pluralists and their modern followers - the legal process school - draw a straightforward conclusion from this basic assumption regarding the behaviour of legislators: that the product of legislation reflects the views of the general public, or, rather, the views of the majority. The public choice school does not accept this straightforward picture, and additional factors, with different emphases by different scholars, are added to it, resulting in a much more complicated picture.⁹ One important addition is the analysis of the political organization of interest-groups. Due to organization costs, information costs and the problem of the 'free rider', the political arena is dominated by interest-groups, which do not represent the will of the

⁸ See: Chapter 1, section 3.2.1. For an attempt to combine the approaches by assuming self-interested politicians and public-regarding judges see: McCubbins, Noll & Weingast [1990].

⁹ For a general overview see: Eskridge & Frickey [1988], pp. 46-64.

majority.¹⁰ Some writers proceed to claim that politicians are actively shopping for such interest-groups and even help to form them.¹¹ The process of legislating is perceived by public choice theorists as an exchange contract in market conditions, in which legislation is sold by the legislature and bought by interest-groups.¹²

Let us return for a moment to the main argument of this chapter as outlined above. In order to derive from the observation of a gap between the structural dependency and the substantive independence of the judiciary the claim that an independent judiciary is to the benefit of the legislature or government, we do not need to adopt in full the public choice view of the legislative process. All we need is the economics assumption, rather than the republican one, i.e. self-interest rather than public-interest, regarding the behaviour of legislators. If we assume that legislators are motivated by self-goal choices, the mere fact that they have the powers to curtail judicial independence, but refrain from using these powers, ought to imply that an independent judiciary is in their interests.

On this point it is noteworthy to refer to the debate concerning the positive analysis of separation of powers and the independence of the judiciary, outlined in Chapter 4. The phenomenon of the independence of the judiciary, moulded with the underlying assumptions of the economic approach - rationality and self-maximizing behaviour - poses a serious problem to the "obstacle" view of separation of powers and of the independence of the judiciary, and the observed gap between structural and substantive independence has to rule it out altogether. Taking these assumptions into account, this gap means that legislatures and governments positively prefer to maintain an independent, rather than a dependent, judiciary. Had an independent judiciary worked against the interests of the legislature and the government, this would not have been so. We will return to this point in the next two chapters.

So far our perception regarding the independence of the judiciary is along the same lines as the Landes-Posner model. Both explanations assert that it is (at least partly) the result of a rational choice made by the legislature or government. But this is also the point at which the theories depart from each other. While Landes and

¹⁰ Stigler [1971]. See also: Macey [1988/89], p. 47. On the organization of interest-groups and the way they operate see: Dunleavy [1991], chapters 2&3.

¹¹ See in Macey [1987], p. 63.

¹² See, for example: Pletzman [1976]; Posner [1982], p. 265; Macey [1987], p. 62; Macey [1988], p. 474;

Posner base the rest of their argument on a dogmatic and rather crude public choice notion of the process of legislation - the capture theory - I prefer to base my ideas on a more subtle and refined version. In a Landes-Posner world a piece of legislation is sold to one interest-group which offers and provides the highest bid of political support. Other interest-groups are the losers in what is essentially a zero-sum game. But without an independent judiciary the legislature, or future legislatures, can breach the contract and sell the same product to a rival interest-group. This sharp, clear-cut and dramatic process creates the need for an enforcer - an independent judiciary.

I think that the basic notions of the public choice approach to legislation, described above, does not necessarily imply that a piece of legislation is sold to a particular interest-group to the exclusion of all other groups. Competition between interest-groups can, and in most cases does, result in a compromise which is bought by several groups together.¹³ This compromise reflects the legislature's calculation as to its maximization of political support, in which it seeks to alienate as few groups as possible. Future amendments to, or substitutions for, this legislation are not necessarily a different product altogether which is bought by different interest-groups. They may introduce only minor changes reflecting a new compromise or a new political cost-benefit analysis which can involve the same groups.

An amendment to a tax law does not necessarily mean the abandonment of one interest-group for the sake of another; it can reflect a minor change of weights given to the demands of the two groups. In this case the price which the originally favoured interest-group is willing to pay to avoid the amendment is not as high as in the Landes-Posner description. In this kind of world it is not so obvious that the benefits to the legislature from a body which (presumably) increases the durability of legislative contracts exceed the costs of maintaining such a body.¹⁴ In this kind of world we have to look, therefore, for other reasons why it is in the interest of the legislature to maintain an independent judiciary. I propose to take a different direction from Landes' and Posner's, towards the theory of delegation of powers.

¹³ See, along the same lines: Macey [1988/89], p. 46.

¹⁴ Even Landes and Posner acknowledge the existence of such costs which include, among other factors, invalidations of statutes by the courts. They argue, however, that the benefits outweigh these costs. See: Landes & Posner [1975], 883-885.

2. The Delegation of Law-Making Powers

The issue of delegation of legislative or law-making powers occupies many pages of legal writings. Almost all of this literature, however, has focused on the (positive and normative) analysis of what I regard as only one type of legislative delegation. This is the case in which the legislature, through a statute, delegates law-creating powers either to an existing authority in the central or local government or to a specially created body called an administrative agency or Quango. My notion of law-making powers delegation is much broader, both in terms of the type of delegation and the identity of the delegatee. The type of delegation can be classified according to its **form** - a positive (active) form or a negative (passive) one; and according to its **timing** - ex-ante to the use of these powers by the delegatee or ex-post. The delegates can be those habitually referred to - the executive or administrative agencies - but they can also be the courts.

In constitutional arrangements of most legal systems, the legislature has the ultimate power to create and amend the law.¹⁵ This 'monopoly' is sometimes limited by substantial constraints or by procedural ones. The American Congress, like many other legislatures, cannot enact a law which violates human rights and other basic principles determined by the Constitution ("Congress shall make no law..." are the opening words of the American Bill of Rights¹⁶). The British Parliament was in the past (at least until the seventeenth century) restrained from legislating in the areas of the Crown Prerogative.¹⁷ Legislation is very often bound to a specific procedure, which might require the participation of other branches of government (such as the Presidential power to veto legislation in the U.S). But, setting these constraints aside, the legislature has full autonomy to make law. Thus, whenever rule-making powers which are not constitutionally assigned to a body other than the legislature are in fact being exercised by such a body, this can be regarded as a delegation of legislative powers.

The most straightforward delegation is the ex-ante positive one. This is the case in which the legislature, by a statute, directs other bodies to create rules in a specific area instead of creating them itself. The delegatee can be the executive, a

¹⁵ This is not, however, a universal feature. In France, for example, the executive has an inherent power to issue ordinances or decrees.

¹⁶ Article I to the Amendments of the Constitution, ratified in 1791.

¹⁷ See: Wade [1980], pp. 47-50.

committee of the legislature, a local authority, a public corporation or a special administrative body; but it can also be the courts.¹⁸ When an enacted law states that an immoral contract is not binding,¹⁹ we may infer that the legislature did not want to specify what an immoral contract is, and delegated the powers to fill this term with substance to the courts. It is clear, in this example, that the legislature was aware of the fact that a more detailed arrangement of this issue is required and that the courts would carry it out.

But the delegation of legislative powers can occur also in a negative (or passive) form. No one would doubt, for example, the powers of the English Parliament to enact a law of contracts. But the fundamentals of this legal field is left unregulated by the legislature, in the hands of the courts. For centuries they have been creating the law in the field of contracts. Indeed, the whole of the Common Law may be seen (at least at present) as a negative delegation of powers.²⁰ It is noteworthy that there are cases, especially of negative delegation of legislative powers, in which the courts are not interested to exercise their delegated powers and refer the issue back to the legislature.²¹

The implicit delegation of legislative powers can be distinguished also according to the point in time at which it is made. In 1964 the American Congress enacted the *Civil Rights Act*.²² The act did not indicate explicitly the legitimacy of affirmative action plans (although it specified that it should not be interpreted as requiring the granting of preference to individuals or groups on the account of imbalanced existing representation²³). Ten years later the Supreme Court was asked to decide about the legality of affirmative action plans and whether they violate the act's 'non-discrimination in work' clause (Title VII).²⁴ The majority interpreted the

¹⁸ The courts, in fact, can play two distinct roles: the role of a first-tier or a direct delegatee and the role of a second-tier or an indirect delegatee. The latter role consists of scrutinizing the decisions of the first-tier delegates (especially those of administrative agencies). In this context see: Pierce [1989] who discusses the question whether the courts or the President in the U.S. ought to serve as a secondary agent of the people, and especially pp. 1251 ff, discussing the courts' role of interpreting statutes which are meant to be enforced by administrative agencies. See also: Spiller [1991]; Eskridge [1989].

¹⁹ As specified, for example, in section 30 of the Israeli *Law of Contracts : General Part* 1973.

²⁰ Calabresi [1982] can be seen as holding a similar view. See: pp. 3-7.

²¹ For more on the role of the courts as legislatures, see: Neely [1981], especially chapter 3.

²² 78 Stat 241 (codified as amended in scattered sections of 42 U.S.C.).

²³ Ibid., Title VII, section 703(j).

²⁴ *United Steelworkers of America v. Weber*, 443 US 193 (1974).

Civil Rights Act as legitimating such plans and rejected the claim of discrimination by the appellant. It is very likely that Congress (as a collective decision-making body), at the time of enacting the bill, did not consider the question of the legitimacy of affirmative action at all; but nevertheless it could have responded and regulated the issue following the Court's decision. It has not done so. In this case affirmative action can be seen as an issue which was delegated by Congress to the courts ex-post. (If we assume, alternatively, that Congress thought about affirmative action when enacting the bill, but decided to be silent on the issue, it can be regarded as a negative ex-ante delegation). In a recent case which involved the same question, Justice Brennan, on behalf of the majority of the Court, used the silence of Congress to support his position in favour of affirmative action. He noted that Congressional inaction, or failure to amend Title VII in order to repudiate the previous decisions of the Court, allows the Court to assume that these decisions were correctly made.²⁵

An interesting example of delegation of legislative powers (this time not to the courts but with their involvement) concerns the insurance industry in the United States.²⁶ Congress, in spite of its significant intervention in most aspects of financial services during the first half of this century, has refrained from regulating the insurance industry. This industry was regulated, instead, by the States' legislatures. This can be regarded as a negative ex-ante delegation by Congress. When the Supreme Court decided in 1944 that the States no longer have the exclusive control of the insurance industry,²⁷ Congress a year later enacted a statute delegating regulatory authority over insurance to the States and holding that no act of Congress should be interpreted as implicitly invalidating any State insurance regulation.²⁸ This development, following the Supreme Court's decision, transformed the delegation of legislative powers from a negative form to a positive one.

²⁵ *Johnson v. Transportation Agency*, 107 S. ct. 1492 (1987), and see the dissenting opinion of Justice Scalia. For more on the legislative history of the *Civil Rights Act* and on the Supreme Court decisions regarding this bill see: Eskridge & Frickey [1989], pp. 1-28, 65-90. For a similar view of interpretation as an ex-post delegation see: Calabresi [1982], pp. 31-44. In fact, Calabresi's proposal to allow the courts to relate to statutes as if they were Common Law ("A Common Law for the Age of Statutes") implies a further negative delegation of rule-making powers by the legislature to the courts.

²⁶ See: Macey [1990], pp. 280-281.

²⁷ *United States v. South Eastern Underwriters Association*, 322 U.S 533 (1944).

²⁸ *McCarran-Ferguson Act*, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C sec. 1011-1015 (1988)).

The traditional reasons for delegation of legislative powers are: the lack of parliamentary time to regulate all there is to be regulated, especially since the emergence of the welfare state in the second half of this century and the significant increase in state intervention; the technical complexity of subject matters which can be overcome more successfully by experts; the higher degree of flexibility which is needed for detailed rules; and the need, in special cases like times of emergency, for swift rule-making procedures.²⁹ These reasons or justifications cannot be sufficient if the broader definition of rule-making delegation is accepted. They cannot explain a major share of the ex-post delegation, and a major share of the delegation of rule-making powers to the courts. The three examples given above - contracts, morals and affirmative action - are not minor or technical issues which require skills of special experts. These are not issues for swift regulation, nor for frequent reconsideration and change. It seems, therefore, that a fresh explanation is needed. The one which I want to offer is based on the 'softer' public choice perspective of legislation, and will be linked also to the phenomenon of the independence of the judiciary.³⁰

In a public choice world individual legislators would not vote to delegate their rule-making powers unless this delegation is in their interests. But an outcome of legislative delegation can occur also as the result of a collective decision-making process which does not necessarily reflect an equilibrium-majority vote solution. Under these two umbrellas I will present, in the rest of this chapter, my explanation for delegation of legislative powers and for the role of independent courts within the framework of this delegation.

3. The Nucleus Political Decision-Making Unit's Perspective

This thesis attempts to provide a general explanation - across various constitutional and political systems - for the phenomenon of the independence of the judiciary. In the last paragraph I mentioned the two delegation perspectives to be discussed, the individual legislator's perspective and the collective decision-making one, and although I think that these two perspectives can be perceived as a general

²⁹ See, for example, de Smith [1989], pp. 338-340; Wade & Bradley [1985], pp. 611-612; Aranson et al. [1982/3], p. 21. For a linkage between these traditional reasons for delegation and public choice analysis see: Fiorina in Noll [1984], pp. 184-188.

³⁰ These line of thought can be also associated with the contractual view of legislation. In this context see Shepsle's theory of interpretation [1992], pp. 250-254. Shepsle relates (footnote 26) his theory indirectly also to the independence of the judiciary.

analytical framework, its application to specific constitutional-legal systems requires further adjustments. For example: the more significant equivalent to the individual legislator in a system of proportional representation with a national constituency, such as the Israeli system, is the party (due to a lack of accountability of the individual politician to an exclusive group of voters and a strict party discipline), rather than the individual legislator.³¹ This unit is in effect the individual legislator in systems, such as the American one, in which legislators are accountable to constituencies and their party affiliation plays only a secondary role. Although the 'individual legislator' terminology will continue to be used below, it seems that the more accurate terminology for this perspective is the one mentioned in the title of this section, that of the 'nucleus political decision-making unit'. After this terminological clarification we can proceed to the substance of this perspective.

The desirability of rule-making powers delegation can derive simply from a cost-benefit analysis of the decision-making procedure itself. Rule-making by a delegatee body might be cheaper than the use of parliament's expensive time; thus the legislature can simply save money by delegating its rule-making powers.³² However, I propose to focus here on a wider aimed cost-benefit analysis - a political one. By delegating legislative powers members of parliament or political parties can channel their time to more productive activities from their point of view, including activities that bear more fruit in terms of political support. But let us narrow the analysis even further, setting aside other activities of legislators, and focusing on the analysis of the primary and official task of legislators, namely legislating. I will show below that even within this activity alone legislators can benefit from delegation of legislative powers.

3.1 Shifting Responsibilities

Legislators or parties who are seeking to maximize their political support, as they do in our public choice world, often face tough dilemmas as to the legislation desirable from their point of view. The cases in which all potential voters of a legislator unanimously support a certain arrangement are extremely rare. Usually

³¹ This description sets aside the analysis of decision-making process within parties, which can be regarded as a third important perspective, though not directly related to our enterprise. On this decision-making level see: Dunleavy [1991], ch. 5.

³² Aranson et al. [1982/3], pp. 17-21 present delegation within the framework of principal-agency relations, in which the legislator is seeking to minimize the sum of the parliamentary decision-making costs plus the agency costs involved in delegation. See also: Fiorina [1982], pp. 45-46.

one finds, within the potential voters' group (a local or a national constituency), a subgroup which will benefit from certain legislation and thus support it, and another subgroup which will lose from this arrangement and will naturally oppose it. If this were all there is to it, and the legislator had the information about the number of voters who supported the arrangement and the number who opposed it, his or her calculation would have been quite straightforward.

But this is not the full picture. Support and opposition to specific legislation can be manifested in different degrees of intensity, degrees which might or might not influence or determine whether the voter is going to give his or her support and vote for the legislator. The stakes of voters in a specific issue can be such that although they have a view on the matter, the way in which the legislator votes would not have any influence on their support for the legislator. On the other extreme, they may be issues to which such importance is attached that the responsibility attributed to any individual legislator (as against, for example, the party) will be, paradoxically, lower. The political system and mechanisms affecting the connections of legislators to their parties will have significant effect on these factors.³³ Furthermore, legislation is not a 'yes or 'no' question. There are infinite possible arrangements of one issue, and it might be difficult to identify the optimal one from the constituency's point of view. Moreover, lobbies and interest-groups on the one hand, and the free rider problem on the other hand, will distort the picture as to the views on the legislation in question. These are some of the reasons which might make it worthwhile for legislators to refrain from a decision on the merits of a particular issue and, instead, delegate the rule-making powers in this issue to others.

The observation according to which legislators might prefer to delegate authority instead of deciding themselves is not original. Theodore Lowi discusses it in the context of the shift of powers from the American Congress to the President, a process which began, according to Lowi, already in late nineteenth century. He titles it 'Legiscide'.³⁴ In a similar context Thomas Sargentich attributes this phenomenon specifically to the responsibility-shift explanation.³⁵ William Eskridge acknowledges the fact that sometimes legislation is an intended lack of decision, or rather delegation of the decision-making power, when he tries to offer the best theory of

³³ See: Noll in McCubbins & Sullivan [1987], pp. 474-477.

³⁴ Lowi [1987], p. 299.

³⁵ Sargentich [1987], p. 429.

legislative interpretation by the courts.³⁶ Jonathan Macey analyzes the division of powers between the Federal legislature and the States' legislatures in the U.S. in the light of the supremacy clause of the Constitution (Article VI, section 2), and describes the current division as a deliberate delegation of powers by the Federal legislature to the States. This happens, according to Macey, whenever the Federal legislature evaluates the political support which it will gain from the delegation as greater than the political support which it will gain from regulating the issue at stake itself.³⁷

Even judicial review of legislation can be accommodated within the shifting-responsibility explanation. The existence of judicial review means that the judiciary shares responsibility for the outcome of legislation. In this case, whenever a statute is invalidated by the courts, the legislature can still claim the credit for the legislation had it not been invalidated ("we regulated in accordance with the desires of the interested groups, the court is responsible for the non-outcome"), while not bearing the cost of this legislation ("the final outcome is favourable to those groups who opposed the arrangement"). Thus the legislature can be less hesitant about legislating. Some of the differences between legislation in a system without judicial review of legislation, such as the British system, and legislation in a system with judicial review, such as the American one, can be attributed to this factor. Indeed, Patrick Atiyah and Robert Summers indicate, in their analysis of the differences between the American and English legal systems, this factor of shifting-responsibility as one explanation for the observation according to which the American legislature is less hesitant and careful in legislating.³⁸

The desirability of delegation, in the individual legislator's (or the party's) eyes and from the perspective of political costs, depends on a divergence between the credit shifts and the blame shifts that the delegation is likely to create. If a decision of the delegated body would have the same effects in terms of support and opposition to the legislator, the delegation could not benefit him or her. If, in turn, the legislator, by delegating rule-making powers, can diminish his or her responsibility for the outcome in the eyes of those who oppose the arrangement, and at the same time claim part of the credit from those who support it, then the delegation can increase his or her political gains.

³⁶ Eskridge [1989], p. 323.

³⁷ Macey [1990], p. 267.

³⁸ Atiyah and Summers [1987], pp. 298-335. See also: Atiyah in Katzman [1988], p. 154.

The following formal presentation of the shift-responsibilities model and the conditions for the occurrence of delegation of powers by the legislator is a variation of Morris Fiorina's analyses.³⁹ Let X be a specific arrangement of an issue.⁴⁰ The adoption of this arrangement creates in the i constituency,⁴¹ $b_i(X)$ benefits and $c_i(X)$ costs. The constituency will be in favour of X , therefore, if:

$$b_i(X) > c_i(X)^{42}$$

A direct legislation of X , for which the legislator will be held accountable, will bring $b_i^l(X)$ support for the legislator, and $c_i^l(X)$ opposition.⁴³ We can assume that usually:

$$b_i(X) > b_i^l(X) \quad \text{and} \quad c_i(X) > c_i^l(X)$$

because, as explained before, not all the credit and blame for X will find its way directly to the legislator. Nevertheless, the main consideration from the legislator's viewpoint (on whether to vote for the suggested arrangement) will be the sign of $L_i(X)$, where:

$$L_i(X) = b_i^l(X) - c_i^l(X)$$

The legislator, if there are no other constraints, will vote for X if $L_i(X) > 0$ and will oppose X if $L_i(X) < 0$.

The same arrangement, X , can be regulated by a delegated authority, if the powers that are assigned to it include regulating X . We can expect that an adoption of X by a delegated body will have effects on the support for the politicians who are responsible for the delegation (especially when the delegates are not accountable

³⁹ Fiorina [1982], pp. 46-55; Fiorina in Noll [1984], pp. 174-197.

⁴⁰ In the original model X represents a scalar measure of government involvement (the size of a project, the level of income redistribution etc.). It is taken from a legislative model built by Shepsle and Weingast [1981].

⁴¹ Constituency in this context is a flexible notion which should be tailored to fit the specific voting system under scrutiny. It includes all the potential voters for a certain legislator or party. Thus in a system with proportional representation this might be a national constituency.

⁴² Or, if the question is what degree of X to adopt (in the cases in which X is a scalar measurement), the constituency will support X which will maximize the outcome of $b_i(X) - c_i(X)$.

⁴³ This support is translatable also to campaign contributions and manpower in addition to ultimate votes. See also: Pletzman [1976]; Horn and Shepsle [1989], p. 500.

to the general public). There is no reason, though, to assume that these effects on support will be identical to those occurring in the case of direct regulation by the legislature. The effects of X regulated by a delegated body, in terms of political support for the legislator in the i constituency, can be represented by $D_i(X)$, where:

$$D_i(X) = b_i^d(X) - c_i^d(X)$$

The assumption here is that regulating X through a delegated body instead of a direct parliament act would diminish blame for the arrangement, but by the same token would prevent the legislator from claiming the full credit. Thus $c_i^l(X) > c_i^d(X)$ and $b_i^l(X) > b_i^d(X)$. The legislator will, therefore, prefer delegation over regulating a specific X if:

$$c_i^l(X) - c_i^d(X) > b_i^l(X) - b_i^d(X)$$

There are several interesting implications of this model: first, if, contrary to our assumption, delegation can shift blame and at the same time maintain the credit (or increase it), it will always be preferred to direct legislation. In an environment of powerful interest-groups, that have influence or power over administrative agencies and bureaucrats, this might be the case. The credit for an arrangement can be given to legislators who empowered the agency to adopt it (or, rather, allowed the agency to be manipulated by interest-groups), while the blame for an undesirable arrangement can be self-attributed by the interest-groups, as failing to pull the right strings at the right time. This might also be the case in our context of delegation to the courts. Since the courts are usually perceived by the general public as law-enforcers and not as law-creators,⁴⁴ when certain types of issues are in fact regulated by the courts the tendency will be to give the credit to the legislature; while blaming the courts in cases of undesirable decisions (especially if, in turn, legislators reveal their dissatisfaction with the decision of the court). We will return to deal with delegation to the courts later.

Second, under the alternative and more plausible assumption that delegation creates credit shift as well as blame shift, but the blame shift will tend to be greater than the credit shift, all legislators or parties whose constituencies are net losers from X will prefer, if X is going to be adopted in any case, delegation over detailed

⁴⁴ See: Atiyah [1980].

legislation.⁴⁵ This conclusion is important for a system of government, such as the British, in which there is individual accountability to constituencies and at the same time a strong party discipline. Legislators who might be compelled to vote for an arrangement X, although it is against their constituencies' interest, can minimize their loss in terms of political support by delegation rather than direct legislation. To put this differently, delegation can be a compromise between those legislators whose constituencies are the big winners from the arrangement on the agenda and those legislators whose constituencies are losing from it. This eventuality can also occur in systems with no strong party discipline, since it is possible that regulating X through delegation will in fact, due to significantly unequal credit and blame shifts, increase the legislator's political support despite the fact that his or her constituency is actually worse off. In addition, under this assumption, those legislators whose constituencies are beneficiaries of the proposed arrangement X will tend to prefer detailed legislation by parliament over delegation, but not always. Not only net losers will prefer delegation.⁴⁶

The institutional framework of a specific arrangement can tell us something about the prospects of the benefits' distribution likely to result from it. A widespread support among legislators for delegation of powers regarding a certain arrangement ought to raise suspicion as to the scope of benefits from this arrangement. Such a support usually implies big gains for few constituencies and diffused costs to the rest. This is the point in which the public choice view of rent-seeking activity and its implications for the outcome of legislation (as opposed to the pluralist view of legislation) can be integrated into the analysis of institutions. Whether X will be regulated at all (although it might not benefit the majority of the public or even the majority of constituencies) is a question of the traditional literature of public choice.⁴⁷ What is added here are some insights into the institutional choice for the regulation. An arrangement which is not for the benefit of the majority is likely to be adopted through delegated authority and not by direct legislation.⁴⁸

⁴⁵ A numerical example of such a situation (using a specific example of credit and blame shifts function) with a proof of this supposition are provided in Appendix 2.

⁴⁶ For a numerical example see: Appendix 2.

⁴⁷ Public choice theory claims that because the interest-groups are well organized and their prospective benefits from the arrangement are significant, and because the costs of this arrangement will be distributed to the rest of the public at a very negligible individual cost, then although the arrangement makes the majority worse off, interest-groups can manipulate the legislature to pass it without losing a net political support. See, in addition to the references mentioned before, Mitchell [1988b], pp. 22-40

⁴⁸ On the connections between the interest-group view of legislation and delegated powers see: Spiller [1990c].

Despite the integration of traditional public choice maxims to the shifting-responsibilities model of legislative powers' delegation it is noteworthy that this shifting-responsibilities model is, in fact, not limited to a public choice view of legislation. Our analysis so far can fit a pluralist view of legislation which assumes that legislators faithfully represent the views of their constituencies. It can even be accommodated within a republican view of legislation: by representing 'civic virtues' or by acting independently from current views of voters legislators may jeopardize their chances of re-election. They can diminish this risk by regulating through delegation. Indeed, unpopular policies, or policies which are intended to bear fruit only in the long term and bring hardship in the short term can be legislated by delegation. Monetary policy to combat inflation adopted through a central bank can serve as a good example.⁴⁹

As a general model of legislation our analysis is obviously simplistic, particularly in the sense that it deals with the question how X will be regulated, without asking whether it is going to be regulated at all. In practice the two questions are interrelated, and the legislation process may create combined dilemmas.⁵⁰ The final choice, for example, might be between $L(X^*)$ and $D(X^{**})$, i.e. a choice between different arrangements as well as different institutions.⁵¹ However, for our original purpose of examining the delegation of legislative powers to the courts as an explanation for the independence of the judiciary, I think that we may stop at this point and turn our attention to the integration of the judiciary in the portrayed picture of legislative powers' delegation.

3.2 Whom to Delegate to?

The literature covered in the previous section and used to explain why it is worthwhile for legislators (or parties), in certain circumstances, to delegate their legislative powers, does not normally employ the term 'delegation' or the theoretical framework which has been set out here.⁵² It is usually concerned with the question

⁴⁹ See: Ferejohn & Shipan [1990], p. 9.

⁵⁰ But see the observations of Noll in McCubbins & Sullivan [1987], p. 464, who distinguishes between three chronological stages of government interference in the market: the decision that central involvement is required, choosing the policy instrument, and choosing the enforcement tools.

⁵¹ In this direction see: Fiorina [1982], pp. 49-52; and in Noll [1984], pp. 195 ff.

⁵² But see: Fiorina [1986]; Mashaw [1985].

of the establishment of administrative agencies and with the analysis of their control by the government. This literature typically presents the institutional choice as a choice between legislating and creating an agency. I have tried to broaden the field and provide a wider perspective on the legislator. Thus the options which face the legislator (or party) were altered into the regulation of a specific arrangement by the legislature itself, or the delegation of the law-making powers to another body. This alternative framework leaves us with an additional question: if delegation, then to whom?

The legislature can delegate its powers to one of the other central branches of government - the executive⁵³ or the judiciary.⁵⁴ It can delegate its powers to a specially created central agency which is given a mixture of all the three traditional governing powers - legislating, executing and adjudicating,⁵⁵ and it can delegate its powers to a lower tier of government - a state in a federal system⁵⁶ or local government. One can argue, justifiably, that in most cases the decision-making powers are shared among several delegated bodies, and that almost always one of them is the judiciary. This line of argument can go further claiming that in practice the legislature is always delegating its powers, and even when it regulates a specific issue in detail, the powers to shape the authoritative and final arrangement are in the hands of the courts.

This is all true to some extent: judicial review of the administration means that the courts are taking part in the agency-delegated powers, and interpretation by the courts means that they take part in the legislating process even when the legislature itself regulates an arrangement. But this only reinforces the question - why do we have independent courts in the first place. Moreover, I think that there are differences of degree which amount to a qualitative distinction between cases in which the legislature is interested in regulating an issue by itself and cases in which the trend is to leave the issue to the courts, either through a positive delegation or through a negative one, ex-ante or ex-post.⁵⁷ The same applies to delegation to

⁵³ See, for example: Lowi [1987]; Tumlin [1984], p.30.

⁵⁴ On the distinct characteristics of the judiciary as a delegatee (in the US) see: Neely [1981], pp. 190 ff.

⁵⁵ See, for example: Fiorina [1982]; and on the recent development in the US - the creation of independent agencies - Miller [1988].

⁵⁶ See, for example: Macey [1990].

⁵⁷ It is true that in the former case some aspects of the issue regulated by the legislature, usually ones unforeseeable at the time of legislation, might afterwards get to the courts and be decided there more in the way of judicial law-making than straightforward application of the law. But this does not mean that the legislature at the time of legislating had meant to

other bodies and to the roles assigned to the courts as second-tier delegates. I want to suggest, therefore, that the legislature is facing a real institutional choice, and that one of its options is to delegate its powers to the courts - an option that is distinct from delegation to administrative agencies or regulating the issue itself.⁵⁸

So what are the considerations which take part in the legislator's decision - whom to delegate to? Some traditional public choice adherents will try to present the dilemma yet again in the framework of interest-group analysis. They will claim, for example, that lawyers will try to push the legislator towards delegation to the courts. This, in turn, is likely to increase the workload of lawyers and benefit them at the expense of the general public, who will have to finance an increasingly extensive courts system, and will of course have to pay for the usage of this system. Thus a strong representation of lawyers in parliament, or a powerful lobby of lawyers outside parliament, would result in more delegation to the courts. In a similar way, a powerful influence of bureaucrats will result in more delegation to the executive.⁵⁹ But in a way this is only a secondary explanation, which takes the institutional playground as given. The shifting-responsibility explanation can be used as a primary explanation, which might explain not only why a specific issue is delegated to the courts or to an agency, but also the institutional existence of such options.

A formal extension of the shifting-responsibility model will look like this: instead of a two-option choice, legislation - L, and delegation - D, legislators now face a multi-option choice - L, D₁, D₂...D_n. Their basic calculations, though, remain the same. Each legislator or party will try to find the institution D_j which will maximize the figure resulting from the deduction of the blame shift from the credit shift, or in a formula:

$$\text{Max}_j \{c_i^l(X) - c_i^{d_j}(X)\} - \{b_i^l(X) - b_i^{d_j}(X)\}$$

The assumption behind this formula is that there are relevant differences between institutions, and that there are parallel differences in the character of issues

delegate these issues to the courts, although we might derive, from a lack of response by the legislature, an ex-post delegation. Note that the courts themselves acknowledge a distinction between interpretation and lacunae.

⁵⁸ See also: Posner [1986], pp. 571-576.

⁵⁹ A similar claim with regard to the character of administrative law across various legal systems as influenced by the type of judges manning the administrative courts is made by Bishop [1990], pp. 493-495.

to be dealt with by the legislature. It is to the benefit of politicians, therefore, to maintain the different optional types of delegatee institutions, to each of which they can delegate the appropriate matters (from their point of view). Let us take, as an example, two issues from the American context: the protection of the environment and abortions. Rule-making powers in both issues were delegated by Congress in different ways; the former to an administrative agency and the latter primarily to the courts.⁶⁰

The environment issue can, on the surface, unite almost everyone. Who would not acknowledge the need to protect the environment? But when we move from the principle to a detailed account how to achieve environmental protection and how to balance this desirable goal with other tasks, we face innumerable complicated controversies, changing circumstances and clashing interests. Congress has chosen, therefore, to acknowledge the need for environmental safeguards by establishing an agency and delegating broad discretionary powers to it. Congressmen can claim (or at least were able to claim in the past) a substantial credit for the protection of the environment by the mere act of showing concern and establishing the agency.

The specific issues that are decided by the agency are so complex that it is difficult, or even not feasible, for the simple interested member of the public to monitor the agency and its performance. Thus the decision-making process of the agency is left to be manipulated by extensively and intensively interested groups. In this case, as we indicated before, while a major share of the credit for the establishment of the agency and its successful operation is likely to be given to Congress, the blame for its output will be mainly self-directed by the interest-groups. In other words, the delegation can create a substantial blame shift with a minor credit shift. As a further benefit, the character of an administrative agency also leaves room for some intervention by the legislature itself, for example by means of budgeting and appointments approvals, and also through the courts' review of agencies' decisions.⁶¹ The solution, from the legislator's point of view, seems optimal.⁶²

⁶⁰ Macey [1990], pp. 286-290, asserts that the abortion issue was delegated by Congress to the States. A more accurate description is that the issue has been delegated to the States, President and courts, with participation of Congress. But I think that if one had to single out the dominant body which is regulating the issue of abortions, the courts would have had to be pointed at, especially after the decisions of the Supreme Court in *Roe v. Wade* [410 U.S. 113 (1973)] which brought abortions under a constitutional umbrella, and subsequent decisions, such as *Webster v. Reproductive Health Services* [109 S. Ct 3040 (1989)], which qualified this constitutional right, providing the courts with a broad leverage to decide on the issue.

⁶¹ On the legislative design to provide sufficient control of agencies see: McCubbins [1985]; McCubbin et al. [1987] & [1989]; Bishop [1990].

The abortion issue is of a different type. Here no common principle can be agreed upon by the different camps. The controversy is straightforward. One finds oneself either on one side of the controversy or on the other. In this case the legislature cannot elegantly delegate its powers to an agency. It will be too clear that it is trying to avoid the issue; besides, it is (constitutionally) unacceptable to delegate an issue to an agency without conveying to it any instructions or guiding principles whatsoever.

This is not the case with delegation to the courts. First, such delegation is less obvious. Most of the people would not perceive the fact that the American courts are shaping the current arrangement regarding abortions as the result of delegated legislative powers. But the legislature could have interfered with the rulings of the courts either on the merits of the matters (for example, by making abortions legal, or by setting other arrangements which are currently made by the States) or on procedural-jurisdictional grounds. The inaction of Congress is what we dubbed a negative delegation (both ex-ante and ex-post). Second, and related to the first point, it is implicitly accepted that delegation to the courts can be of a more general sort, with much wider discretionary powers, or even without any guidelines. This is partly due to the fact that in practice the courts have the residual legislating powers (as best demonstrated by the common law).

The recent decision of the Supreme Court on the issue, *Rust v. Sullivan*⁶³ can support this explanation. The issue at stake was a 1980 decision of the Department of Health and Human Services to prohibit abortion counselling at Federally-funded clinics. It was based on the 1970 *Public Health Services Act* which specified that no Federal funds will be used in "programs where abortion is a method of family planning" (Title X of the Act). Although the original legislation, which was, ironically, designed to provide family planning services and information in order to reduce the number of unwanted pregnancies,⁶⁴ relates to abortion, its interpretation with regard to concrete questions such as abortion counselling was not clear. The Court, therefore, after ruling that the administrative decision to ban Federally-funded counselling is not unconstitutional, preferred deference to the agency, which was

⁶² For more on the delegation of powers in environmental issues see: Macey [1990]; McCubbins et al. [1987], pp. 264 ff.

⁶³ 111 S. ct 1759 (1991).

⁶⁴ See: Shapiro [1990], p. 1738.

guided by the conservative line of President Reagan (but see the dissenting opinion of Justice O'Connor, based on the interpretation of the statute). Congress has not responded.

In the framework of the shifting-responsibilities model, the delegation of the abortion issue to the courts creates significant blame as well as credit shifts. It is of such nature that it is desirable from the point of view of American legislators to create the widest possible responsibility (blame as well as credit) slippage. This is also connected to problems of information and uncertainty which will be discussed in the next sub-section. Nevertheless, the delegation of the abortion issue to the courts does not create a full shift of responsibilities. For example, some politicians predict that the Supreme Court's partial departure from *Roe v. Wade*, in its recent decision of *Webster v. Reproductive Health Services*, would benefit the Republican Party.⁶⁵ This might be, at least partly, due to the fact that the judges are not totally structurally independent, and, more specifically, that their views in controversial key issues like abortions are being considered by the other branches of government before appointment or promotion. In addition, candidates for elections are required to state their views on the matter, and we are told that in several cases they even feel obliged to modify their tone or personal views.⁶⁶ In spite of that, Congress refrained from direct regulation of the matter, and thus avoided some of the potential blame which could have been directed at it from both camps.

It is noteworthy that unlike legislators, Presidents and presidential candidates are more explicit on the issue (including attempts to exercise influence on the policies of administrative agencies and on judicial appointments). This is possibly because a presidential candidate's position with regard to a particular issue is likely to have less influence on the potential support of his voters than a similar single-issue position of a legislator (there are, for example, many voters who are 'pro-choice' and nevertheless voted for Presidents Reagan and Bush⁶⁷).

We can now close the circle and return briefly to our initial question - why do we find a gap between the substantive and structural independence of the judiciary? From the discussion above it emerges that legislators ought to be interested in the

⁶⁵ See: Macey [1990], p. 289.

⁶⁶ Ibid, quoting an article by Weisberg titled 'Abortions Olympics' which was published in the *New Republic* on 12 February, 1990, p. 12.

⁶⁷ See: Carter [1992], p. 2759.

existence of a variety of bodies to which they can delegate some of their legislative powers. Each issue to be regulated has different features which determine whether it is to the benefit of the legislator to regulate or to delegate it, and, if delegation is preferable, who is the optimal delegatee. The independence of the judiciary is one characteristic which differentiates it from other possible delegates. This characteristic distances the judiciary from the legislature more than most other delegatee bodies, and this, in turn, helps to maximize the responsibility shift whenever this shift is needed, as in the abortion issue (for a numerical example see Appendix 2a). It is true that an independent judiciary can also impose costs on the legislature, by deciding against its interests - the most significant cases are invalidation of statutes in a system with judicial review of legislation - but the legislature, due to structural dependency, has the tools to lower these costs by using the relevant institutional measures, as happened, to some extent, in the United States in the course of the New Deal. The fact that these measures are not usually taken by the legislature shows that lowering these direct costs is not worthwhile in total, due to the potential loss of benefits which the legislature derives from delegating its rule-making powers to independent courts.

3.3 Decision-Making Under Conditions of Uncertainty

Legislation can be presented as a complex three-tier structure comprising the voter, the legislator (or the party) and the delegatee.⁶⁸ It consists of a system of two principal-agent relationships: the first between the voter and the legislator, and the second between the legislator and the delegatee. In our discussion so far we implicitly made three important assumptions which I will now try to relax. The first assumption was that legislators know what are the consequences of their selected arrangement X^* for the problems which this arrangement is set to solve, or more specifically what are the chances that this arrangement will in fact result in $b_i(X)$ benefits and $c_i(X)$ costs. In many cases when there is such uncertainty it is likely to be asymmetrical with regard to the benefits and costs, and frequently the costs of an arrangement can be better predicted than its prospective benefits (e.g. putting up taxes to fund a new project).⁶⁹

Connected to this assumption is the second assumption, which relates to the first principal-agent relationship, according to which legislators or parties know the

⁶⁸ See also: Pierce [1989]; Bishop [1990].

⁶⁹ See: Fiorina in Noll [1984], pp. 178-179; McCubbins & Page in McCubbins & Sullivan [1987], pp. 414 ff.

distribution of opinions in their constituencies, and, more important, they know the political implications of their vote for or against a specific arrangement, including the effects of interest-groups, free rider and other public choice complications, on the support that they are likely to gain or lose. In our formal presentation we refer to the knowledge by the legislator or the party of $b_i^l(X)$, $b_i^d(X)$, $c_i^l(X)$ and $c_i^d(X)$.

The third assumption, relating to the second principal-agent relationship, was that when delegating the powers to legislate, the legislator (or party) can precisely predict what will be the arrangement X which will be adopted by the delegatee body, or that the legislator can instruct the delegatee what arrangement to adopt. These three assumptions cannot pass the test of reality. Relaxing them will propel us to deal with situations in which there is no full information (the second assumption), or there are conditions of uncertainty (the first and third assumptions). I will try show that the relaxation of these assumptions can explain another segment of legislative delegation to the courts.

What are the consequences of relaxing the first and second assumptions? This involves making the alternative assumptions that legislators and parties do not always know what are the consequences of their selected arrangement in terms of benefits and costs for their constituencies, what are the political costs to them of being held responsible for this particular arrangement, and whether these political costs outweigh the benefits. When the main problem is uncertainty about the ramifications of an arrangement, rather than its effects on the political support for the legislator, it is likely that a legislator will prefer a delegation of such nature that will enable him or her to claim a significant share of the credit should the arrangement be successful, while avoiding some of the blame. A delegation to an administrative agency, rather than to the courts, is more likely in this case, as agencies are not totally detached from the government and can be monitored ex-ante by setting rigid procedures for their operation and placing them under judicial review, and ex-post by budgetary and other scrutiny means.⁷⁰ It is possible to delegate a wide range of powers to such an agency, while limiting its scope of discretion. It is likely that the range of delegated powers will correspond to the degree of uncertainty with regard to the prospects of the arrangement to be enacted.⁷¹

⁷⁰ See: McCubbins [1985]; Arnold [1987]; McCubbins et al. [1987].

⁷¹ See: McCubbins & Page in McCubbins & Sullivan [1987], pp. 416-420.

A different story is the case in which the main problem is a lack of information about the political consequences of an enacted arrangement. Legislators who are totally ignorant as to this political cost-benefit analysis face a sort of gambling problem. If they are risk-averse, and this is usually the case, they will be seeking to lower their risk. One can argue that in this case it is best for the legislators not to regulate at all. But of course this option can impose costs in the same manner that regulating can, because absence of legislation is negative legislation, or in some cases negative delegation. Thus, not doing anything is not a solution. Nevertheless, under the assumption which was explored before, according to which delegating legislative power creates a shift of responsibilities, the task of diminishing this political risk can be achieved by the delegation of legislative powers. In the case of total ignorance or full uncertainty the legislators will look for the delegatee that attracts the largest responsibility shift, i.e. the largest risk shift. This delegatee is usually the courts.⁷² More generally, we can say that legislators will seek to delegate in such a way that the risk is assigned most efficiently.⁷³

We do not have to assume that legislators are ignorant of the opinions in their constituencies in order to explain a choice of rule-making powers delegation. Such delegation, connected to uncertainty, can be worthwhile in two other cases. The first is the result of situations in which although the legislator can map the different opinions of individuals and groups in his or her constituency, there is no pure strategy equilibrium of 'public opinion', due to collective decision-making problems such as cycling. In this case the best strategy of the legislator would be a strategy of ambiguity. This, in turn, means a broad delegation of legislative powers.⁷⁴ We will elaborate on delegation as a solution for this sort of collective decision-making problems in the next section.

Furthermore, even when the legislator has a complete knowledge of the preferences in the constituency, delegation might still be chosen by him or her as the optimal option. This may be due to the voters' attitude to risk and their preferences' distribution. The following example is a variation on an analysis by Kenneth

⁷² Macey [1990], p. 285, is using a similar argument to explain why the American Congress prefers at times to delegate its powers to the States rather than to an administrative agency.

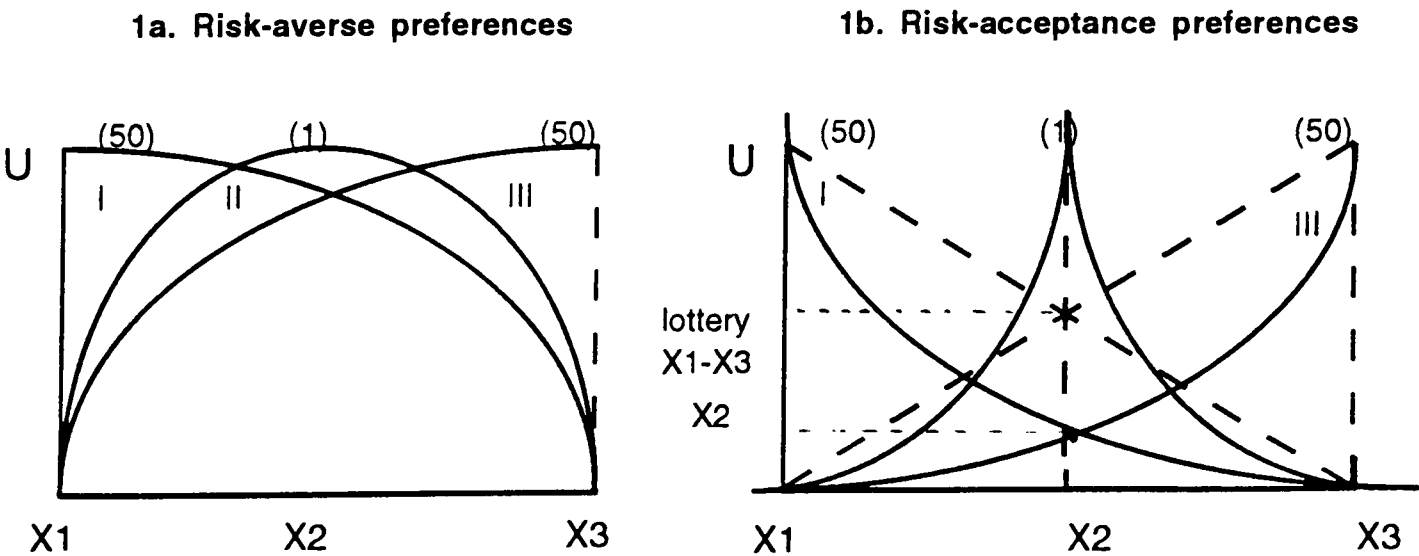
⁷³ See: Horn & Shepsle [1989], pp. 505-507.

⁷⁴ See: Aranson et al. [1982/3], pp. 32-33; Shepsle [1972].

Shepsle.⁷⁵ Let us assume that among 101 voters in the constituency, considering a level of spending X on a certain project, all voters have a single-peaked preference order over three options - X_1 , X_2 , X_3 . 50 voters prefer option X_1 to X_2 , and X_2 to X_3 ; 50 voters prefer X_3 to X_2 , and X_2 to X_1 ; and one voter prefers X_2 to both X_1 and X_3 .

According to the Black theorem,⁷⁶ there is in this case a stable majority solution - the preferred option of the median voter, i.e. X_2 , and this is the option which the legislator ought to vote for in order to maximize his or her political support. But this is actually true only for the case of risk-averse utility functions, as demonstrated in figure 1a. The figure shows that the voters will prefer a certainty of X_2 to a lottery of X_1 and X_3 . If, in contrast, we assume that the voters have a convex utility function - i.e. that they are risk acceptors, as in figure 1b, then the best option for the legislator would be to adopt an arrangement which is a lottery - 50% chances of arrangement X_1 and 50% chances of arrangement X_2 , as this kind of a lottery yields greater utility for the voters than the certain arrangement X_2 . The legislator, in the latter case, can optimize his or her choice by opting for delegation, in these circumstances, to an unbiased body, such as the courts.

Figure 1
Two types of single-peaked preferences



The last example brings us to the relaxation of the final assumption which relates to the second level of our three-tier model - the relations between the legislator and the

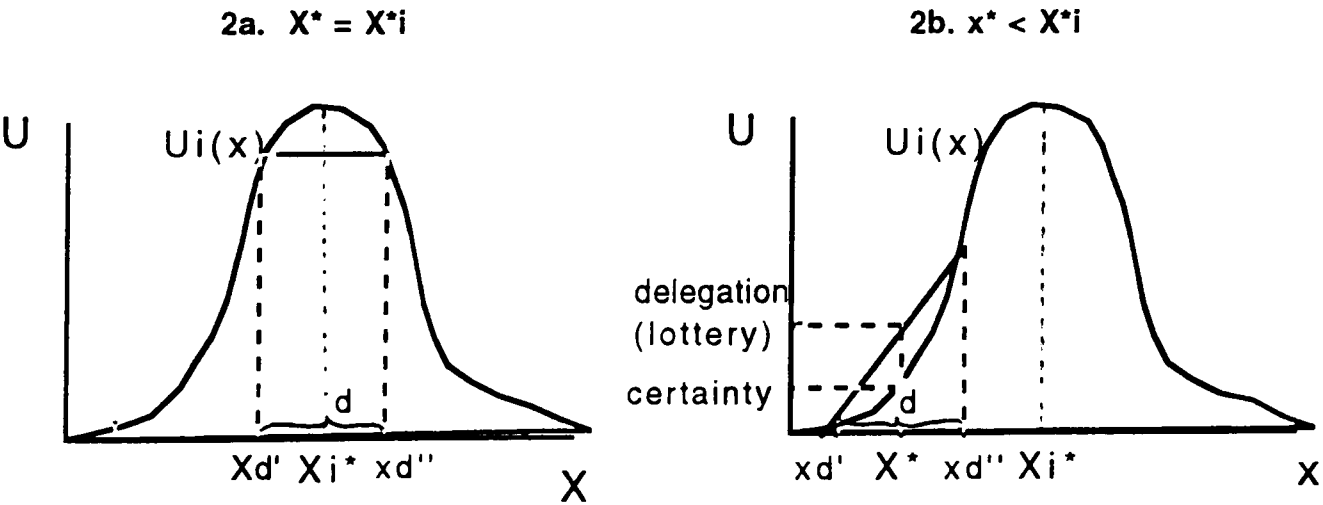
⁷⁵ Shepsle [1972], pp. 560-563. Shepsle's analysis was offered in the context of electoral competition between an incumbent politician and a challenger.

⁷⁶ See: Chapter 1, section 3.2.2

legislator and the delegatee. I shall isolate, again, the interesting question from our point of view, that is: after the legislature's (or majority of legislators') decision was reached to support a specific arrangement X^* , what are the preferences of legislator i with regard to the institutional question how to achieve X^* - whether to legislate X^* directly by parliament, or through delegation of powers?

When offering the shifting-responsibilities explanation to the delegation of legislative powers we implicitly assumed that legislators can instruct the delegatee to enact exactly arrangement X^* , or, alternatively, that they can predict precisely what arrangement will be regulated by the delegatee. In reality this is not the case. The legislature can enact X^* itself, but if the powers to regulate are delegated it can direct, and therefore expect, only that the delegatee will regulate an arrangement in the surroundings of X^* . In other words, legislators are facing a dilemma between taking a risk by delegating their powers, and avoiding the risk by going for the certain solution and regulating themselves.⁷⁷

Figure 2
*Bell-shaped utility function and symmetric distribution function of the delegated body, with two possible locations of X^**



We can apply to this situation the classic model of behaviour under conditions of uncertainty or risk, in which the options, as perceived by the legislator, are X^* - the legislation option, or the interval $(X^{d'}, X^{d''})$ which surrounds X^* - the delegation option. Morris Fiorina has shown that if legislators believe that delegation creates a symmetric probability-distribution around the adopted X^* (which can fit our assumption about delegation to the courts), and they have individual symmetric bell-shaped utility functions around their preferred X_i^* , as in figure 2, then those

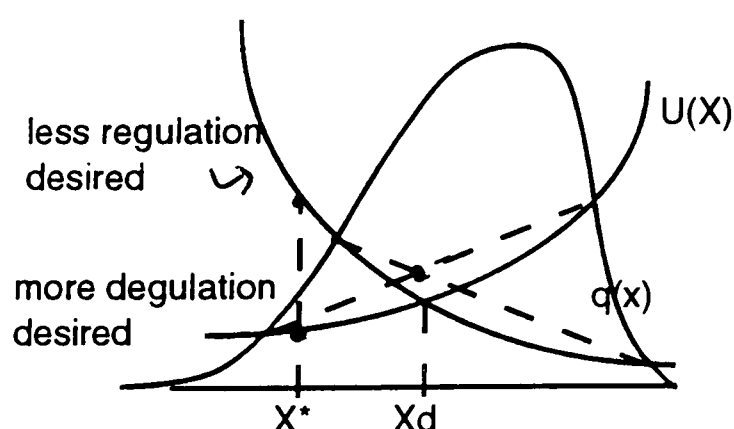
⁷⁷ As a matter of fact, even when the legislature itself regulates we can still expect that in the course of the enforcement of the arrangement, by the executive and the courts, there will be a shift from the original X^* . But if this is a detailed arrangement (rather than a negative delegation) the shift should be marginal.

legislators whose X^*i , is close to X^* will prefer legislation over delegation, while those legislators whose X^*i is far from X^* , that is, they view the proposed arrangement as significantly too little or too much, will prefer delegation over legislation.⁷⁸ Figure 2 shows these two cases for the same individual utility function of legislator i with a most preferred arrangement in X^*i , and a symmetric distribution function of a delegated body. In figure 2a, X^* - the choice of the legislature (which is the choice of the median legislator under the assumption of single-peakedness) - is identical to X^*i , a situation in which legislator i will prefer legislation over delegation; in figure 2b, X^* is much below X^*i , a situation in which the legislator will prefer to delegate, i.e. to take a risk, rather than legislate, because the expected utility from such a risk is greater than the utility from the risk-free option of X^* .⁷⁹

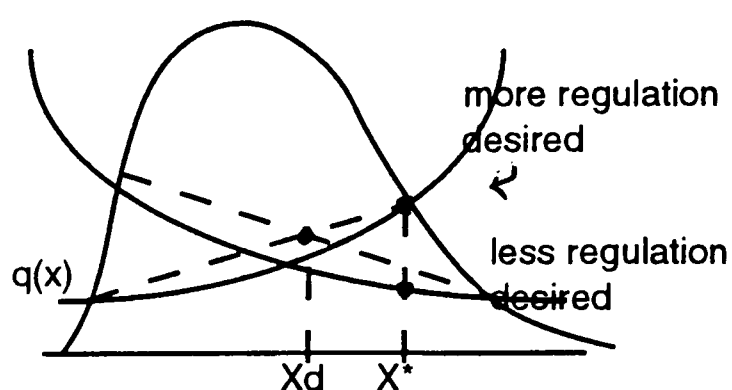
If the predictions about the behaviour of the delegatee body in the interval (X^d', X^d'') are not of symmetric distribution, i.e. it is believed to act in a biased manner (this can fit a description of a delegation to an administrative agency⁸⁰), the symmetry between those legislators who think that the proposed arrangement is too little and those who believe that it is too much no longer exists. In this case it is possible that only one of the camps would prefer delegation.⁸¹

Figure 3
Bell-shaped utility function and asymmetric distribution functions of the delegated bodies

3a. The delegatee is biased towards more regulation



3b. The delegatee is biased towards less regulation



⁷⁸ Fiorina [1982], pp. 55-60.

⁷⁹ This is a result of the fact that a bell-shaped utility function is convex in the margins, i.e. that the legislator is a risk-acceptor when the chosen option of the legislature is significantly far from his or her most preferred option.

⁸⁰ It is possible that in certain circumstances the courts will be perceived as a biased delegatee body, as may be argued in the case of Labour governments' perception of the English judiciary.

⁸¹ For elaboration see: Fiorina [1982], pp. 58-60.

Figure 3 shows two delegatee bodies with biased (asymmetric) distribution functions (in contrast to figure 2, which displays the utility function of the legislator and only indicates the interval of the delegatee's distribution function, figure 3 displays the full distribution functions and only the relevant parts of the legislators' utility functions). The delegatee in figure 3a is biased towards more regulation, and thus its X^d , namely the expected arrangement to be adopted by it - $E(q(X))$, is greater than X^* . The delegatee in figure 3b is biased towards less regulation, and thus $X^d < X^*$. In the former situation (figure 3a) delegation is preferred to self-legislation only by legislators who prefer more regulation than the legislature's choice ($X^i > X^*$), and not by legislators who prefer less regulation. Figure 3b is the exact opposite: delegation will be chosen by legislators who prefer less regulation and not by those who prefer more regulation. This description is further complicated by the fact that there are several potential delegates and by the supposition that different delegates have different probability distributions around X^* (or, rather, different probability distributions in the eyes of various individual legislators).

The conclusion, therefore, is that even if we ignore all the previous factors which might explain the desirability of legislative delegation, still the mere fact that delegation creates uncertainty with regard to the specific arrangement to be adopted can bring some legislators to prefer it. The assumption embodied in the above description was that legislators have a bell-shaped utility function, i.e. they are risk-averse in the area of their most preferred level of legislation, but risk-acceptors on the margins or with regard to arrangements which differ significantly from their most desirable ones (as demonstrated by figures 2 and 3 above). But this is not a necessary assumption for explaining delegation as deriving from uncertainty.

Even under the assumption that legislators are risk-averse throughout their utility function, delegation might still be preferred. This will be the result of an asymmetrical probability distribution or biased enforcement by the various delegatee bodies. In other words, if the institutional framework for regulation is being considered after the level of regulation had been decided, then due to different degrees and directions of possible bias of the different delegated bodies, a legislator might prefer the risk involved in delegation over direct regulation. The very differences between the individual legislator's utility function and the delegatee's probability function can bring the legislator to prefer the lottery in spite of his or her risk-averse utility function. In general, legislators will choose the institutional option which maximizes their expected utility from the arrangement (the calculations of the

expected utilities from different institutional forms are contingent upon the probability functions of the different delegates).

Morris Fiorina analyzes in detail ten situations which can be applied to the choice legislators face between delegation to unbiased courts or delegation to a biased agency. The situations are classified according to the relations between X^* - the arrangement most preferred by the legislature (as a collective body)⁸²; X^*_i - the arrangement most preferred by the legislator i ; X^a - the arrangement expected by the individual legislator to be adopted by the agency under delegation of X^* ; and $X^{d'}$ - $X^{d''}$ - the range of possible arrangements to be adopted by both the courts and the agency under delegation of X^* in the eyes of legislator i . Since the courts are perceived as unbiased the expected arrangement to be adopted by them is X^* . Fiorina tries to predict how legislator i will vote under each of these situations.⁸³ For example, in a case in which $X^*_i < X^{d'} < X^a < X^*$ (the level of the desirable arrangement for the legislator is lower than the minimal arrangement by the delegatee body, which is, in turn, lower than the expected level of arrangement by the agency, which is lower than the collective desirable level) the legislator will prefer delegation to an agency over delegation to the courts. In contrast, when $X^*_i < X^{d'} < X^* < X^a$ the legislator will prefer delegation to the courts over delegation to the agency. A more detailed account of the ten categories is given in Appendix 2b.

We can now sum up the general picture portrayed in the models above. Legislators may differ, with regard to every item on the agenda, in the shape of their utility function and in the distance of their most preferred option from the option chosen by the legislature. Different delegatee bodies can differ from one another in two features: the degree of symmetry of their probability distribution with regard to the adoption of the legislature's desirable arrangement (or, in simple words, their degree of bias); and the range of the possible arrangements ($X^{d'}$ - $X^{d''}$) to be adopted by them. As with regard to the shifting-responsibilities explanation, here too it will be beneficiary for the politicians to maintain different institutions with varying scopes of power and discretion to which they can delegate varying chunks of legislative authority.

⁸² Fiorina assumes X^* to be the arrangement most preferred by the median voter. The inherent assumption is that the utility functions of all legislators are single-peaked and convex (i.e. that legislators are risk-averse). The median and risk-averse assumptions, however, are not necessary components in demonstrating the possibility of legislative delegation.

⁸³ See: Fiorina [1986], pp. 41-44. What is missing in this model is the direct legislation option.

Thus, legislators will be interested in maintaining bodies with symmetric (or almost symmetric) and narrow probability distribution around X^* , as well as bodies with asymmetric and broad probability distribution with an average not necessarily at X^* . Courts, through their distinctive institutional features, namely the structural independence of the judiciary, will tend to correspond to the former type of delegates, while administrative agencies will correspond to the latter type. Agencies will tend to have an asymmetric and broad range of probability distribution ($X^d - X^d''$); they might deviate from the legislature's desirable arrangement, X^* , more than the courts. It is, however, possible to find examples of broad delegation to courts, as well as narrow delegation to agencies,⁸⁴ as legislators, under the given constitutional-institutional structure, can affect the breadth of delegated powers, and, to a smaller degree, the delegated body rate of bias.

What we have offered here is a general framework of analysis. Its application to a specific constitutional-political context requires further adjustments. Institutional structure (a parliamentary system with proportional representation on the basis of national constituency versus separation between legislative and executive where legislators are elected from single-member constituencies) will determine, for example, whether the political debate will be about particularized or generic issues, and this, in turn, will have significant impact on uncertainty considerations in the eyes of the nucleus political decision-making unit.⁸⁵ The interaction between institutional structure politics and geography is likely to be of importance for these considerations as well;⁸⁶ and perceptions of the degree of bias of delegated bodies can change even within the same system among different legislators. Some argue, for example, that while Tory MPs in Britain view the courts as unbiased delegates, Labour politicians view them as biased towards conservative values.⁸⁷ In Chapter 8 I will try to apply this suggested theoretical framework to a specific system - the Israeli one - and show cases in which the courts were delegated decision-making power, as a result of responsibilities-shifts. The prime examples for these cases are in the area of the Arab-Israeli conflict, security and the Occupied Territories.

⁸⁴ Fiorina [1986], p. 48 puts forward the American examples of the *Sherman Act* as a broad delegation to courts and parts of the *Clean Air Act* as a narrow delegation to an agency.

⁸⁵ See: Noll in McCubbins & Sullivan [1987], pp. 474-489.

⁸⁶ See: Macey [1990].

⁸⁷ See: Griffith [1985].

Nevertheless, I think that it is possible to generalize the claim that institutional differences between potential delegatee bodies will improve the range of possible choices available to the nucleus political decision-making units, and thus enable them to achieve a higher degree of utility, or, rather, to optimize their political support. The individual utility function of the nucleus political unit around its preferred arrangement X^*_i , the distance between this preference and the legislature's choice X^* (which will be in the centre of the delegation interval), and the final outcome probability-distribution around X^* of potential delegates, will determine in every individual case which alternative the political unit will opt for.

4. Delegation of Legislative Powers as a Solution to Collective Decision-Making Problems

4.1 Solutions for Cycling in a Two-Dimension Decision-Making Process

In the previous section we have focused our attention on the nucleus political decision-making unit and its incentives to delegate legislative power instead of exercising it itself. We have looked mainly into the relations between the potential voters and the legislator or party, and on their effect on the decision whether to delegate or not. But delegation of legislative power can also occur when there are neither uncertainties or lack of information problems as to the preferences of the voters, nor predicted benefits in terms of political support for the legislator or party from shifting responsibilities. Even in the extreme case in which the whole constituency, unanimously, prefers a certain arrangement, we might still find that the legislator 'votes his or her district' by opting for delegation of powers. This can happen due to the problems caused by aggregating the preferences of the different individual legislators or parties as they try to reach a collective decision. I refer, here, to the traditional social choice analysis of collective decision-making, and especially to the 'fallacy' of the simple majority rule. Delegation of legislative powers in this context can be seen as trading democracy for stability, rationality and decisiveness.⁸⁸

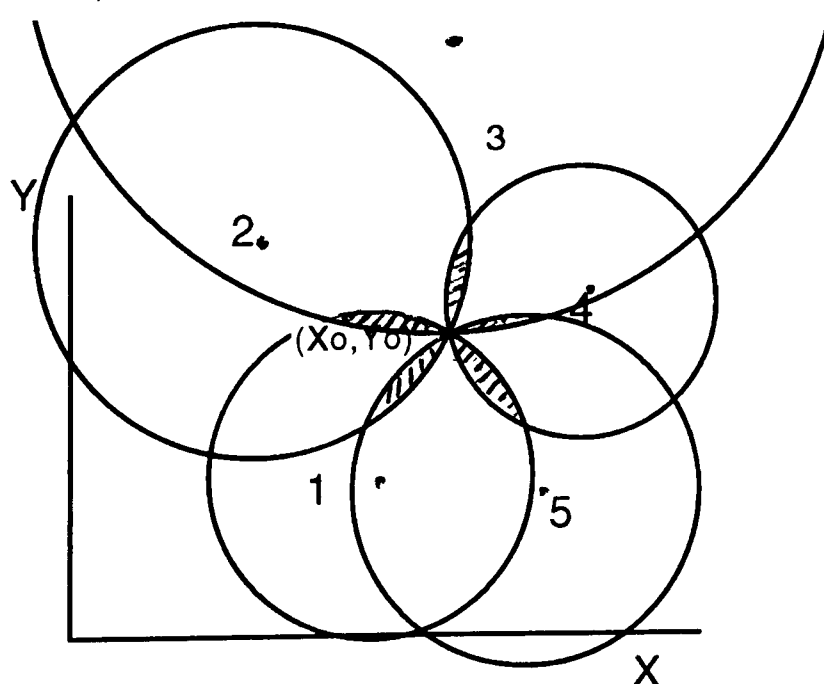
We indicated before⁸⁹ that one of the striking outcomes from the theoretical investigation into the simple majority rule is that it cannot guarantee a result which is stable **and** non-arbitrary - the paradox of a rational person and irrational society. Let

⁸⁸ See: Mayton [1986], p. 959.

⁸⁹ Chapter 1, section 3.2.2

us begin here with an analysis of a two-dimensional issue, as constructed in Chapter 1 (this analysis can be extended to any n -dimensional policy space⁹⁰). Here I will assume that there are five legislators (or parties). Each of them has a full knowledge of the preferences of his or her constituency. Legislating in this specific framework means selecting a pair (X^*, Y^*) in a space of two ideological dimensions. Each legislator has a singled-peaked preference order in this two-dimensional space, X and Y , which represents the expected political support from the constituency for legislating the respective arrangements. The current arrangement is (X_0, Y_0) . Figure 4 specifies this status quo as well as the most preferred points for each of the legislators numbered 1-5 and their indifference curves which pass through the status quo.⁹¹ The shaded areas cover all the alternative arrangements (to the existing legislation) which can be legislated under these conditions, using simple majority rule; this is the majority rule **winning-set**. Each of the five lenses included in it is preferred to the status quo by at least three legislators and, therefore, all the points in it are potential winning options. The cycling problem here is that for any point (X_i, Y_i) the simple majority winning-set is not an empty group, which means that there is no stable winning arrangement.

Figure 4
Single-peaked preferences of five legislators in a two-dimensional issue



Possible solutions to this cycling problem, which involve various procedural or institutional constraints, are offered by Shepsle and Weingast,⁹² and by Denzaw.⁹³

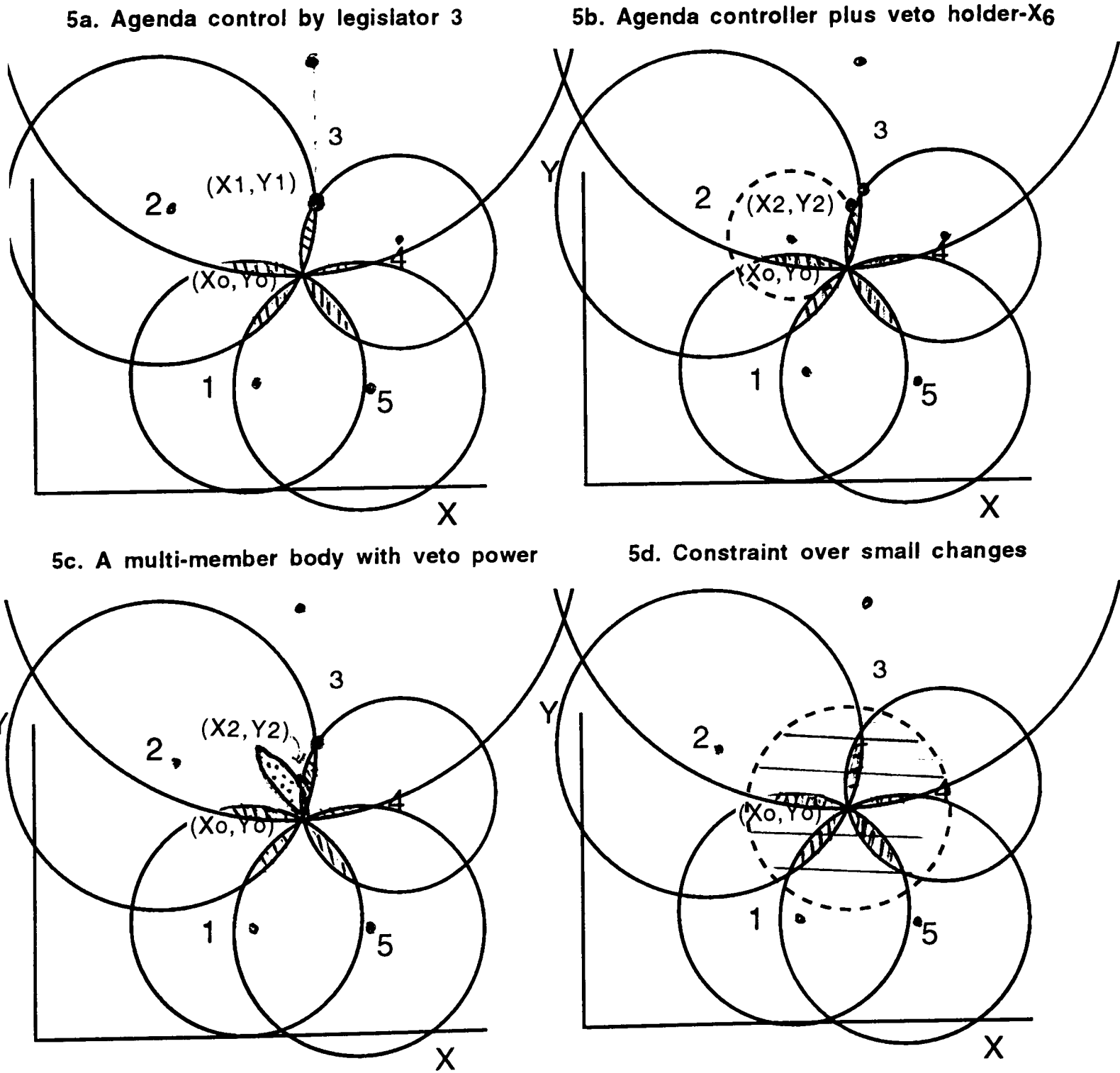
⁹⁰ See: Shepsle & Weingast [1981].

⁹¹ An indifference curve connects all the points with an identical utility level for a legislator. Since we assumed single-peakedness, the indifference curves are in the shape of circles (or closed lines), of which a longer radius (= further distance from the most preferred point) represents a lower degree of utility.

⁹² Shepsle & Weingast [1981], pp. 507-511.

Some of them are in the form of agenda control. If, for example, the power to put forward a bill, or amendment to an existing act, is restricted to a subgroup of legislators - a committee or a chairperson - then this subgroup will propose the best arrangement from its point of view, which will be accepted by a majority of the legislators. Let us assume that legislator 3 in our example has monopoly on the agenda. In this case she will put forward a motion to move to (X_1, Y_1) , as presented in figure 5a. This is the closest option to her most preferred arrangement, (X_3, Y_3) , which is still part of the winning-set, $W(X_0, Y_0)$.

Figure 5
Possible solutions to the cycling problem, using procedural constraints



In order to limit the powers of the agenda controller we can add other constraints, like a veto power or the requirement of an approval by a second group of decision-makers. Thus, in our example, if we introduce a person or a body, 6, with the same sort of preference order (single-peaked with the most desirable arrangement represented by point 6 in figure 5b), who has only veto power on the outcome of the other five legislators, then the possible outcomes are further limited, as shown in figure 5b. In this case the agenda controller, 3, after calculating what her best feasible option is, will put forward the arrangement (X_2, Y_2) , which will, in turn, be voted for by the other legislators and approved by the veto holder. Obviously, in this case the agenda controller is less privileged than in the previous case, and the outcome is likely to be more remote from her most preferred arrangement.

In this case the differences between a single veto holder and an approving body comprised of more than one individual, such as a second chamber, will come across in the shape of the additional constraint. In figure 5b the additional constraint is that of an individual veto holder. A multi-member constraint will be in the shape of one or more lenses of the same type as the original legislature's winning-set, as demonstrated by the dark shaded area in figure 5c. The agenda setter, 3, will under these circumstances, propose the arrangement (X_2, Y_2) which is the closest to her most preferred option and is within the lens of the constraining body.

Another direction for solving or limiting the cycling problem is the exclusion of all (or most of) the arrangements included in $W(X_0, Y_0)$, the winning-set for (X_0, Y_0) , from being placed on the legislature's agenda. In figure 5d this 'restricted approach' area is marked by the broken line circle which encompasses the five lenses of the winning-set. Since the winning-set can be of varying radiuses, a fixed size restricted area does not always cover all of it, but in any case it can diminish significantly the cycling problems. The effect of such a measure is only on small changes, and, of course, if some of the legislators change their preferences, or if there is a change in the composition of the legislating body, the new winning-set may exceed the limits of this restricted area. Thus, this restriction does not significantly violate democratic requirements, and at the same time it does not grant an a-priori advantage to a subgroup of legislators or to an outsider function, as in the other possible solutions.

A trace of all these mechanisms can be found in real life in governments' institutional structures and parliaments' procedural rules. Thus, the existence of a second chamber of a legislature, which usually does not have the same

representation structure as the other chamber, is equivalent to the multi-member approving body (figure 5c). A Presidential veto is the equivalent of the veto power presented in figure 5b. In parliamentary systems such as the British and the Israeli, bills put forward by the Government have various procedural advantages over Private Members' bills. One of them is the subordination of a Private Member's bill to a Government bill regulating the same issue. This also creates an effect similar to that of the veto or the approval power which is held, in this case, by the Government.

In most legislating bodies there are certain procedural rules granting committees a powerful position in controlling the agenda, in some cases amounting almost to a veto power. Here is one example: if there are several versions of a bill or amendments to it or to an existing law, the proposals or amendments initiated by the relevant committee are usually voted on second to last, before the vote on the status quo.⁹⁴ This rule limits the general winning-set in such a way that it consists only of what is also in the committee's winning-set.⁹⁵ In many legislating bodies there is power vested in the hands of the speaker⁹⁶ or a special committee⁹⁷ to restrict the access of motions which failed to pass in previous votes in the same legislature's term of office, or of similar motions. This resembles the theoretical small changes restriction presented in figure 5d.

4.2 Delegation to the Courts as a Solution for Cycling in Two-Dimensional Decision-Making

How does the judiciary fit into the above analysis? The general proposition which I would like to put forward is that some of the theoretical solutions for cycling and other problems we have discussed can be achieved through delegation of legislative powers to an independent judiciary. The function of an independent judiciary, from this point of view, is equivalent to other institutional components of the legal-political system, as well as to certain procedural rules of the legislature, and at times it even has several advantages over the other mechanisms. Since legislators

⁹⁴ The status quo is voted last in order to ensure that in any case the adopted arrangement will be in the original winning-set. Otherwise the final arrangement might lie in any region of the space. See: Shepsle & Weingast [1981], p. 503; Shepsle [1992], pp. 245-247.

⁹⁵ Such a procedural rule exists, for example, in the American House of Representatives and in the Israeli Knesset. For other advantages of committees in legislation processes see: Shepsle [1992], pp. 245-247.

⁹⁶ As in the Israeli system according to sections 133 and 143 of the *Knesset Standing Rules*.

⁹⁷ As in the American case according to the *Rules Committee in the House of Representatives*.

and parties usually want to avoid cycling, it is in their interest to maintain these mechanisms, including an independent judiciary.

It is noteworthy that this proposition is in a way similar to that of Landes and Posner, in the sense that it draws functional parallels between an independent judiciary and the procedural rules of legislatures. But this is also the point in which the two explanations depart from each other: the function of these mechanisms for Landes and Posner is to increase the durability of legislation, while in my description they serve a more basic and primary function - the very possibility of achieving stable legislation. One can argue that the differences are only a matter of degree, and that stability is nothing more than durability. But I think that in the context of the two models these qualities are significantly different. The most important difference is that for Landes and Posner the assumption according to which an independent judiciary is loyal to the original, rather than to the current, legislature is crucial to the coherence of the model; while in my explanation this problematic assumption is not required. It does not matter how the judiciary decides (within a constrained area of possibilities), the crucial factor is that the courts do decide.⁹⁸

Let us return to the legislature's decision-making problems and to the possible solution of delegating legislative powers to independent courts. It is important to distinguish here between what we have called 'delegation ex-ante' and 'delegation ex-post'. I will begin with the former type. The traditional literature distinguishes between a legislature whose task is to create rules, and a judiciary who is assigned the task of applying the rules. However, in reality this is not always the case. Legislation can be on different levels of specification. It is true that sometimes the legislature does not envisage a specific question that might arise from the arrangement it adopts, but in other cases the legislation's wording seems to be deliberately general and not detailed. Here the lack of specific delegation of secondary rule-making powers to the executive or to a specially created body means that the legislature implicitly leaves the question to be decided by the courts. In these cases the courts are actually assigned a rule-making power rather than merely an enforcement power. In other words, although individual legislators or parties may have a clear position with regard to a specific question within the general

⁹⁸ In a way, our discussion of the problems associated with the legislation process and the possible solution of delegating legislative powers to the courts is closer to the way in which Calabresi [1982] portrays the judiciary than to Landes and Posner. Although Calabresi departs from a different (and more normatively orientated) view point, some of the examples which will follow are comparable to his. The perception of judicial review of legislation is one of them.

arrangement under consideration, they might at times refrain from promoting it and prefer to leave the details in the hands of the courts.

This practice can be presented in a way similar to the theoretical solution of the restricted area limitation (portrayed in figure 5d). Instead of a shift from the status quo, (X_0, Y_0) , to a new arrangement which is in the winning-set, $W(X_0, Y_0)$, the legislature prefers to adopt a vague arrangement which is not another point like (X_i, Y_i) , but a wider range of options, like the broken line circle of figure 5d. The final choice of a solution within this range is left to the courts. This kind of choice by the legislature saves, on the one hand, the costs involved in the instability of shifting from one solution to another within the winning-set (the problem of cycling), and, on the other hand, the deposit of excessive influence in the hands of a committee or an agenda setter.⁹⁹

In a similar way it is possible to present judicial review of legislation as resembling the veto power or the approval power portrayed in figure 5b or 5c. (Since the more important decisions of the courts are entrusted to several judges - a bench, or the whole court - figure 5c seems a better model for the function of the judiciary). In this case the winning-set is limited to what the courts perceive as constitutional. This scrutiny by the courts can decrease the cycling problem by the very limitation of the winning-set. This proposition should be tailored to fit the specific constitutional structures of different legal systems;¹⁰⁰ but in legal systems with judicial review of legislation in which there is no **explicit** allocation of this power of judicial review to the judiciary (as in the American and the Israeli legal systems), one can actually go further and claim that this allocation can be seen as consented to by the legislature, and hence as a delegation of legislative powers to the judiciary.¹⁰¹ Now we can explain why the legislature grants its consent to this kind of institutional arrangement, despite its ability to limit judicial review. In the American case, for example, limitation of the courts is possible, albeit not practiced, through Article 3 of the Constitution,

⁹⁹ McCubbins [1985], p. 732, using a slightly different analytical framework, shows the formal necessary conditions for specific enactment and for delegation, under the assumption that the status quo is the last motion against which all alternatives are pitted. The condition for delegation is considerably weaker than the condition for specific enactment. This explains why delegation is so common.

¹⁰⁰ See: Ferejohn & Shipan [1990].

¹⁰¹ In this context it is interesting to compare the above description to the view of Tushnet, Schneider & Kovner [1988] on judicial review. They draw functional and procedural similarities between legislating by the legislature and judicial review by the courts, in order to invalidate normative claims in favour of judicial review.

which empowers Congress to limit Federal courts' jurisdiction.¹⁰² In the Israeli case this can be done simply through a constraining legislation of the Knesset, which, as we shall see in Chapter 8, the Knesset has so far refrained from doing.

If this explanation of ex-ante delegation of legislative powers to the courts as a solution for the legislature's collective decision-making problems is viable we should expect to find a trade off between rule-making by the legislature and rule-making by the courts. Furthermore, we should expect to find a trade off between delegation to the judiciary and other procedural constraints of the legislating process. There are, indeed, some interesting findings in this direction: Richard Pierce, for example, observes that in the last decades the American Congress has gone through a democratization reform in which 'dictatorial' agenda control and party rule were curtailed to provide a more fair debate. But the consequence of this reform, he argues, was increasing inability to decide, which in turn triggered more delegation of powers. The only way to avoid this delegation, according to Pierce, is a return to a tight agenda control.¹⁰³

Tushnet, Schneider and Kovner, in their attempt to confront the traditional normative justifications for judicial review, show that the institutional elements, personal characteristics and procedure of adjudication and of legislation in the American legal system are gradually becoming more and more alike. Their conclusion, which is used to reject the traditional justifications for judicial review, is that the American Supreme Court is fulfilling very similar functions to those of Congress.¹⁰⁴ We may conclude from these observations that the courts are being used to carry out the same sort of tasks as Congress, namely legislating.

Other interesting findings, connected to the observation above, are reported in Anderson's and Higgins' comparative research on substantive due process in the States of the USA.¹⁰⁵ Substantive due process is a review by the courts of

¹⁰² In his analysis of the judicial power in the United States McDowell [1988], pp. 4-13, shows that despite the explicit dissatisfaction of Congress with the growing powers of the courts, the procedural constraints on their jurisdiction and authority, which were removed in the Thirties, have not been re-instated. He concludes that the American political system plays into the hands of the judges. A similar view of the lack of resistance to judicial review as granting it legitimacy is made by Choper [1980], pp. 47-54.

¹⁰³ Pierce [1989], pp. 1245-1251. The main argument of the author is that delegation is preferable to agenda control, but the main delegatee should be the President, rather than the courts.

¹⁰⁴ Tushnet et al. [1988].

¹⁰⁵ Anderson and Higgins [1987], pp. 105 ff.

legislation or regulations on the basis of their contents, rather than on the basis of the procedure by which they were adopted (the latter type of review is dubbed 'procedural due process'). The efficiency of an arrangement, or the degree in which it takes into account the protection of human rights, are examples of possible grounds for substantive due process. On the American Federal level, the courts in the mid-Thirties shifted their criterion of review from substantive to procedural due process.¹⁰⁶ A significant number of States, however, continued with substantive due process type of review. Anderson and Higgins examined, across the different States, the correlation between the existence and degree of substantive due process and the volume of regulating and legislating. They found a significant negative correlation between these two variables: in States with substantive due process there is less legislative activity, which means that substantive due process is a substitute to regulating or legislating.

Related observations are made by Atiyah and Summers, in their comparative study of the American and the British legal systems.¹⁰⁷ The 'law' in Britain, according to their findings, relies much more on Parliamentary legislation and far less on judicial decisions than in the legal system of the United States; thus the two sources of law can be presented as interchangeable. Some of the reasons given by the authors for the differences between the two legal systems can fit well into my model. The structure of the legislature and the party system in the two countries provide part of the explanation. In Britain individual legislators are far less dependent on their constituencies than their American counterparts. They are, therefore, less exposed to the pressure of interest-groups, and more flexible in voting for, or supporting, one arrangement or other according to the choice of their party. Collective decision-making is, therefore, less of a problem. In the American legal system the formal process of legislation is shared among several bodies, and the significance of party affiliation in the legislating houses is far less important than in Britain.¹⁰⁸ These differences can help to explain why the American legislative product is much more general and vague than the British one. This, in turn, gives the courts a rather more important role of rule-making. All this does not explain why

¹⁰⁶ This was done after a period of extensive substantive due process which began with the *Lochner* decision of 1905.

¹⁰⁷ Atiyah and Summers [1987], see especially chapters 10 and 11.

¹⁰⁸ *Ibid*, pp. 306-310.

there are such significant institutional differences between the two systems; I will not attempt to deal with this important question here.¹⁰⁹

* * *

Let us move to the second type of delegation - the ex-post one, which evolves quite straightforwardly from our theoretical description of collective decision-making. The main idea here is that although individual legislators or parties have complete preference orders, the collective decision-making process may result in an incomplete set of preferences; in other words, the legislature will not be able to decide between every pair of options. This means that if another body, like the courts, shifts the legal situation from the status quo arrangement to a different point, the legislature may not be able to indicate whether this shift is an improvement or not, and there will be no majority for a shift back to the original status quo. The legislature would thus refrain from intervention, and this is what we called an ex-post delegation.¹¹⁰

The above explanation can apply on two distinct levels: the inter-body level, when more than one authority take part in the legislation process, and the inner-body level as described above. The following is a simplified demonstration for the former level. Let us assume that legislation is a joint product of two houses of the legislature, each has a different structure of representation, and therefore a different preference order. I ignore, for the time being, the internal decision-making problems of each house so that we are able to present the preferences of each house as complete and single-peaked over a space of two ideological dimensions. Figure 6 portrays the described model in which (X_l, Y_l) is the most preferred option of the lower house and (X_u, Y_u) is the most preferred option of the upper house in a specific two-dimensional issue. The status quo is (X_0, Y_0) .

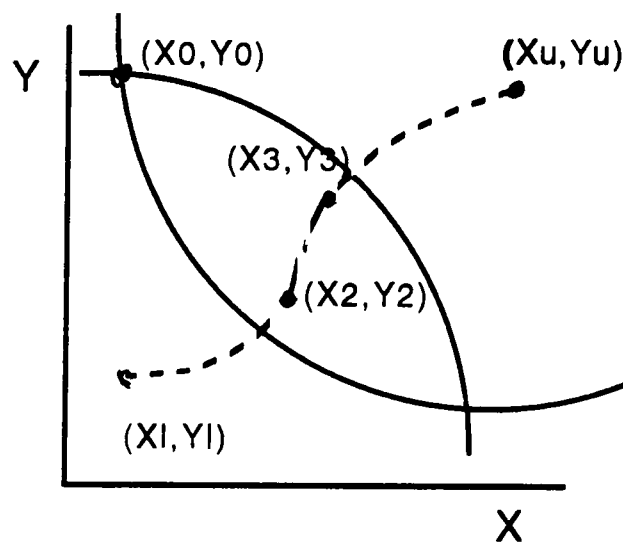
In this case the two houses can agree on a change of legislation. Both can improve their position by a move to any of the points in the lens created by the indifference curves which pass through (X_0, Y_0) , for example point (X_2, Y_2) in figure 6. But if the courts are quick enough to precede this change of legislation and shift

¹⁰⁹ But see Atiyah's and Summers' [1988] analysis (especially chapters 8 and 9), which focuses on the different historical emphases on form and substance in the two legal traditions.

¹¹⁰ An example can be given from the interaction following judicial review of legislation (which makes only a small share of legislative delegation): we are told that only four times in the history of the United States did the Congress initiate an amendment to the Constitution following an invalidating decision of the Court. See: Choper [1980], p. 48.

the legal situation to any of the points on the contract line which are within the relevant lens,¹¹¹ such as point (X_3, Y_3) , then the two houses would not be able to depart from the new solution, because it is Pareto optimal, i.e. there is no change which can benefit one house without worsening the position of the other house.

Figure 6
Modeling the role of the judiciary in a bicameral system



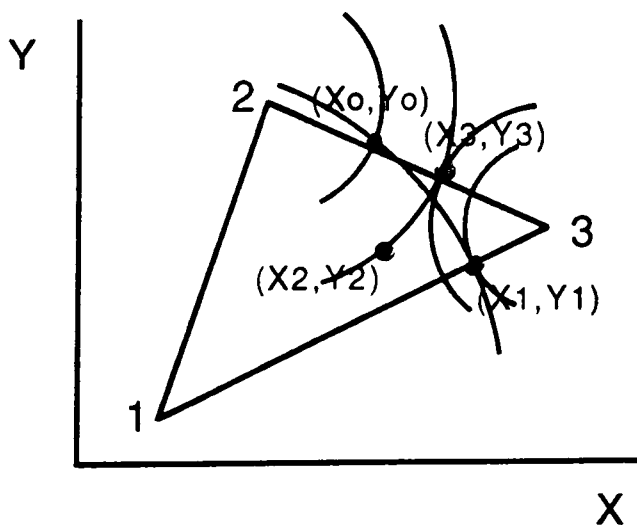
This description is also valid for a situation in which the starting point - the status quo - is already Pareto optimal, where the courts' shift is to another point on the contract line, such as a shift from (X_2, Y_2) to (X_3, Y_3) or vice versa. The two houses would not be able to agree on a change of the new judge-made law. Without the intervention of a third party (like the courts), the final solution is dependent on the bargaining powers of the two houses and on procedural-institutional factors which can provide an advantage to one of them. Thus in the case of (X_0, Y_0) as a starting point, a change through legislation may be to a point like (X_2, Y_2) if the power of the lower house is more significant, and to a point like (X_3, Y_3) when the upper house gains the upper hand. Such a bias may result also from a legislative delegation to an administrative body if such a body is under a stronger influence of one of the houses, which is often the case. This is the reason why both houses would not resist, and might even encourage, an institution such as an independent judiciary, which is not a-priori biased towards either one of them.¹¹²

¹¹¹ The contract line is defined as the line connecting all the Pareto optimal points between (X_u, Y_u) and (X_l, Y_l) .

¹¹² In some systems, notably the British, the courts may at times be perceived as biased towards one of the houses: a Labour-dominated House of Commons might view the judiciary as biased towards the House of Lords.

The following is a second example for an ex-post delegation referring to the second level of application.¹¹³ Let us suppose a legislature which consists of three equal-sized parties - 1, 2, and 3. Each party has a different most preferred point on a two ideological dimension space, and circle-shaped indifference curves around this point, as depicted in figure 7. We have seen how instability and cycling are likely to occur in such a case. For this reason party 3 is assigned a monopolistic power in setting the agenda and in putting forward motions to change the status quo, (X_0, Y_0) . Under these conditions the best strategy available to party 3 is to put forward a motion to shift to (X_1, Y_1) . It is the best improvement to the existing situation from its point of view which will receive the support of one other party, in this case party 1. Party 1 is actually indifferent between (X_0, Y_0) and (X_1, Y_1) , so in order to get its definite support party 3 ought to propose an alternative which is slightly closer to party 1's most preferred point. This alternative will defeat the status quo by a vote of two to one.

Figure 7
An ex-post delegation to the judiciary



The enacted arrangement does not have a real effect unless it is implemented. If this task is not assigned to a special body it is within the responsibilities of the courts (which can intervene, through judicial review, even if the task is assigned to another body). Let us assume that the courts implement (X_2, Y_2) instead of the enacted (X_1, Y_1) . Following this move by the courts, the best strategy of party 3 is to propose (X_3, Y_3) ; this proposed amendment can receive the support of party 2. But when this motion, (X_3, Y_3) is put against the previously enacted arrangement (X_1, Y_1) , as most parliaments' procedural rules require, we discover that it will be defeated by the votes of 1 and 3 against the vote of 2. Hence it is likely

¹¹³ It is taken, with slight modifications, from McCubbins et al. [1989], pp. 436-440.

that the legislature will accept the judge-made law. This conclusion would have been definite had each of the parties held a veto power to block any change of legislation. In such a case any shift initiated by the judiciary within the triangle 123 (that is, the Pareto optimal set), would have benefited at least one of the parties, and therefore its replacement, or the return to the intended legislation, would have been vetoed by it.

This last, modified example can actually serve as a description of the American legislative process, in which the President and each of the Houses have veto power over proposed legislation (in this case parties 1, 2 and 3 in our example will represent the Senate, the House of Representatives and the President). This description can explain Atiyah's comparative observation, according to which in Britain it is much easier to change a decision of the courts through legislation (even a retroactive one) than it is in the United States.¹¹⁴ The main reason for that is the lack of the triple veto power in the English legislation mechanism. This, in turn, can explain why American judges assign themselves a more creative role than English judges: they know that they can afford to do more without being overturned by the legislature. It is noteworthy that, according to this explanation, the differences between American and British court decisions do not originate from the character of the judges, their political affiliation or the method of their appointment, but from the structure of the legislature and from the process of legislating. (One can nevertheless argue that the differences in the personal characteristics of judges originate from, or at least are strongly related to, the consequences of these institutional differences).¹¹⁵

The theoretical illustrations of the difficulties of ex-post control by the legislature are used in the literature mainly to demonstrate the problems involved in controlling administrative agencies, and to explain the shift towards ex-ante control, mainly through structural and procedural constraints, as a compensation for this inability to exercise ex-post control.¹¹⁶ However, the same phenomenon can also explain the institutional choice, or why (structurally) independent courts might be preferred by the legislature to administrative agencies. The latter tend to be more biased, more influenced by interest-groups and under more efficient control of the

¹¹⁴ Atiyah in Katzman [1988], p. 137.

¹¹⁵ Ibid, pp. 137-140.

¹¹⁶ See, for example: McCubbins et al. [1987]&[1989], pp. 440 ff; Weingast & Moran [1983]; Arnold [1987].

legislature's committees than the legislature as a whole.¹¹⁷ Taking into account the difficulties of ex-post monitoring and control, the choice of courts rather than administrative agencies seems to make a great deal of political sense.¹¹⁸

4.3 Delegation to the Courts in Single-Dimensional Issues

So far we have analyzed situations in the framework of two ideological dimensions space. The analytical basis for decision-making in a single dimension was laid down in Chapter 1. Its most important feature was the Black theorem, according to which a single-peaked preference order for all decision-makers will result in a stable outcome - the most preferred option of the median voter. The application of this theorem to the process of legislation seems to raise some difficulties. Let us assume that there are three legislators (or parties), each of them having full knowledge of the preferences of his or her constituency. The issue at stake is a straightforward one-dimensional issue, say the level of subsidies to farmers. Each legislator has a utility function with regard to different degrees of subsidies, which represents the expected political support from the constituency for legislating these levels. These utility functions are symmetric and single-peaked, as portrayed in figure 8a. Legislator 1 represents an urban constituency, and therefore his most desirable level of subsidy is low - X_1 ; legislator 3 represents a rural constituency with many farmers; her most desirable level of subsidies, therefore, is high - X_3 ; legislator 2 is representing a mixed constituency, and thus her most preferred level of subsidies is X_2 .

If the three bills on the agenda are X_1 , X_2 and X_3 , the stable result will be the option which is most preferred by the median legislator, namely X_2 . This sort of equilibrium would also be achieved if the three options facing the legislators are not identical to their most desirable ones, but something like W, Y, Z in figure 8a. But since we are talking about a **level** of subsidy there are many options on top of this set of three or another. As a matter of fact, there are infinite possible levels of subsidy. If we change the rules of the initial Black theorem and assume that the voters can offer new options, an assumption that better suits a decision-making body

¹¹⁷ McCubbins et al. [1987], pp. 247-248.

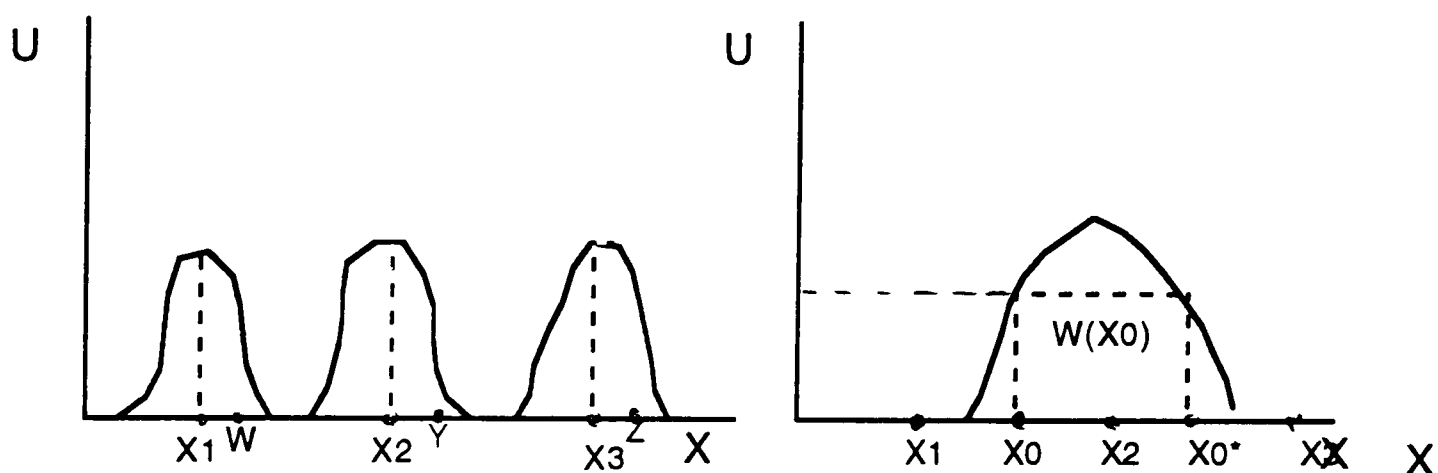
¹¹⁸ McCubbins et al. [1987], pp. 271-273 and [1989], p. 445, do mention the possible application of their ex-post and ex-ante control theory also to the relations between the legislature and the judiciary. They argue that due to the lack of external standards for evaluating decisions of the courts, ex-ante constraints by the legislature would be less effective, and, therefore, less common. However, they do not deal with the implications of their analysis for the initial institutional choice by the legislature.

like a legislature facing such a decision, we are complicating the problem from an economic theory point of view with the introduction of bargaining theory. Its solution will now depend on the starting point - the status quo - and on the bargaining powers of the different legislators. In reality these bargaining powers are crucially affected by the party and representation system, the committees system, agenda control, and other procedural rules concerning legislation.

Figure 8
Preferences of three legislators in a uni-dimensional issue

8a. A possibility group of 3 options

8b. An infinite possibilities group



Let us assume, under the new rules of the game, that the status quo is X_0 in figure 8b.¹¹⁹ The majority rule winning-set - i.e. all the possible bills that can defeat X_0 by a simple majority - is $W(X_0)$. The level of subsidies which will eventually be adopted depends on who has the power to form a bill and to place it on the agenda. In many parliaments this role is in the hands of a committee. If the committee is dominated by legislators who represent farmers, we should expect that the final outcome will be close to X_0^* , as this is the farmers' best option which can gain the support of a majority in the full chamber. If, on the other hand, the committee is dominated by urban-representing legislators, the status quo X_0 is likely to remain in force, since this is the city dwellers' best option which can gain the support of a majority.

It is not unrealistic to assume that committees will be dominated by members who have strong stakes in the issues assigned to them. In the American context, for example, members are assigned to committees on the basis of self-selection, and their leading consideration is to serve in committees which deals with issues relevant to their constituencies. In a slightly different way this applies also to systems with no

¹¹⁹ The example was taken, with several modifications, from Weingast & Moran [1983], pp. 773-774.

district representation such as Israel's Knesset. In this case legislators may represent national interest-groups or specific lobbies, and by being members of the relevant committee they will try to maximize their influence on the relevant issues.

Deriving from this description are two main considerations as to why it is in the benefit of most legislators to delegate some of their rule-making powers. First, usually the winning-set (over the status quo) is not an empty group, even when there is a single-peaked preference order over one-dimension issues among all legislators. It will be so only if the status quo is the most preferred option of the median legislator. However, this is not likely to happen, because of the committee structure (the tendency of members with strong views on the issue to join the relevant committee), and the discrepancy between the distribution of views in the committee and in the full chamber. In other words, almost every arrangement is subject to amendment if it is put on the agenda of the legislature. In order to prevent such an on-going amendment process, which is costly and unstable, some delegation would be preferred by legislators. Second, and more important, legislators who are not members of the relevant committee will be afraid to give too much power to a committee that can manipulate them to support the least desirable arrangement which is better than the status quo from their point of view. In order to prevent committees from having too much influence on the final outcome, legislators would prefer to delegate some of these powers to an outside body.

The description of committees as comprising interest-group representatives or members with strong stakes might be less suitable for the British Parliament. This is another factor which can explain the smaller need in Britain for delegation of legislative powers. This, in turn, can explain the more limited rule-making role of administrative agencies and courts.

We have specified two main reasons why legislators will prefer to delegate some of their legislative power under circumstances involving committees and single-dimensional issues. How does this description bear on the identity of the delegatee? Delegation to an administrative agency, or to the executive, helps to solve the first problem mentioned above (the lack of stability), but is less effective with regard to the second problem (too much power to committees). Delegation of this kind normally requires some monitoring and control, which often finds its way to the relevant committee (it is unfeasible to assign this task to the legislature as a whole). Thus the excessive influential power of committees does not disappear with

the delegation;¹²⁰ on the contrary, the committee continues to hold a key position, while the full chamber is even more excluded. Delegation to independent courts is a different story: structurally independent courts are less biased, they do not need close monitoring, and delegating to them does not provide an additional advantage to committees. Thus in many issues this will be the preferred type of delegation. The same reasoning can be extended to include multi-dimensional issues analysis as well.

The question of delegation to the courts can be approached also from another point of view. Under the assumption that delegation of some legislative power to the executive or administrative agencies will be always necessary (due to the traditional reasons of delegation of powers and the fact that courts are not capable of fulfilling this task single-handed), the question is what will be the effect of independent courts exercising judicial review on the administration and agencies. In their study on different institutional structures and their influence on the bureaucracy, John Ferejohn and Charles Shipan found, using the analytical framework of the single-dimensional issue, that the introduction of judicial review to a parliamentary model with delegation to administrative agencies results either in leaving the outcome unchanged (compared to the absence of judicial review) or in shifting it towards the parliament's median preference.¹²¹ Similar results were reached when judicial review was introduced to a system of separation of powers between a legislature and an executive (in the form of presidential veto over legislation). Judicial review diminished the impact of the presidential veto and increased the responsiveness of the delegated agency to the legislature's preferences.¹²² The conclusion of this analysis is, again, that it is beneficial for the legislature to maintain independent courts.

5. Conclusion

We began discussing the logic of delegation of legislative powers by mentioning that it is possible to explain delegation as a crude cost-benefit analysis of decision-making costs. I now propose to close a circle and return to that starting-point. All the discussed explanations for delegation, beginning with the decision-

¹²⁰ See also: Weingast & Moran [1983].

¹²¹ Ferejohn & Shipan [1990], pp. 9-12.

¹²² Ibid, pp. 15-17. See also the extension of the model by Spitzer [1990].

making cost analysis, continuing with the political cost-benefit analysis, which occupied most of this section, and ending with the collective decision-making factors, can be combined into one integrated model. This model has many common features with the pioneering work of James Buchanan and Gordon Tullock in the *Calculus of Consent*.¹²³

Buchanan and Tullock discussed the optimal **decision-making rule**, while our concerns are with the institutional structure of government, or, more accurately, with the allocation of decision-making or law-making powers. Nevertheless, the line of thought is similar. Buchanan and Tullock advocate the decision rule which results from the minimization of two types of costs: the internal costs - the decision-making costs themselves; and the external costs - the costs to those who are not taking part in the decision-making. A move from a simple majority rule towards a unanimity decision-making rule increases the former type of costs, while decreasing the latter. Applied to the analysis of delegation of powers, we face a minimization problem which involves the decision-making costs (both pecuniary and political), on the one hand, and the agency costs created by delegation of powers and the identity of the delegatee body, on the other hand.¹²⁴ In general, it can be asserted that a broader delegation decreases the decision-making costs while increasing the agency costs and vice versa. The equilibrium, or rather the minimization, of those two types of costs, in every given institutional and political system, depends upon the sort of issue to be decided or regulated.

From this alternative viewpoint fresh elements are revealed and can be investigated. Thus, we can take all issues which, when delegated to a certain delegatee, are likely to create the same level of agency costs, and examine what will occur with these issues on different levels of decision-making costs. We may well discover that for this group of issues, as the decision-making costs are increasing (due to the need for complex information, the need to decide quickly, the character of the collective decision-making process etc.), there is a likelihood of more delegation of powers, and vice versa. If, on the other hand, we collect all the issues which have the same level of decision-making costs, we can expect to find that as the agency costs are increasing (due to the character of the issue under consideration), there will be less delegation, or delegation to a different body (such as the courts, which may impose relatively low agency costs). This framework is also a good departure

¹²³ Buchanan and Tullock [1962], pp. 68-84.

¹²⁴ See also: Aranson et al. [1982/3], pp. 17-21; McCubbins & Page in McCubbins & Sullivan [1987], pp. 409-410.

point to proceed from a positive to a normative level of analysis - but this departure requires a separate study.

In this chapter I have tried to offer a new route for explaining the independence of the judiciary. It goes part of the way along the Landes-Posner approach, in the sense that it views the legislature as consciously preferring to have an independent judiciary. It also shares, to some extent, Tollison's and Crain's sceptical view of the practice of the doctrine of separation of powers, in the light of its proclaimed tasks. I have argued, as Posner and Landes did, that maintaining an independent judiciary is to the benefit of the legislature. But my direction was more minimalistic; it was not based on Landes' and Posner's problematic assumption regarding the orientation of an independent judiciary as loyal to the original, rather than the current, legislature, a view that is supported neither by empirical findings nor by theoretical proof. According to my suggested description, the existence of an independent judiciary benefits the legislature regardless of its subject of loyalty, be it the original or the current legislature.

A partial empirical confrontation between the two explanations will be offered in the next two chapters. Chapter 7, focusing on judicial decision-making in the English Court of Appeal, will test (in a negative way) the Landes-Posner model. A comparison between judicial decision-making during Governments' first terms in office and Governments' second and third terms, in light of the independence-orientated promotion policy of British Governments, might tell us whether independent judges are indeed loyal to the original legislature - the pivotal assumption on which the Landes and Posner model is constructed. Chapter 8 will try positively to substantiate the delegation explanation for the independence of the judiciary, offered in this chapter.

The essence of this explanation is that the nucleus political decision-making unit, be it an individual legislator or a party, will in various circumstances prefer to delegate its legislative role to outside bodies. This is the result of cold calculations as to the maximization of political support and the chances of re-election. In certain cases these calculations will direct the legislator or party to shift responsibilities to a delegatee body. In other cases the delegation will result from a lack of information as to the preferences of the legislator's or party's constituency and its attitude toward risk. Delegation can also be a solution to problems deriving from the fact that legislation is a collective decision-making process, and primarily a solution to the problem of cycling. I have tried to present, in this context, the advantages and

disadvantages of an independent judiciary over other potential delegates. Although a comprehensive formal framework for this institutional choice was not provided, I hope that the reader is convinced that having a variety of options at the politicians' disposal, which include an independent judiciary, can best serve their interests.

It is worthwhile noting two other important differences between this suggested direction and the Landes-Posner model. My theory is constructed upon less rigid assumptions, not only with regard to the orientation of an independent judiciary, but also with regard to the perception of legislation. Landes and Posner base their model on the capture theory, viewing legislation as a set of contracts between the legislature and specific interest-groups, while the direction offered here is based on a broader view of legislation. Although interest-groups might play a role in this model, legislation does not have to be necessarily a contract between the legislature and one interest-group at the expense of other groups. Thus, this explanation can be integrated also with the pluralist view of legislation and some of its components may even be accommodated with the republican view of legislation.

Related to these minimalist assumptions is the second important difference, which involves the implications of independent courts on the gains and losses of interest-groups vis-à-vis the unorganized general public. Richard Epstein argues, as we indicated in Chapter 4, that an independent judiciary is working on behalf of individuals and against organized interest-groups, as well as against the legislature; Landes and Posner argue the opposite. My analysis does not bring a decisive view to bear on this issue. We have seen why an independent judiciary benefits the legislature, but this does not necessarily have to go along with benefiting interest-groups at the expense of the unorganized public. This last difference has important implications for the normative side of the story, which was not dealt with here and should be left to further examination.

Further examination is required also in order to apply the general framework offered here to provide a comparative analysis of the judiciary across different constitutional structures. Some comparative observations were made, and I believe that they demonstrated the predictive force of the explanation. Many differences between the American and British judiciaries, for example, can be explained using the suggested framework. The more minimalist rule-making role of the English judiciary versus the extensive role of its American counterpart can be attributed to the differences in the legislature's structure and the party system in the two countries. In

Britain individual legislators are far less dependent on their constituencies than their American counterparts. They are, therefore, less exposed to pressures of interest-groups, and more flexible in voting for, or supporting, one arrangement or another according to the choice of their party. This description can be accommodated with our analysis of responsibility-shift and behaviour under conditions of uncertainty with regard to the relations between individual legislators and their constituencies. The importance of these factors, and therefore the extent of delegation, directly correlate to the degree in which the political support for legislators and their re-election are dependent on their legislation record.¹²⁵

Furthermore, in Britain there are far fewer collective decision-making problems, both within Parliament and on the inter-body level, and the structure of committees is different from the American equivalent in a way that diminishes the advantages of a judiciary over administrative agencies or departments of the executive. In the American system the formal process of legislation is shared between several bodies, and the significance of party affiliation within the legislating houses is far less important than in Britain. These differences can relate to our analysis of the collective decision-making process, explaining why the American legislative product is much more general and vague than the British one. This, in turn, gives the courts a rather more important rule-making role. In Chapter 8 I will try to apply the theoretical framework of the delegation of legislative powers more systematically to the Israeli constitutional-political system.

There have been very few attempts so far to combine positive analysis of judicial decision-making with positive analysis of political and bureaucratic decision-making and with analysis of institutional choice.¹²⁶ The model offered here goes in this direction, as although dealing with institutional choice it can shed light on, and inject some interesting insights to, other fields of enquiry, such as positive analysis of judicial decision-making. We can use it to explain, for example, the courts' own attitude towards delegation of legislative powers to other branches or bodies. In American law the 'non-delegation doctrine', which states that the legislature is not entitled to delegate rule-making powers to others, was a very late development.

¹²⁵ See also: Atiyah & Summers [1987]; Atiyah in Katzman [1988], pp. 146 ff. In a way, the shifting-responsibility and the uncertainty explanations operate in Britain on an additional level, which might even be perceived as the primary one in the English system. This is the delegation of powers from the party (or the government, in the case of the ruling party) to individual legislators in moral or conscience issues (*ibid.*, p. 150). These are left to private bills and private member bills, because the government or the party, as a collective body, predict that it will benefit from not taking a clear stand on such issues.

¹²⁶ For one integrated analysis of some of these segments see: Ferejohn & Weingast [1992].

Only in the late Twenties did the Supreme Court lay it down, and it took almost another decade until the doctrine was used by the Court actually to invalidate legislation.¹²⁷ Although the Supreme Court has never abandoned the non-delegation doctrine, it has never re-used it after the New Deal to invalidate legislation, and recent attempts by Chief Justice Rehnquist and other conservative justices to revive the doctrine have so far been unsuccessful. It can be argued that the reluctance of the courts to use this doctrine in order to invalidate wide delegation of legislative powers is at least partly the result of the judges' own conviction that the usage of this doctrine will affect their role and will diminish their legislative power and its legitimacy.¹²⁸ This explanation is even more plausible against the background of the Court's tougher stance on the exercise of other powers - executive and adjudicative - by bodies which were not designated to exercise them, especially the legislature,¹²⁹ as well as its extensive application of other doctrines to scrutinize legislation and regulations.

This chapter opened with a normative statement on the delegation of legislative powers, written by John Locke in 1690. It is interesting that this issue was discussed long before the construction of the modern doctrine of separation of powers and the expression of the need for an independent judiciary. In a way, our discussion in this chapter has turned the tables, using the delegation issue as an explanation for the separation of powers and the independence of the judiciary. In recent years there has not been much theoretical discussion of these two concepts, either from the positive or the normative points of view. I hope that the proposed lines of thought will contribute to the re-discovery of these two important ideas and to their integration into a more comprehensive look at the political system and constitutional law.

¹²⁷ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). This decision was followed by three other invalidating decisions which formed the most significant battle ever between the President / Congress and the Supreme Court- the battle about the New Deal. See: Aranson et al. [1982/3], pp. 7-17; Yasky [1989], pp. 433-437.

¹²⁸ Along these lines see: Sargentich [1987], pp. 429-432; Aranson et al. [1982/3], pp. 55, 63-66.

¹²⁹ See: Krent [1988]; Bruff [1984]; and Pierce [1989].

Book III

Empirical Findings

Chapter Seven

The Judges of the English Court of Appeal: Decision-Making Characteristics and Promotion to the House of Lords

...[S]uppose a future Prime Minister should seek to pack the Bench with judges of his own extreme political colour. Would they be tools in his hand? To that I answer 'No'. Every judge on his appointment discards all politics and all prejudices. You need have no fear. The Judges of England have always in the past - and always will - be vigilant in guarding our freedoms. Someone must be trusted. Let it be the Judges.

Lord Denning¹

Introduction

The aim of this chapter is to examine empirically several aspects of the theoretical discussion put forward in the previous chapters, dealing with the positive analysis of the independence of the judiciary, through the examination of judicial decision-making characteristics of the judges of the English Court of Appeal and their influence on the chances of the judges to be promoted to the House of Lords. I will not pretend to offer here a comprehensive test or verification of the models scrutinized; instead, the chapter will focus on two main elements of the discussion so far.

The first involves the general common features of the 'revisionist' economic analysis explanation, as opposed to the traditional, 'obstacles', explanation, for the independence of the judiciary. Using the terminology of this thesis, I refer to the phenomenon of the independence of the judiciary - the gap between structural and substantive independence. I will try to show, along the lines of the Posner-Landes model as well as my own theory, that we have an independent judiciary because it is in the interests of the government of the day to maintain such an institution. This will be done by examining to what extent the loyalty of a judge to the current Government influences his chances of promotion. If we find that British Governments promote judges who decide against them, or that they simply do not take into account the 'loyalty' of judges in their promotion policy, that will imply, under the general premises of the economic approach, a refutation of the traditional model which views an independent judiciary as a check and balance mechanism, or as working against the interests of political power holders.

¹ Lord Denning, *Misuse of Power*. The Richard Dimbelby Lecture, 1980, p. 19.

The second theme of this chapter has bearing on the challenge, within the 'revisionist' approach, which this thesis offers to the Landes-Posner model. It involves an examination of the pivotal assumption on which the Landes-Posner model of the independence of the judiciary is based. I will try to examine whether independent judges are really loyal to the **enacting** legislature. This will be done by comparing judicial 'loyalty' to Governments in their first terms of office with the degree of 'loyalty' to the same Governments in their second and third terms, vis-à-vis promotion decisions. If the Landes-Posner hypothesis is to be verified, we can expect, as will be explained later, that Governments will favour 'disloyal' judges in their first terms in office, but less so in their second and third terms. If our findings do not meet this expectation, the Landes-Posner model is weakened. As a by-product of this empirical study, the chapter will also examine which other factors in judicial decision-making can explain decisions whether to promote judges from the English Court of Appeal to the House of Lords.

Section 1 of the chapter will provide a background introduction on the legal system, the court and the decisions chosen for this study, trying to show why these are good experimental grounds for the aims of this research. **Section 2** will bring general results of the data analyzed in the research. **Section 3** will present a formal model to explain promotions from the Court of Appeal to the House of Lords. **Section 4** will discuss patterns of decision-making after promotion to the House of Lords. It will be followed by a conclusion.

1. Introduction to the Research

1.1 The Chosen Test Case: the English Legal System, the English Judiciary and the Doctrine of Separation of Powers

Although the modern version of the doctrine of separation of powers finds its roots in seventeenth-century England, with the struggle between King, Lords and Commons and its later misrepresentation by Montesquieu,² England, in fact, has never enjoyed a real separation of powers. English history is not lacking, and can actually be characterized by, struggles between powers, but these never culminated in a separation of powers such as the American or French. The history of the English

² See our discussion in Chapter 3, section 1.

judiciary and its independence is a different story. It begins long before the modern appearance of the doctrine of separation of powers and only later interlocks with it.³

The legal system in Anglo-Saxon England was decentralized and based primarily on local customary law and courts. This was changed with the Norman conquest in the eleventh century. From then onwards the judiciary can be identified as an 'arm' of the Crown. The Norman kings, in order to tighten their control, adopted a policy of centralized government. Instead of ruling through local magnates they developed a method of ruling by delegates whose base was the King's court in London. The judiciary was part of this system, and local trials were held by judges who came down from London (sometimes with the assistance of a local jury). The seeds of the notion of judicial independence were sown already then, as the Kings were abroad on military adventures so often that arrangements for the courts to function in their absence had to be made.

The fourteenth and fifteenth centuries witnessed a further consolidation of the centralized system of government, including its judicial branch. The whole of England was ruled and controlled from London and a homogeneous body of law was in process of creation. Courts of first instance (Common Pleas and King's Bench) as well as appeal courts (first the Chancery and the Exchequer and later the Star Chamber and the Privy Council) were established in the capital, though they were not pure judicial bodies and were not operated by full-time judges. The people who carried out judicial duties, the 'judges', were servants of the king; they performed administrative tasks as well as judicial tasks. There was no separation between powers in government.

The sixteenth century was significant as far as the independence of the judiciary was concerned. As the law became more and more complicated, this period saw a constant process of judicial specialization.⁴ Thus, judicial posts became manned by professional law experts, and a legal profession, which included solicitors and attorneys (i.e. barristers), emerged and gradually developed into an exclusive guild. The perception of a judiciary as a separate branch of government originated neither from a structural division or struggle of powers, nor from the implementation of one political theory or another; it originated from a spontaneous

³ For an historical survey of the independence of the English judiciary see: Holdworth [1956], especially Book 10; Shapiro [1977] & [1981], pp. 70-125.

⁴ See: Shapiro [1977], pp. 609-616.

process of professional specialization. Similar developments did not take place on the Continent, mainly because the law there was an academic discipline based not on judicial decisions and special procedures known only to those who practice them, but upon codes and enacted legislation. In a sense, the independence of the judiciary in England developed as a result of the fact that judges were increasingly linked to the emerging legal profession and less and less to the government. Having said this, the judiciary continued to remain an arm of the Crown, an important fact for the coming events.

The clash between King and Parliament, which erupted in the seventeenth century, was strongly related to the judiciary, though the judiciary was not the main concern of either side.⁵ One reason for this struggle was the extensive use of the courts by the Crown to conduct its financial policy. In order to raise money (or, rather, enrich themselves), and trying to avoid the need to approach Parliament to request legislation for new taxes, the Stuarts, using the courts, initiated legal proceedings to claim money from their subjects. Being the kings' clerks or servants, removable by them 'during pleasure', the judges quite naturally decided in favour of the Crown. Parliament was furious that its powers were being exercised by the courts. This anger and frustration were even greater because of the *Bonham* decision of Coke J. from 1610, which stated that the Common Law is superior to Parliament legislation (this was the accepted view of the Common Law until 1701).⁶ The subjects, of course, were aggravated by the results of the courts' rulings. These were some of the reasons for the eruption of the English civil war.

The civil war brought about a more balanced division between the ruling powers, but it did not contribute much to the independence of the judiciary as a separate power of government; quite the contrary. In the short run the war caused a split in the legal profession between most judges, who were loyal to the King, and the lawyers, most of whom were loyal to Parliament. In the long run, the judiciary (as the executive) was released from the control of the King just to find itself subordinated to the control of Parliament. The judiciary did not benefit from the results of the civil war in terms of new political thinking either. The debate emerging from the war on the best structure of government included elements of separation of powers, but in most cases it related only to the legislative and the executive

⁵ See: Shetreet [1976], pp. 2-9; Vile [1967], pp. 25-52; Abel-Smith & Stevens [1967], pp. 8-9; Shapiro [1981], pp. 96-100.

⁶ See: Shapiro [1981], p. 100. It is possible that had this decision remained in force, the courts would have emerged as an equal ruling power alongside Parliament, and England would have had 'real' separation of powers.

branches, discussing the desirable relations between King and Parliament, and ignoring the need for a judiciary as a separate branch.⁷

Despite these developments, the eighteenth century saw the revival of judicial independence. The guild of the legal profession increased its powers and its exclusive standing. The relations between this guild and the judiciary became closer, and the cumulative complication of the Common Law contributed to the increase in the powers of the courts despite their recent subordination to Parliament. On the other hand, as the King grew weaker and the cabinet emerged, judges also ceased to participate in, and to be directly linked to, the executive branch. To these developments one should add the 1701 *Act of Settlement* and its improvements in 1760 and in 1799, which provided security of judicial tenure during 'good behaviour', subject only to removal by the Crown upon the address of both Houses of Parliament, and protection of judicial salaries and pensions.⁸ Although this legislation resulted neither from the development of the doctrine of separation of powers, nor from the recognition of the need for a judiciary as a separate branch of government, it contributed to the independence of the judiciary and its emergence as a separate power.

In the course of the eighteenth century more and more political philosophers acknowledged the existence of the judiciary as a distinct branch of government. Treatment of the judicial branch became an integral part of the writings of political theorists confronting different structural models of government - separation of powers, mixed government and balanced constitution.⁹ It was then that attacks on the judiciary were also beginning to appear, the most significant of which was Jeremy Bentham's. Bentham, who did not believe in the doctrine of separation of powers, wrote a fierce criticism on the English Common Law and the legal profession. He claimed that the judges were deliberately complicating the law in order to serve their own interests and increase their importance. He called for a simplification of the law by replacing Common Law with parliamentary legislation (to be guided by his basic normative principle of maximum happiness to the greatest number of people).¹⁰

⁷ On this debate, and especially on the emergence of the theory of the Balanced Constitution, see: Vile [1967], pp. 47-75.

⁸ See: Shetreet [1976], pp. 10-15, 85 ff.

⁹ Blackstone is considered as the first scholar to include an elaborate analysis of the roles of the judiciary when discussing the doctrine of separation of powers. See: Vile [1967], p. 102.

¹⁰ See extracts from Bentham's *The Limits of Jurisprudence Defined* in: Morris [1985], pp. 274-288.

This attack, together with a democratization movement that advocated improvements in parliamentary representation (a campaign that achieved significant reforms in 1832), brought during the nineteenth century some major changes in substantive law and in the legal and judicial process.¹¹ These reforms increased the powers of the more representative Parliament at the expense of the powers of the judiciary and its independence. The 'mastery' over judges that was gained from the Crown two centuries before was at last asserted by Parliament. At the same period we can also note an extensive involvement of judges in politics and increasing partisan considerations in appointments and promotions, which ended only in 1873 with the enactment of the *Supreme Court of Judicature Act*. The combination of these two factors resulted in a significant erosion of judicial independence during the course of the nineteenth century.¹²

The current structure of the British government was stabilized around the end of the nineteenth century. This structure can be characterized by a **lack** of separation of powers.¹³ All the ruling powers are vested in the hands of Parliament. Although, formally, there are separate executive and judicial branches, in practice there is no such division. The power of the Government is derived from Parliament, and due to this fact (and the political parties' structure), after receiving its confidence the Government can almost always manipulate Parliament to approve its policies and to legislate in accordance with them. In the absence of a written constitution, the judiciary as an institution is subordinate to Parliament (and thus to the Government), and cannot review its legislation (with the partial exception of legislation contravening the EEC treaties).

The current structure of the English judiciary is based more or less on the structure laid down in the 1873 *Judicature Act*, which established the Court of Appeal, and the 1876 *Appellate Jurisdiction Act* (for details see below).¹⁴ One can nevertheless point to significant changes with regard to the nature of the judiciary which have occurred since. The beginning of this century saw less political

¹¹ See: Shapiro [1977], pp. 627-631; Abel-Smith & Stevens [1967], chs. 2&3.

¹² See: Arthurs [1985], ch. 5; Shetreet [1976], pp. 14-15; Shapiro [1981], pp. 104-108.

¹³ See: Marshall [1971], p. 97; Atiyah in Katzman [1988], pp. 129-158.

¹⁴ On the history of this legislation see: Abel-Smith & Stevens [1967], pp. 47-52.

appointments, greater self-restraint of judges, especially with respect to involvement in political issues, and the development of the doctrine of *Stare Decisis*, all of which contributed to the increase in the impartiality and independence of the judiciary.¹⁵

The emergence of the welfare state in the course of this century brought a flux of delegated legislation by the Government, as well as the establishment of administrative tribunals. This caused a further shift of powers from Parliament to the Government and a decline in the powers of the judiciary. At least since World War Two administrators have been making more law than legislators and resolving more legal disputes than judges.¹⁶ The judiciary was late to respond to these changes. Only in the Sixties do we witness some response, with an increasing willingness to widen the scope of judicial review of the administration. Even this late development did not suffice to impress many scholars. From an American perspective Martin Shapiro, for example, after analyzing the leading administrative law cases of the last decades, concludes that the reputation of the English judiciary as the most independent judiciary in the world is unjustified. The judiciary, he argues, only occasionally intervenes against the most patently illegal conduct of local authorities, and exercises even less supervision over the massive discretionary powers of central government. Shapiro describes twentieth-century English judiciary as returning to the pre-seventeenth century status - a loyal servant of the Crown; the only difference is that the role of the Crown is now performed by the Government and not by the King or Queen.¹⁷

To summarize this brief historical survey of the British constitution and the doctrine of separation of powers, it might be worthwhile to dwell on two main points. In general, it can be said that the British system of government has rejected almost completely the doctrine of separation of powers as its desirable structural principle. Although in several periods in the past we observed in England some division between different ruling powers (mainly between King and Parliament), since the end of the nineteenth century the British government is characterized by a lack of such division. The feasibility of the system, or according to some views its success, has been attributed by several scholars to the two-party system and, perhaps more importantly, to the traditional self-restraint of the key power holders in the

¹⁵ See: Abel-Smith & Stevens [1967], ch. 5; Bell [1983], p. 4.

¹⁶ See: Shapiro [1977], pp. 633-634; Arthurs [1985], pp. 139-148.

¹⁷ Shapiro [1981], pp. 112-124 & [1977], pp. 627-651.

government. It was already in 1682 that William Penn cast doubt on constitutional theories, claiming that the quality of government is dependant solely upon the quality of the people who run it.¹⁸

As to the judiciary and the doctrine of separation of powers, it seems that the main conclusion from our historical survey is that the emergence of the judiciary as an (at least partly) separate and independent branch of government is not the result of one theory of government or another. It is the result of a historically persistent desire for a centralized governmental control, on the one hand, and a process of professional specialization on the other hand. The constant attempts (since the Norman conquest of England) to maintain political centralization resulted, among other things, in a centralized judiciary. This enabled the judiciary to emerge as a distinct power. Its actual separation and, to some degree, independence were more a product of the pattern in which English law has been developing, primarily through the Common Law. This pattern required the professional specialization of the judiciary which detached it from the other powers of government.

Precisely because of these historical developments, which resulted in the lack of a rigid separation of powers and a written constitution, it seems that the British system of government is a good empirical ground for our economic analysis. My specific interest in the judiciary, and especially in the question 'why is there **now** an independent judiciary?', becomes more interesting in a system in which this independence is not structured from above (through a written constitution). The arena of the analysis is not historical (as it would have been, for example, in the American system); it ought to focus on the political powers of the present. We should not be asking why did the framers of the constitution create a separate and independent judicial branch of government; we ought to ask why does Parliament (or, more accurately, Parliament and Government), to whom the judiciary is firmly subordinated, maintain the judiciary as a separate and to some degree independent branch.

1.2 The Court Chosen for the Study - the English Court of Appeal

I chose to focus, in the English part of the empirical section, on the judges of the Court of Appeal - the Lord Justices of Appeal - and examine the pattern of their

¹⁸ See: Vile [1967], pp. 223, 298. For a more recent analysis of the British Government in the context of the doctrine of separation of powers see: Atiyah in Katzman [1988], p. 150.

possible promotion to the House of Lords. In the next few paragraphs I will try to show why the Court of Appeal seems to provide good research material for our purpose.

As specified above, the bases for the current structure of the English judiciary were laid down in the *Judicature Act 1873*, which established the Court of Appeal, and the *Appellate Jurisdiction Act 1876*. Some additions and modifications to this structure have been introduced in the course of this century, like extending the County Courts' jurisdiction, reorganizing the High Court divisions, and lately, in 1971, the establishment of the Crown Courts.¹⁹ Currently, the Supreme Court of England and Wales consists of the Crown Courts, the High Court of Justice and the Court of Appeal.²⁰ The highest judicial instance is the Judicial Committee of the House of Lords, which hears appeals from the Court of Appeal (and in special cases directly from the High Court²¹) and from the equivalent Scottish and North Irish courts.

The English judiciary can be divided into first-tier and second-tier judges. The second-tier judges - the magistrates, justices of peace, recorders, County Court and some Crown Court judges - enjoy hardly any structural independence, as they are appointed by the Lord Chancellor (or by the Queen at the advice of the Lord Chancellor) and are subject to be removed by him.²² Among the first-tier judges the High Court judges are appointed by the Queen on the advice of the Lord Chancellor; the Court of Appeal and the House of Lords judges, and the heads of divisions in the High Court, are appointed by the Queen on the advice of the Prime Minister after consultation with the Lord Chancellor. All the candidates for the High Court and the Court of Appeal have to have a right of audience in relation to all proceedings in the High Court for at least ten years, or, for the High Court, to have been Circuit judges for at least two years.²³ All the Supreme Court judges have tenure during good

¹⁹ On the structure of the English courts see: Smith & Bailey [1984], pp. 27-91.

²⁰ As regulated today by the *Supreme Court Act 1981*,

²¹ 'Leapfrog' in common jargon. See: *Administration of Justice Act 1969*, s. 12.

²² *Courts Act 1971*, ss. 17, 20; *Justices of Peace Act 1979*, ss. 5, 6. For more details see: Alder [1989], pp. 267-274; Shetreet [1976], pp. 19 ff.

²³ *Courts and Legal Services Act 1990*, s. 71. Until 1990 the provision in force (which was relevant to the judges included in our study) - section 10 of the *Supreme Court Act 1981* - held that all candidates have to be practising barristers for at least ten years (for the High Court) or fifteen years (for the Court of Appeal). Since the right of audience in the High Court has not been significantly broadened, the practical implications of the change are insignificant. However, the change will have an automatic effect with the extension of the right of audience. In the present situation, therefore, there is a very limited pool for candidates to the Supreme Court. Indeed, calls have been made for a change in the law which will enable also

behaviour, subject to removal only by the Queen on the address of both Houses of Parliament. Their salaries are determined by the Lord Chancellor with the concurrence of the minister for the Civil Service, but cannot be reduced.²⁴ Some of these arrangements date back to the 1701 *Act of Settlement*.

The British texts that I came across assert, confidently, that the English judiciary today is separated from the other branches of government, and that judicial independence does indeed exist.²⁵ However, in light of the appointments and promotions, salaries and tenure arrangements specified above, this conclusion is somewhat problematic and it is still questionable whether the current setting concerning the judiciary is sufficient to facilitate structural judicial independence.²⁶ Be that as it may, as we concluded in the previous section, due to the present structure of powers, the lack of a rigid constitution and the doctrine of the sovereignty of Parliament, the life and death of the current independence of the judiciary (assuming that it does exist) is in the hands of the present Parliament. The current arrangements can be changed from one day to the next.²⁷ Furthermore, because of the unique parliamentary and party structure according to which the Government (i.e. the executive) has an almost full control of Parliament, the status of the judiciary is even more fragile. In this context our queries as to judicial independence can be formed into the question - why does Parliament maintain an independent judiciary?

solicitors and academic lawyers to be appointed to the Supreme Court. See, for example, *Justice*: [1972] & [1992]. Recently (1989) the Lord Chancellor published a green paper in which, among other reforms, he calls for a change in the pool of those eligible to be appointed to superior judicial positions. See: Lord Chancellor's Department [1989].

²⁴ *The Supreme Court Act 1981*, ss. 10-12; *Courts Act 1971*, s. 18. But see on the dissatisfaction with the arrangement concerning judges' salaries: Pannick [1987], pp. 13-14. It is noteworthy that until 1973 Parliament was involved in fixing judges' salaries, which were to be determined by an Order in Council and approved by both Houses of Parliament.

²⁵ See, for example: de Smith [1989], pp. 368-381; Wade & Bradley [1985], pp. 47-59, 332-342; Marshall [1971], pp. 103-104. With regard to similar convictions Leonard Woolf wrote as early as 1928:

The complete separation of executive and judicial functions is believed by all patriotic Britons to be part of their birthright, a mark of our own political integrity and sagacity, one of those beauties in the British Constitution which makes it a liberal education ever to have been born an Englishman... Whether at any period of our history such a separation has ever existed, is extremely doubtful... (taken from Jowell [1988], p. 414).

²⁶ Some writers, although dissatisfied with one aspect of the arrangement or another, conclude that the English judiciary is after all an independent one. See, for example: Browne-Wilkinson [1983] who discusses the problems of the administration of the courts and judicial independence; Hartley & Griffith [1981], p. 180, and Harlow [1986], p. 190, who discuss the procedures for judicial appointments. See also: Shetreet [1976], pp. 33-45, 87-162.

²⁷ Conventions, or the unwritten constitution, might make such an event unlikely, but it is formally possible. See: Marshall [1984]; Wilberforce [1979]; Diplock [1974]. Also, the sovereignty of the British Parliament is qualified now by the EEC treaties.

In this chapter, however, we will try to narrow and focus the question regarding the independence of the English judiciary even further. One of the weakest features with regard to the independence of the English superior court judges is the procedure for their appointments and promotions. This procedure was described by one observer as the most significant political input into the judicial system,²⁸ and recently the chairman of the Bar, Lord Williams, described it as "bizarre and farcical" and "damaged and flawed by pointless secrecy"²⁹ Appointments and promotions are left, in practice, solely in the hands of the Lord Chancellor (with the possible intervention of the Prime Minister). The Lord Chancellor is a political figure; he is a member of the cabinet, appointed by the Prime Minister as any other political appointment. In fact, he is part of all three branches of government: in addition to being a member of cabinet he presides over the Supreme Court and often hears cases in the House of Lords, and he also serves as the Speaker of the House of Lords in its legislative capacity.³⁰

The fact that a political figure is responsible for the appointment and promotion of judges can have a significant effect on their substantive independence; but this time we are referring to independence or dependence whose object is the Government (the executive) rather than Parliament.³¹ Thus, if we still assume that the judiciary is substantively independent (in the sense that its judgments are not decided according to the wishes of the government), our initial question ought to be re-phrased to: why does **the Government** maintain an independent judiciary? This is a tougher question than the previous one. It would seem much easier for the Government to abolish or curtail judicial independence through appointment and promotion policies, than for Parliament to achieve the same goals by changing substantial and time-honoured constitutional legislation.

This feature, the appointment and promotion procedures, has even more potential effect on judicial independence in the light of the fact that the British judiciary is in effect a career-based judiciary. Lord Denning wrote in 1955 that "Once a man becomes a judge, he has nothing to gain from further promotion and does not

²⁸ Morrison [1973], p. 70.

²⁹ *The Guardian* (24.10.1992).

³⁰ For more details on the Lord Chancellor's roles see: Morrison [1973], pp. 199-216; Atiyah in Katzman [1988], pp. 130-134.

³¹ See: Harlow in Harlow [1986], p. 190; *Justice: the Judiciary* [1972], pp. 29-30; Pannick [1987], p. 66.

seek it".³² Lord Scarman added in 1967 that "A judge does not come to the bench looking for further promotion, judicial office is itself the apex of legal career".³³ But the fact is that Court of Appeal judges are paid more than High Court judges and that Law Lords are paid more than Court of Appeal judges, not only in fiscal terms but also in respect and status. It is only natural, therefore, to wish for these promotions

Indeed, the tradition which has been developed in the second half of this century is that the Lord Justices of Appeal are High Court judges who were promoted to the Court of Appeal, and the Law Lords are Lord Justices of Appeal (or the equivalent Scottish or North Irish judges) who were promoted to the House of Lords. The only exceptions to this course in the last forty years were Lord Wilberforce and Lord Simon, who were promoted directly from the High Court to the House of Lords in 1961 and 1962 respectively (Lord Simon, though, was the President of the Probate, Divorce and Admiralty Division prior to his promotion), and Viscount Dilhorne, who was appointed as a Lord Appeal in Ordinary in 1969 after serving as Lord Chancellor (1962-1964).³⁴

I would not think it is untrue to say, therefore, that although the English judiciary is not career-based in the same way as its Continental parallels, there is a notion of career structure. Once appointed to judicial position it seems natural to aspire to promotion to a higher instance. Excluded from these expectations are the Law Lords, who achieved the position at the top of the ladder; but not the High Court and the Court of Appeal judges. This, and the fact that promotion decisions are made by a member of the Cabinet - the executive branch of government - are the reasons which brought me to think that it would be interesting to conduct an empirical study on the English Court of Appeal.

It is surprising that despite the Court of Appeal's highly significant role within the English legal system, (the House of Lords hears only very few cases every year; in fact, no more than 50 cases, of which about one quarter do not come from English

³² Denning [1955], p. 17.

³³ Scarman [1967], p. 3.

³⁴ It might be worthwhile to mention the earlier exceptions of Lord Radcliffe and Lord Reid who were appointed in 1949 to the House of Lords directly from the Bar (Lord Reid from the Scottish Bar), Lord Simonds in 1944 and Lord Uthwatt in 1946 who were promoted to the House of Lords directly from the High Court, and Lord Justice Somervell who was appointed in 1946 to the Court of Appeal directly from the Bar.

courts.³⁵ The Court of Appeal hears more than one thousand appeals a year, from the High Court, inferior courts and a large number of administrative tribunals.³⁶ Its decisions are binding on all courts of first instance and on the Court of Appeal itself.³⁷ very little has been written on the Court of Appeal and its work.³⁸ This can serve as an additional incentive to focus in this chapter on data from the Court of Appeal.

How does the Lord Chancellor decide on appointments and promotions? Shimon Shetreet, based on interviews conducted in 1972, lists five types of considerations which are taken on board in this decision-making process:³⁹ *moral considerations*, including an inquiry into the candidate's personal behaviour, marriage problems, and (un)professional conduct; *the general views of the candidate* - any extreme (judicial or non-judicial) views will be likely to disqualify the candidate; *personal character* - temper and manners; *administrative considerations*, such as health and age; and last but not least - *political considerations* - including previous political experience and political affiliation. Shetreet writes that political considerations dominated the Lord Chancellor's discretion until the Forties of this century (and until the Seventies in Scotland), and they still play a certain role in more recent years.

Sharing Shetreet's conclusions, Louis Blom-Cooper and Gavin Drewry bring in their study on the House of Lords statistical data to show the decreasing role (over the years) of the political factor in the Law Lords' appointments. But their study concentrates on political experience, and hardly examines the role played by the candidate's political affiliation and views.⁴⁰ Robert Stevens, while acknowledging the existence of different policies of appointment and promotion among different Lord

³⁵ In 1988, for example, the House of Lords heard only 38 cases including Scottish and Irish appeals. In 1986 and 1987 the numbers were 23 and 26 respectively. For 1952-1968 and some earlier years' statistics see: Blom-Cooper and Drewry [1972], pp. 43, 186, 438-496.

³⁶ As from 1966 the Court of Appeal hears also criminal appeals, according to *Criminal Appeal Act 1966*. Nevertheless, the current annual number of civil appeals alone exceeds a thousand.

³⁷ See: Zander [1980], pp. 113-123; Lord Denning's Foreword to the microfiche edition of the Court of Appeal Transcripts 1951-1980 [1986], p. 3.

³⁸ The only works on the Court of Appeal which I came across (beside several paragraphs in general textbooks) were not up to date. They include: Evershed [1950]; Asquith [1951]; Cohen [1951]; Eddey [1972].

³⁹ Shetreet [1976], pp. 61-84.

⁴⁰ Blom-Cooper and Drewry [1972], pp. 168-169.

Chancellors, argues that as a whole the decisions are not made on political grounds.⁴¹ Thus, for example, with regard to promotions to the House of Lords in the period he dubs 'substantive formalism' (1940-1955) he concludes that "professional competence, especially competence in the Court of Appeal, was the standard for promotion. Luck and connections did, however, help".⁴²

One of the former Lord Chancellors - Lord Hailsham - admits that political appointments were the practice until 1914 and "even between the wars some of the appointments were far from being above suspicion". According to Hailsham political considerations are still common in appointments of lay magistrates, but with regard to higher judges he assures us, from his own experience, that: "either I made the appointment myself without regard to politics, or the Prime Minister, in the cases when the appointment is his, occasionally acted on my recommendation".⁴³

In 1986 the Lord Chancellor published an official document which deals with judicial appointments. This document specifies the procedure according to which the Lord Chancellor's decisions are reached. Two other officials are reported to be involved in this procedure - the Permanent Secretary and the Deputy Secretary. Other judges of the Supreme Court are usually consulted. There are no applications for nomination or promotion; the appointments and promotions are by invitation. As to the considerations behind the decisions the document provides this laconic account:

The Lord Chancellor's policy is to appoint to every judicial post the candidate who appears to him to be the best qualified to fit it and perform its duties, regardless of party, sex, religion or ethnic origin. Professional ability, experience, standing and integrity alone are the criteria, with the requirement that the candidate must be physically capable of carrying out the duty of the post, and not disqualified by any personal unsuitability.

The overriding consideration in the Lord Chancellor's approach is always the public interest in maintaining the quality of the bench and confidence in its competence and independence. In any conflict this consideration has to take precedence over all else.⁴⁴

⁴¹ Stevens [1978], pp. 354-359.

⁴² Ibid, p. 357.

⁴³ Hailsham [1978], p. 4.

⁴⁴ *Judicial Appointments* [1986], p. 1. A slightly different picture of two lists which are kept in the Lord Chancellor's office - of those who are likely to become High Court judges and those 'who pick their noses' and were thought unsuitable - is reported by Lord Williams, the chairman of the Bar (*the Guardian* 24.10.92).

The following sections of this chapter will examine, using Court of Appeal decision-making statistics, this policy statement, as well as the conclusions of the aforementioned scholars about promotion of Court of Appeal judges to the House of Lords. I will attempt to link this test to the positive analysis of the independence of the judiciary.

1.3 The Period Chosen for the Research

This empirical study of the Court of Appeal will refer to the period 1951-1986. These thirty-six years were chosen for several simple reasons. First, as we are dealing with statistical analysis, I wanted the database to include all relevant decisions, without selection bias or suspected selection bias. Until 1951 no shorthand notes of Court of Appeal judgments were taken, unless a shorthand writer was instructed by the parties. It is true that some of the decisions were reported in the various series of law reports, but we cannot rely on these reported judgments to be a representative sample of all the decisions of the Court of Appeal.⁴⁵

Only in 1951 was a systematic recording of Court of Appeal (civil⁴⁶) judgements introduced. A direction issued by the Lord Chancellor - Lord Jewitt - stated that "An official note of all judgments in the Court of Appeal shall be made by the Association of Official Shorthandwriters. One copy of the transcript will be filed in the Bar Library, where it will be indexed, and one copy sent to the Court from which the appeal lies".⁴⁷ In 1978, following the establishment of the Supreme Court Library in the newly opened Queen's Building, the Court of Appeal transcripts were moved to this library and have been collected and kept there since.⁴⁸ These transcripts of the Civil Division of the Court of Appeal decisions were the source for our database. It should be noted that a similar system of transcribed criminal appeals has not been introduced, and these decisions, therefore, were not included in the present research.

⁴⁵ In fact, for the last 50 years a steady number of 175-250 Court of Appeal decisions has been annually (fully) reported. This number has not changed despite the significant increase, over this period, in the number of decisions given by the Court (124% increase from 1955 to 1980). Thus, today less than 20% of the Court of Appeal's decisions are being reported. These figures were taken from *The Court of Appeal Transcripts* [1986], p. 19.

⁴⁶ At that time the Court of Appeal did not have criminal jurisdiction.

⁴⁷ 95 *Solicitor Journal* (1951) 266.

⁴⁸ The 1951-1980 transcripts were microfiched and are now more widely available. All the post-1981 transcripts are available on the computerized Lexis system.

Going through the transcripts I discovered that, surprisingly, Lord Jewitt's direction was not fully complied with and not **all** decisions of the Court of Appeal since 1951 have been preserved and recorded. The initial suspicion emerged when a sharp increase was noticed in the number of transcribed decisions from the early Eighties. This suspicion was confirmed when the number of transcripts in every year was compared to the official judicial statistics published annually by the Lord Chancellor's department. This comparison is presented in Table 1 below.

Table 1
*Number of cases and decisions in the Court of Appeal 1955-1985 **

Year	no. of transcripts	no. of cases deposited of	no. of decisions**	ratio of transcripts to decisions (%)
1955	437	661	511	86
1960	430	718	515	83
1965	445	698	515	86
1970	624	1022	715	87
1975	771	1252	876	82
1980	976	1527	1016	96
1985	1200	1548	1200	100

* Sources: Judicial Statistics in the relevant years (published by the Lord Chancellor's department) and The Court of Appeal Transcripts [1986], p. 19.
** The difference between the number of cases deposited of (third column) and the number of decisions (fourth column) is the number of withdrawn appeals or other appeals in which a full decision of the Court was not required.

It seems that most of the decisions which have not been transcribed are interlocutory decisions. Since in recent years most of these interlocutory decisions are transcribed, and in order not to bias our database, I will ignore these decisions altogether in most of the statistical reports.

Returning to the period chosen for our data from the Court of Appeal, as explained, I could not go earlier than 1951; I chose to go as far as 1951 in order to have a large enough sample and to enable future verification of some of the findings by using official documents from the Lord Chancellor's department regarding the promotion of judges. These documents are revealed to the general public thirty years after the date in which they were created.⁴⁹ The database ends in 1986 because this was the year in which the most recent promotion from the Court of

⁴⁹ Some work has already been done on the basis of these documents from the Lord Chancellor's department. See: Stevens [1988].

Appeal to the House of Lords took place prior to 1991 (for details see Appendix 3), and the data regarding the more recently appointed Lord Justices of Appeal is not sufficient for statistical purposes. The research, therefore, covers the period between 1951 and 1986.

The 36 years covered in this research saw 24 years of Conservative rule and 12 years of Labour rule, with seven different Lord Chancellors. Table 2 below provides a more detailed account of this political map.

Table 2
Parties and Lord Chancellors in government 1945-1986

Period	Government	Lord Chancellor
1945-1951	Labour	Lord Jewitt
1951-1954	Conservative	Lord Simons
1954-1959	Conservative	Viscount Kilmuir
1959-1962	Conservative	Viscount Kilmuir
1962-1964	Conservative	Viscount Dilhorne
1964-1970	Labour	Lord Gardiner
1970-1974	Conservative	Lord Hailsham
1974-1979	Labour	Elwyn Jones
1979-1983	Conservative	Lord Hailsham
1983-1987	Conservative	Lord Hailsham

1.4 The Judges Included in the Research

The Court of Appeal, over the period of the research, almost tripled its size. It includes ex-officio judges: the Lord Chancellor (who hardly ever sits in the Court of Appeal), the Lord Chief Justice (who hears mainly criminal appeals), the Master of the Rolls (who in practice presides over the Court), the President of the Family Division and the Vice Chancellor. At times Lords of Appeal in Ordinary (i.e. Law Lords), High Court judges and retired judges are invited to sit in it. But the major work in the court is carried out by the Lord Justices of Appeal, who are in the focus of our research. Their number increased from nine in the Fifties to 22 in the mid-Eighties, and currently it stands on 27.

Between 1951 and 1986, a total of 86 Lord Justices of Appeal served in the Court of Appeal; 29 of them were promoted to the House of Lords. Table 3 specifies these numbers according to the nominating Governments. A full list of the judges is provided in Appendix 3. In most of the statistical analyses below I will regard as

promoted also those Lord Justices of Appeal who were appointed as Lord Chief Justice or Master of The Rolls (without being promoted to the House of Lords), as these two positions are deemed to be in the same status as Law Lords. There are three such cases.⁵⁰

Table 3
*The number of Lord Justices of Appeal 1951-1986 and the nominating Government **

No. of judges who served in the C.A 1951-1986 (Other judges who served in the H.L but not in the C.A during this period)	86 (21)
No. of judges promoted to the C.A by a Conservative govt. -----	57
No. of judges promoted to the C.A by a Labour govt. -----	29
No. of judges serving in the C.A in 1986 -----	23
No. of judges retired or promoted 1951-1986	63
No. of judges who were promoted from the C.A to the H.L -----	29
No. of judges promoted to the H.L by a Conservative govt.	24
No. of judges promoted to the H.L by a Labour govt.	5

* Sources: Walker [1980], pp. 1329-1332; All E.R series.

As the table shows, while Labour and Conservative Governments had equal opportunities to appoint judges to the Court of Appeal, according to their relative periods in power (the Conservatives were in power for two thirds of the relevant period and got to appoint about two thirds of the Lord Justices of Appeal), the same cannot be said with regard to promotions to the House of Lords. In this respect the Conservatives had more 'luck'; they were able to appoint 24 Law Lords, while Labour Governments had the opportunity to appoint only five.⁵¹ (The number of Law Lords was more or less fixed over this period. The only change was in 1968 when a tenth Lord of Appeal in Ordinary was appointed⁵²).

As we shall try to explore the factors affecting the decision whether or not to promote a Court of Appeal judge to the House of Lords through the decision-making characteristics of the individual judges, and especially the connections between

⁵⁰ Lord Parker and Lord Widgery, who were appointed as Lord Chief Justice in 1954 and 1968 respectively, and Lord Donaldson who was appointed as the Master of the Rolls in 1982. Other L.C.J and M.R served in the House of Lords before (e.g. Lord Denning and Lord Lane) or after (e.g. Lord Evershed) holding these positions.

⁵¹ In fact, Labour Governments appointed over this period seven Law Lords, but two of them were Scottish.

⁵² Recently (1992) an eleventh Law Lord was appointed.

'loyalty' to the Government and promotion, it is important, as a preliminary step, to examine whether the explanatory factors for these promotions might lie outside the decision-making records - in the biographical backgrounds of the judges (which are beyond the scope of this research). A brief survey of these biographical backgrounds reveals that they cannot furnish us with this desired explanation; this is due to the fact that the personal profiles of the judges are very homogeneous, indeed almost identical.

In the period of our research the Court of Appeal judges were all white males (only in 1988 was the first woman Justice of Appeal appointed). The vast majority of them attended prestigious universities. Burton Atkins in his comparative study of the American and English judiciaries indicates that 93% of the Lord Justices of Appeal who served in the years 1983-1985 graduated from Oxford or Cambridge.⁵³ Most of the judges, 87% according to Atkins' study, were educated in Public Schools (i.e. private schools). Furthermore, in 1820 only 67% of the English High Court and Appellate judges came from the upper and upper-middle classes, while 14.1% came from the lower-middle and working classes; in 1968 as many as 77% of the judges came from the upper and upper-middle classes and only 9.3% came from the lower-middle and working classes.⁵⁴ Atkins concludes that while the influence of the class structure upon many professions (including politics) has been declining, the judiciary has been immune to this trend; in fact, among the higher English judges there is even an opposite trend.

It seems, therefore, that personal biographies prior to judicial appointment cannot at a first glance, tell us much about predicted chances for promotion from the Court of Appeal to the House of Lords (although they may tell us a great deal about the chance of becoming a high judge in the first place). What about the judicial path, beginning at the first judicial appointment? We mentioned before that in recent decades there has been a typical fixed 'course' for a Supreme Court judge - from the Bar to the High Court, to the Court of Appeal and to the House of Lords (with different finishing lines, of course, for different judges). Some more details about this course are provided in Table 4.

As can be seen, the median age for appointment to the High Court is 52, although we can find judges who were appointed in their early forties (like Hodson at

⁵³ Atkins [1989], pp. 595-596.

⁵⁴ Ibid, p. 602. For similar statistics see: Abel-Smith & Stevens [1967], pp. 299-300.

the age of 42 - the youngest appointed High Court judge, and Devlin at the age of 43) and judges who were appointed in their sixties (like Birkett at the age of 67 and Shaw at the age of 62). The average length of service in the High Court is a little over eight years, and this means that the expected promotion to the Court of Appeal is at the average age of 60, although we find judges who were promoted at a much younger age, like Evershed at the age of 48 and Denning at the age of 49. It is important to note, though, that the youngest judges to be appointed to the High Court are not the youngest judges to be promoted to the Court of Appeal. The period in the Court of Appeal for the judges who are subsequently promoted to the House of Lords is around six years, and the average age at promotion to the House of Lords is 63-64. The average retirement age for all judges is around 72.

Table 4
*Ages of judges at appointment to different courts**

	Age at first judicial appoint.	Age at appoint. to C.A	Age at appoint. to H.L	Age at retirement
All Judges**	51.8 (52)	60.0 (60)	63.4 (63)	71.6 (73)
Judges who were promoted to H.L	50.2 (49.5)	57.4 (57)	63.5 (63)	72.0 (72)
Judges who were not promoted	52.6 (52)	61.3 (61)		71.1 (72.5)
Judges who were promoted to C.A by Tory govt.	51.6 (52)	59.9 (60)	64.1 (65)	71.6 (73)
by Labour govt.	52.1 (52)	60.1 (60)	62.7 (63)	71.4 (72)
Judges who were promoted to H.L by Tory govt.	49.7 (49)	57.3 (57)	63.2 (63)	71.5 (71.5)
by Labour govt.	51.6 (52)	57.8 (58)	64.6 (65)	74.6 (74)

* Sources: Walker [1980], pp. 1329-1332; All E.R. series; Who and Who; National Biographies.

** The figures indicate the average age; the number in brackets refers to the median.

From the table we can conclude that there are no significant differences between the Conservatives' appointment/promotion policies and the those of Labour with regard to the ages of the appointed judges. But what also seems to emerge is that an appointment to the High Court or to the Court of Appeal at a younger age improves the chances of promotion to the House of Lords. There is a difference of around two years in the average age at first judicial appointment between judges who were eventually promoted to the House of Lords and judges who were not promoted. This gap increases to about four years with regard to the age of promotion to the Court of Appeal: the average age at appointment to the Court of

Appeal of judges who were promoted to the House of Lords is around 57, while the general average age of promotion to the Court of Appeal is 60.

However, in a more formal test, which will be presented later, it appears that only the age at promotion to the Court of Appeal and **not** the age at first judicial appointment is a statistically significant explanatory factor for promotion to the House of Lords.⁵⁵ This result coincides with what we concluded before: that the decision whether to promote a Court of Appeal Judge to the House of Lords is based primarily upon the period beginning with the scrutinized judge's first judicial appointment, and not before.

1.5 The Cases Included in the Research

Against the background of the theoretical models of the independence of the judiciary presented earlier the main task that was set for this empirical study is to examine the connections between judges' degree of 'loyalty' to the Government and their chances of being promoted from the Court of Appeal to the House of Lords, where 'loyalty' to the Government is represented by deciding cases according to the Government's will.

The Landes-Posner model, described in Chapter 5, is actually using this measure of loyalty to define 'judicial independence'. A dependent judiciary, according to this model, would decide cases "in conformity with the views of the current rather than the enacting legislature", while an independent judiciary would "interpret and apply legislation in accordance with the original legislative understanding".⁵⁶ Applying this model to the English system of government, in which there is no real separation between the executive and legislature, we can substitute "the legislature" with "the Government" (Landes and Posner do not deal at all with the complications created by the existence of separate executive and legislature, and their model, therefore, seems a-priori to fit Britain better than the U.S). The main theme of their model is that governments prefer an independent judiciary to a dependent one. This was also one of the main elements of my explanation of the independence of the judiciary provided in the previous chapter, an element which differentiates both models from the traditional law and economics

⁵⁵ See: Tables 11 & 12 below.

⁵⁶ Landes & Posner [1975], p. 879.

postulates and from non-law and economics explanations to the independence of the judiciary (see the survey in Chapter 4).

The Government has its own interests in many kinds of legal disputes, probably in all fields of law. But these interests are not easy to detect. It is very possible, for example, that the Government favours a specific side to a private breach of contract or a negligence dispute, not to mention a labour relations dispute; this can be because of individual favouritism or the broader implications of the specific case. Although in some such private law cases it can be easy to identify the side which the Government supports, in most cases this would not be so straightforward. At any rate, the task would require an individual treatment of every case, too tall an order for a study at this scale. This is the reason that I chose to select for this study only the 'public law' decisions of the Civil Division of the Court of Appeal (that is, excluding criminal appeals).

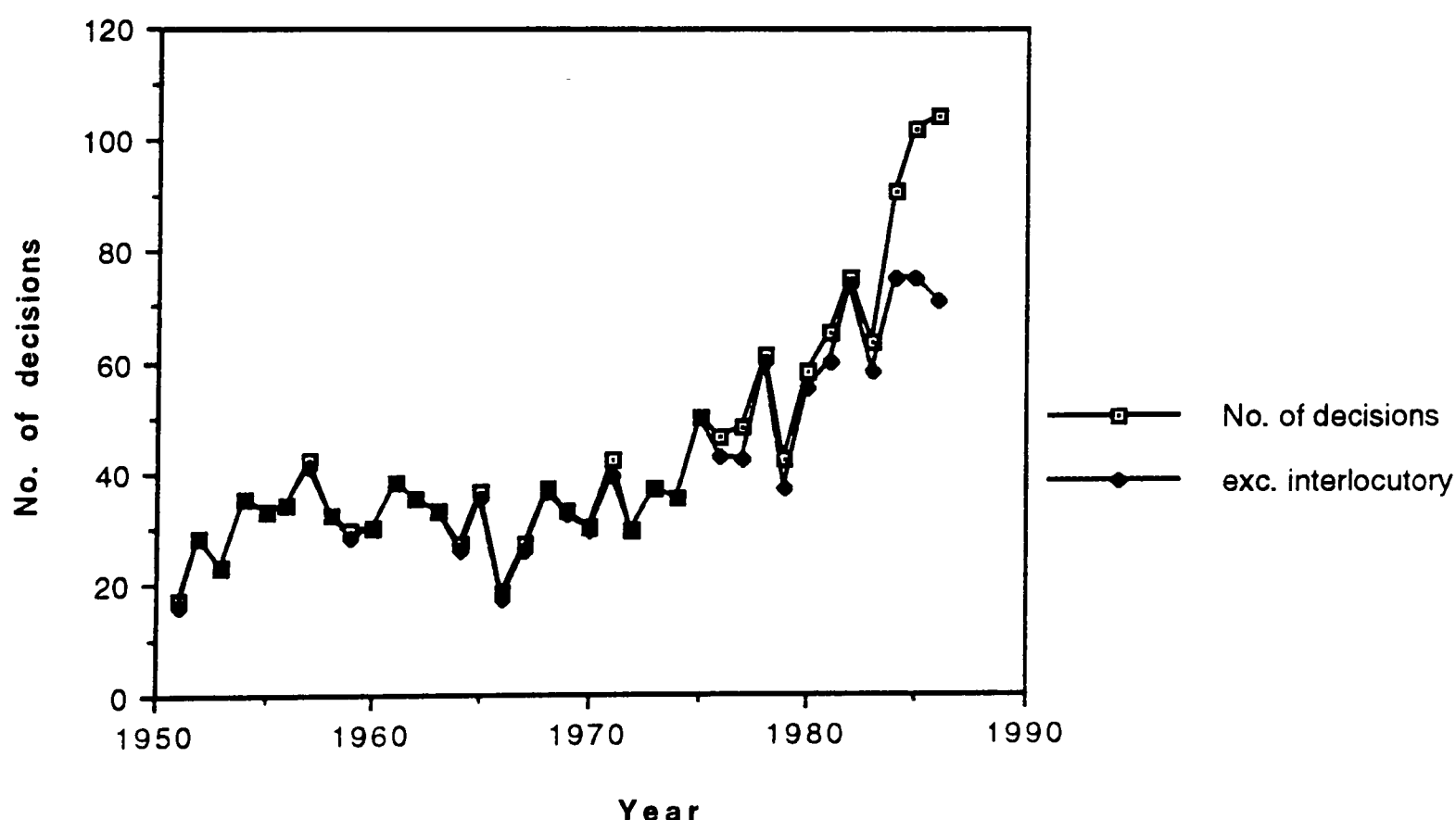
Discussions on the definition and scope of 'public law' have occupied a significant share of legal writings in recent years. We do not need to delve into the controversies around this issue. I use a broad definition of public law which seems suitable for our purposes. Thus, included in it are **all the legal disputes in which the Government is a litigant**. My assumption is that when the Government is a party to a legal dispute it obviously prefers to be on the winning side, and therefore the 'Government's will' or 'deciding according to the Government's will' is quite straightforward to detect. It is probably true that there are exceptions to this rule. One can think, for example, about a decision of a minister which is challenged in the courts after the deciding Government is no longer in power. In this case our crude assumption might not be applicable. But it seems to me that these exceptions are marginal, and as a whole the 'Government's will', when specified in terms of individual cases (in contrast to general terms, i.e. what does the Government want the courts to do), can be represented by 'deciding for the Government'.

The next question to be asked is: how should we define 'the Government'? The answer is again pragmatic, tailored to suit the purposes of the research. It is adapted according to the 'surroundings' of the decision-making process of judicial promotions, namely the top echelons of central government. Thus, I have left out local government and state-owned companies. Neither can be totally identified with the will of the central government; deciding legal disputes in their favour cannot be said to represent the Government's will. We are left with four categories of 'the

Government': ministers and ministerial departments, officials representing the central government (e.g. immigration officers), governmental bodies, and tribunals.

Scrutinizing the transcripts of the Court of Appeal between 1951 and 1986 under these two constraints - 'public law' type cases against the 'central government' - found 1565 cases, or 4554 individual opinions (in most cases three judges participated in the decision, though some cases were heard only by one or two judges⁵⁷). An account of the number of decisions according to years is presented in Graph 1. It shows a significant increase in the number of cases from the mid-Seventies, after a more or less steady caseload in earlier years. This may be attributed to changes in the substance and procedure of English administrative law which have been taking place since the mid-Sixties, but we will not speculate further on this point.

Graph 1 - Number of 'public law' decisions of the C.A 1951-1986



The 1565 'public law' decisions of the Court of Appeal between 1951 and 1986 can be divided into several topical categories as specified in Table 5,⁵⁸ which

⁵⁷ For details about the number of judges on the bench see: Smith and Bailey [1984], pp. 723-734.

⁵⁸ Compare with similar findings of Sunkin [1987], pp. 441 ff, with regard to application for judicial review at the High Court between 1981 and 1986.

also divides the cases into three 12-year periods covered by this research. As we mentioned above, the fact that there are so few interlocutory decisions in the first two periods is not because such cases were not heard by the Court of Appeal, but because they were not transcribed. For this reason I will use in most of the following analyses the group of 1446 decisions which excludes interlocutory ones.

Table 5
*The types of the selected cases according to twelve-year periods**

Type of cases	number of cases			
	1951-62	1963-74	1975-86	Total
Constitutional	0	8	16	24
Administrative				
planning	23	33	85	141
local government	1		7	8
transport	2	1	7	10
health	6	1	1	8
immigration	1	20	164	185
welfare		5	48	53
prisoners	6		13	19
race relations		4	8	12
other	16	56	48	120
Total Const.+ Admin.	55 (15%)	128 (34%)	397 (57%)	580 (40%)
Employment	11	10	12	33
Damages/Compensation	11	10	19	40
Tax				
income	153	150	147	450
custom/excise	8	12	28	48
rates	63	27	23	113
Total	224	189	198	611
Private law	70	21	21	112
Police	2	17	50	69
Total exc. interlocutory	373	374	699	1446
Procedure/ interlocutory	3	10	106	119
Total	376	384	805	1565

* The periods are defined according to the date in which the decision was given.

It may be questioned whether all the above categories of decisions can represent the 'will of the Government'. It can be argued, for example, that deciding an individual tax case one way or another cannot reflect 'loyalty' or 'disloyalty' to the Government. Bearing in mind, however, that our focus is on the judges' decision-making record and not on individual decisions, it seems that a decision-making record of 95% tax cases decided in favour of the inland revenue versus a 5% decision rate in favour of the inland revenue, can say something about 'loyalty' to the Government, as the Government in general can be viewed as wishing to maximize its

revenue. In addition, it should be remembered that this tax-cases decision-record is only one component of a judge's degree of 'loyalty' to the Government, which is not examined independently from other categories of decisions.

Nevertheless, in order to avoid possible distortion of this 'loyalty' record by an excessive decision-making record in one particular field, a core group of decisions was also selected as an additional test group of the research. This core group consists of all decisions in which the defendant's side was a minister or ministerial department, i.e. cases in which the attack was aimed at the top political level. These cases are usually identified as a 'battleground' between the citizen and the authorities more than the other cases, and my assumption is that when a plaintiff succeeds in this type of case this is seen as a defeat for the Government, more so than in the rest of the cases. This group of cases usually falls within (or strongly correlates with) the subgroup of constitutional and administrative law decisions or 'public law' decisions, using a narrow definition of public law. Most of these cases can be associated today with the special (and exclusive) procedure of judicial review. I expect that some characteristic of these cases will differ from the general sample, and this might be relevant for the analysis of the explanatory factors for promotions. There are 461 such judgments.

1.6 Creating the Database for this Research - A Summary

The data for this research was taken from the 'public law' decisions of the Court of Appeal in the period 1951-1986, based on the Court of Appeal's transcripts. The database includes 4554 'cases', each of them representing one opinion in a decision of the court (three 'cases', or sometimes two or one, comprise one judgment of the court). The information for each case includes the following variables:

1. Year - the year in which the decision was delivered.
2. Number - the serial number of the transcript (usually assigned chronologically according to the date the decision was delivered).
3. Type - the type of the case, classified approximately as in Table 5 above (with additional specifications, such as whether the decision was interlocutory).
4. Government side - four categories: minister or department, official, governmental body and tribunal.
5. Other side - three categories: private person, company and other governmental body.
6. Appeal - the decision of the Court of Appeal in relation to the lower court's decision: affirmation or reversal.

7. Judge - a coded number of the judge who gave the opinion.
8. Decision - whether the decision was in favour or against the Government.
9. Opinion - whether the judge gave an elaborate opinion or just a concurrence.
(With additional indications on the judge, e.g. if he gave the decision after retirement or promotion)
10. Leave for Appeal - whether leave for appeal to the House of Lords was granted by the judge.
11. House of Lords - the result of the appeal in the House of Lords: affirmation or reversal of the Court of Appeal's decision.
12. Law Lords 1-5 - coded number of the Law Lords who were part of the House of Lords' judgment.
13. Decision 1-5 - the decisions of each of the Law Lords: in favour or against the Government.

These variables were the basis for creating additional variables which will be mentioned later.

2. General Results

This section and the next will present some general information on the decisions included in the database and initial results as to the possible factors in judicial decision-making which may influence promotion decisions. These are indicative results only which do not imply statistical significance. Section 4 will offer a formal statistical analysis examining promotion decisions.

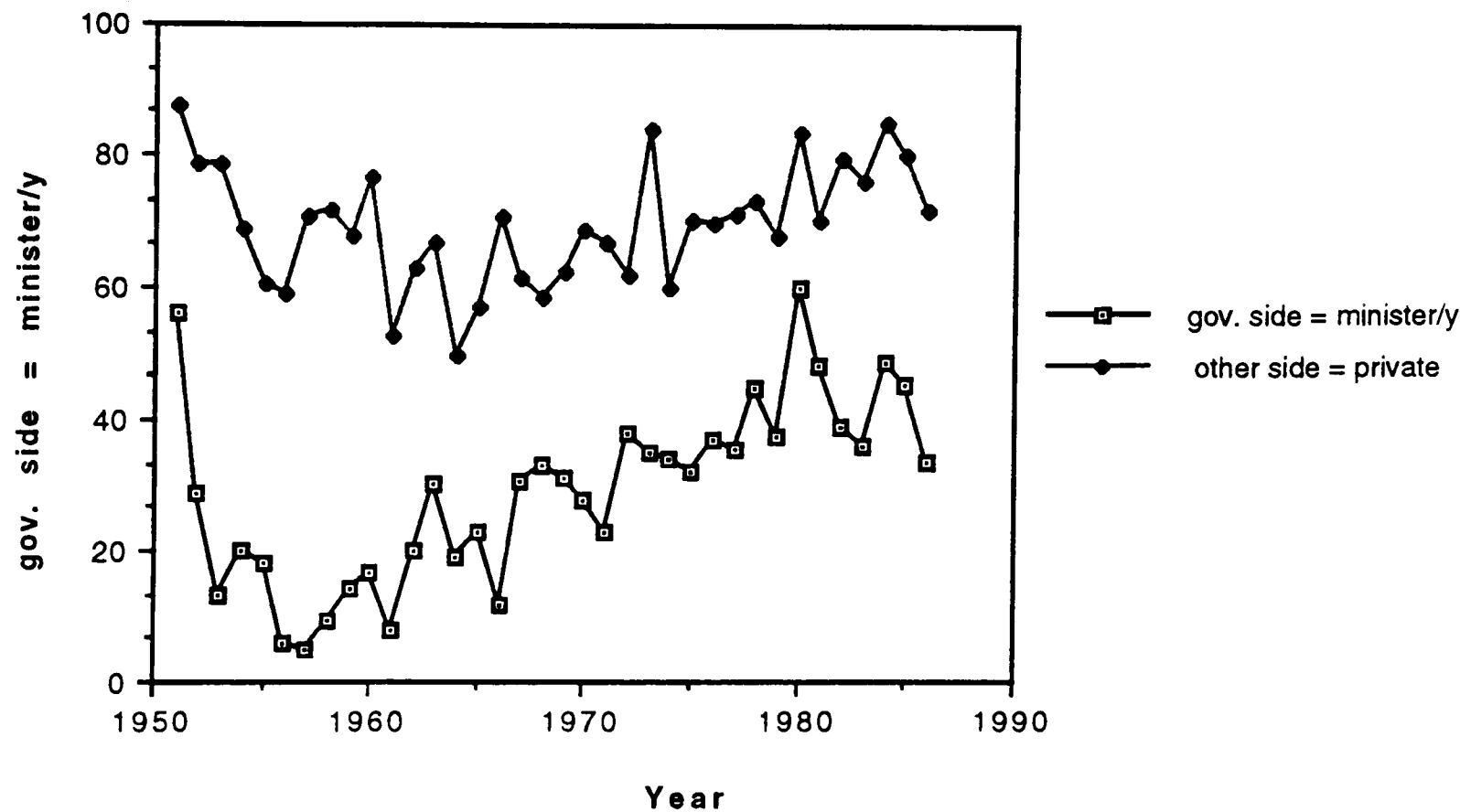
2.1 General Characteristics of the Researched Decisions

Table 6 summarizes the main general characteristics of the Court of Appeal decision making, divided into three periods of twelve years each, covered by this research. The first part of the table deals with the litigating sides. As can be noticed, the share of cases in which the defendant is a minister or department has been increasing with the years (especially at the expense of cases against governmental bodies). So has the share of private individuals on the plaintiff side,⁵⁹ (although it should be acknowledged that a private person as the formal plaintiff does not always represent solely himself; sometimes, and in recent years more frequently, litigation

⁵⁹ Sunkin [1987], pp. 437-440, arrived to similar findings with regard to High Court applications for judicial review. He observed that the number of applications of private persons and the number of applications against central government has been increasing between 1981 and 1986.

which is formally initiated by a private individual in fact represents a larger interest-group, a lobby etc.). A more elaborate presentation of the same data according to years can be found in Graph 2. It shows some connections between the increase in the number of cases initiated by private persons and the increase in the number of cases attacking the top political level of the government.

Graph 2 - The litigating sides: ministers and private persons



The second part of Table 6 focuses on two of the main features which ought to interest us in the decisions of the Court of Appeal - the rate of overturning decisions of the lower courts (mainly reversals of the High Court decisions) and the percentage of decisions against the Government. As can be noticed, both figures have hardly changed in average over the years. Around 32% of the Court of Appeal judgments overturn lower courts' decisions, and around 29% of the decisions are given against the Government. This presentation might be somewhat misleading, and it should be complemented by Graph 3, which shows that these figures can change significantly from one year to another, although on average they are, as we said, more or less fixed over time. It is interesting to note that the general rate of reversal of the Civil Division of the Court of Appeal (i.e. among all its decisions and not only its 'public

law' cases) is higher - closer to 40%.⁶⁰ Thus, the Court of Appeal is less likely to overturn decisions involving the central government.

Table 6
*Characteristics of the scrutinized C.A. decisions according to periods**

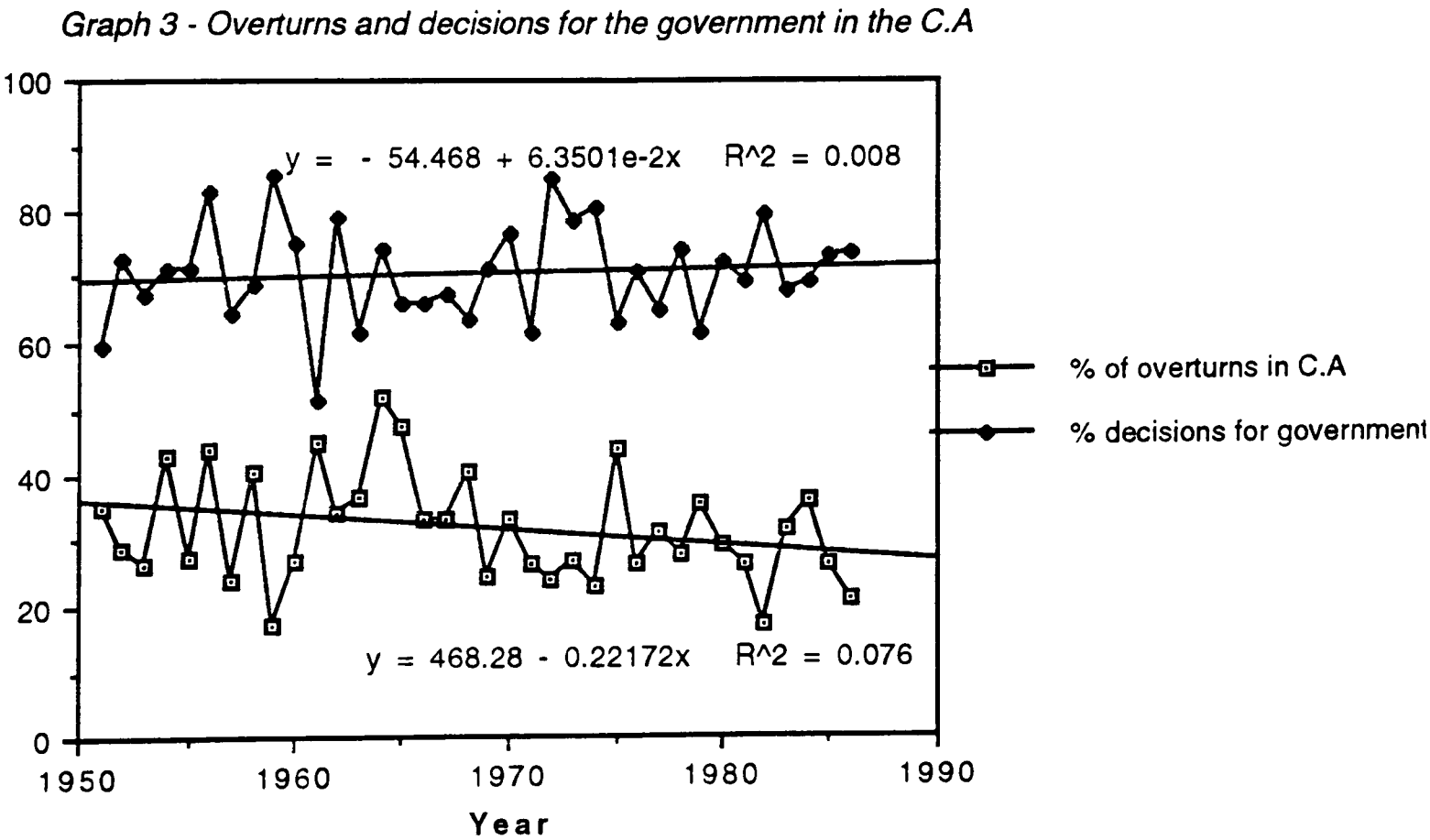
	1951-62	1963-74	1975-86	The whole period
The government side: (%)				
minister or department	15.8	28.9	42.1	31.9
official	37.7	41.2	30.2	34.7
governmental body	42.4	28.9	19.7	27.9
admin. tribunal	5.1	1.1	8.0	5.5
The other side: (%)				
company	23.1	32.4	19.0	23.5
governmental body	8.8	3.5	5.3	5.7
others (= private persons)	68.1	64.2	75.7	70.7
percent of overturns in the C.A.	33.7	34.0	31.5	32.0
percent of judgments against the government	27.9	28.1	29.5	28.8
percent of overturning H.C. decisions for the govt.	14.0	18.6	18.0	17.2
percent of overturning H.C. dec. against the govt.	19.6	15.7	11.1	14.3
percent of judgments with dissenting opinions	8.5	10.4	8.0	8.7
percent of cases in which leave for appeal was granted by the C.A.	22.0	21.9	9.6	16.0
percent of cases that reached the H.L.	19.8	16.0	7.9	13.1
percent of overturns (inc. partial) by the H.L.	36.5	47.5	50.9	43.4
percent of H.L. decisions against the government	36.6	41.8	25.8	35.1

* These statistics exclude the interlocutory decisions. The only major difference if those decisions are included is that the overturning rate of the House of Lords in the third period increases to 53.4%.

Although the rates of overturning and deciding against the Government are approximately fixed over the three periods, the internal division of cases within these two categories is not constant. While in the first period the major share of reversals by the Court of Appeal was of High Court decisions **against** the Government (19% out of 33%), the major share in the last period was of High Court decisions in

⁶⁰ Eddey, in his study on the Court of Appeal [1977], p. 300, mentions the rates of 39%, 40% and 40% for the years 1955, 1965 and 1973 respectively. The official judicial statistics provide slightly smaller figures, like 39% and 37% for 1965 and 1973 respectively.

favour of the Government (18% out of 30%). Among the decisions against the Government, while in the first period more than half of them were affirmations of lower courts' decisions (15% out of 28%), in the last period two thirds of those decisions are reversals (18% out of 28). It seems, therefore, that there is no intended policy of maintaining a certain rate of overturning or deciding against the Government. These rates are the result of some kind of a market mechanism; they can change dramatically over short periods, but add up to a steady outcome in the long run. This may support the Priest-Klein model of litigation, which predicts stable decision-making patterns over long periods of time in spite of changes in the law and in judicial policies, due to the selection process and litigation threshold.⁶¹



Another figure in Table 6 is the percentage of decisions with dissenting opinion. Overall, during the research period, only in 8.7% of the decisions was a dissenting opinion given. This figure is very similar for the first and the third periods, while it is slightly higher in the second period (10.4%). This, together with the fact that the highest rate of overturns is in the second period as well, can reflect the significant changes in English public law which occurred in the course of the

⁶¹ Priest & Klein [1984]. In fact, the authors predict a 50% rate of success in the highest appeal instance; this prediction can be bolstered by the House of Lords rate of reversal, specified in the third part of Table 7.

Sixties.⁶² Periods of judicial changes in the law can be associated with a higher degree of disagreement among judges, which is reflected by both variables.

The last part of the table deals with the Court of Appeal and the House of Lords. Appeals from the Court of Appeal to the House of Lords can be lodged only when leave for appeal is granted, either by the Court of Appeal or, if it was refused there, by the Appeal Committee of the House of Lords.⁶³ In the first two periods leave to appeal was granted by the Court of Appeal in around 22% of the cases, but only around half of them reached and were litigated in the House of Lords. In addition, in the first period the Appeal Committee of the House of Lords granted leave to appeal in 9.4% of the cases and in the second period this rate decreased to 5.9%.⁶⁴ The outcome was that leave to appeal was granted in between a quarter and a third of the cases, although only less than a fifth of them were in fact litigated. The picture changes drastically in the last period, when only in 9.6% of the cases was leave to appeal granted by the Court of Appeal, and only in 3.6% was leave granted by the Appeal Committee of the House of Lords. Only 7.9% of the cases were subsequently dealt with by the House of Lords.

The probable explanation for these figures is that while the Court of Appeal had seen an enormous increase, with the years, in the number of cases which were litigated in it, the House of Lords allowed a more or less fixed number of appeals annually. Naturally, the percentage of Court of Appeal cases which came before the House of Lords decreased, and this caused also a decline in the percentage of leaves to appeal. As a matter of fact, in terms of absolute numbers there were no significant changes in these relevant figures. The Court of Appeal, despite the increase in the number of cases which it heard, granted on average (in all three periods) around seven leaves to appeal each year. The Appeal Committee of the House of Lords granted annually, on average, three leaves in the first period and two in the second and third periods. However, the fact remains that for a litigant today it is much more difficult than in the past to reach the House of Lords.

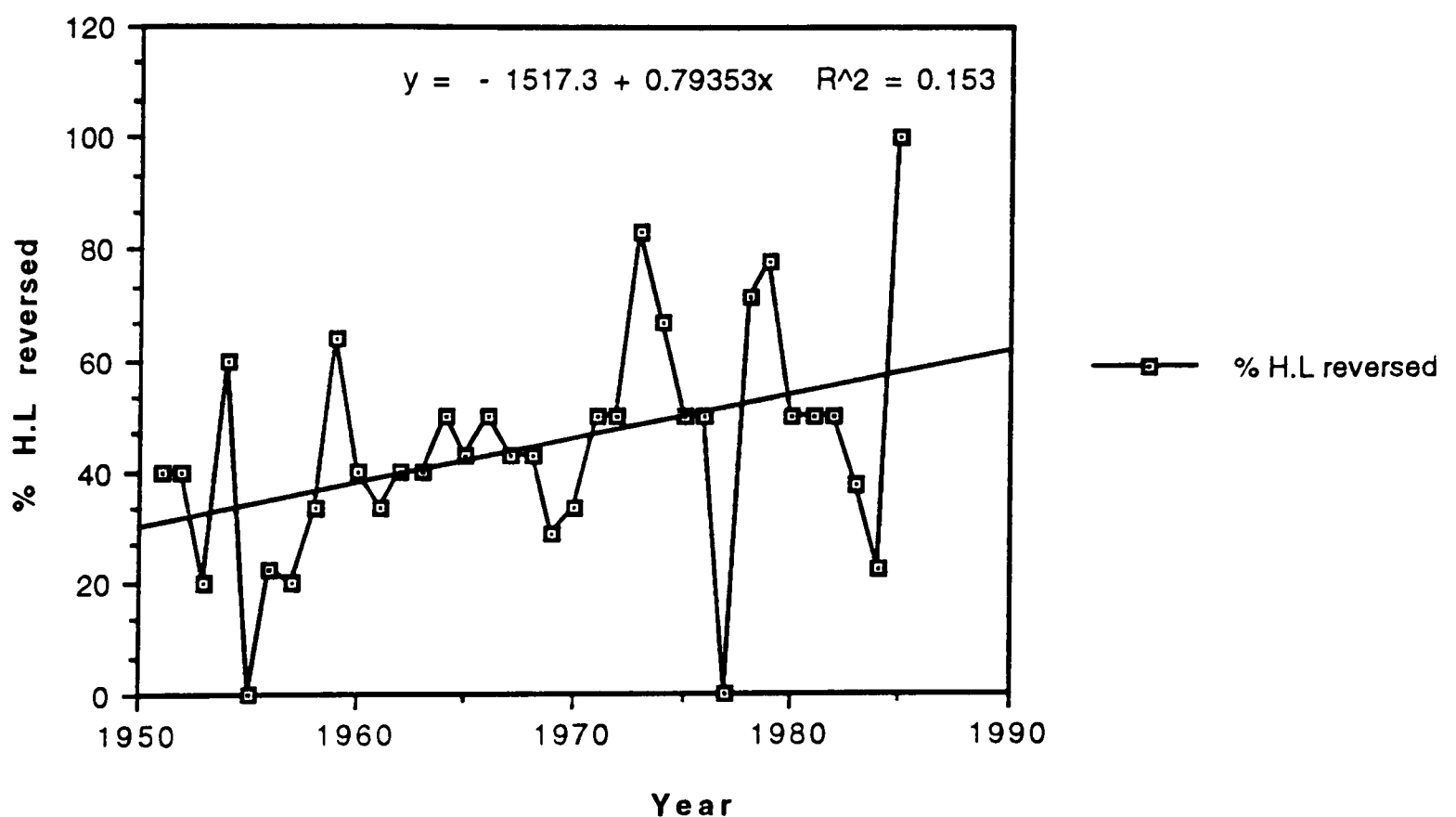
⁶² See: Jowell [1988], pp. 409-412.

⁶³ See: Smith and Bailey [1984], pp. 719-721, and more specifically on the Appeal Committee of the House of Lords: Blom-Cooper and Drewry [1972], ch. 7.

⁶⁴ According to Blom-Cooper and Drewry [1972], p. 126, in the period 1952-1968 the House of Lords allowed in average only five civil appeals (among which are our 'public law' cases) from the Court of Appeal. On leave for appeal granted by the Court of Appeal itself see also: pp. 132, 138-149.

Finally, we are provided with the rate of House of Lords decisions against the Government and its rate of overturning the Court of Appeal. The reversal rate increased from 36.5% in the first period to 50.9% in the last one. Looking at Graph 4 we can notice that although this rate of reversal shifts sharply from one year to another, there seems to be a pattern of an increase over the years. The percentage of House of Lords decisions against the Government differs from one period to another. In the second period it stands on 41.8%, while in the third period it drops to 25.8%. Altogether this rate, over the whole period, is 35.1%, which is higher than the equivalent figure for the Court of Appeal decisions. But this comparison is misleading, as only a small part of the decisions given by the Court of Appeal reaches the House of Lords.

Graph 4 - The rate of reversal by the House of Lords



In order to compare the 'anti-Government' decision-making of the two courts it is more appropriate to look at the relations between the decisions for or against the Government in the Court of Appeal and the affirmation or reversal of these decisions in the House of Lords. As indicated in Table 7, the total rate of reversal by the House of Lords was 43.4%. But when we divide the cases according to the outcome in the Court of Appeal we discover that while the House of Lords overturned only 31.2% of Court of Appeal decisions given **in favour** of the Government, it reversed 59% of the decisions given **against** the Government. The differences are even greater when we look at the core group of cases (those cases in which the defendant was a

minister or a department). In this group the House of Lords reversed only 28.1% of the cases decided for the Government in the Court of Appeal, while reversing 71.7% of the cases decided against the Government. The surprising conclusion is that the impact of House of Lords is in the direction of diminishing the rate of decisions given against the Government. We will return to this important finding later.

2.2 The Political Factor

The political factor can be analyzed from two perspectives: examining whether there are differences in decision-making patterns of the Court of Appeal and its individual judges under different Governments and how these differences are expressed in promotion decisions; and examining different patterns of judicial behaviour of judges who were appointed or promoted by different Governments. Table 7 relates to the second perspective.

Table 7
*Patterns of decision-making by C.A judges who
were appointed / promoted by different Governments*

	Appointees to C.A		Appointees to H.L	
	Labour	Conser.	Labour	Conser.
decisions against govt.(%)	28.3	27.7	31.6	27.8
Leave to appeal granted (%)	17.6	13.7	27.2	18.3
no of elaborate opinion (%)	22.2	35.3	21.3	23.2
House of Lords reversed (%)	42.8	45.8	41.9	47.4

The left side of the table shows that with regard to 'loyalty' to the Government (expressed by the percentage of decisions given against the Government) there are no significant differences between judges who were appointed to the Court of Appeal by Labour Governments and judges who were appointed by Conservative Governments. This is a significant finding in the light of the fact that the Tories ruled during two thirds of the period covered in this research. Had judges been 'loyal' only to their appointing Government the 'loyalty' figures for Labour's and Conservative's appointees would not have been the same. This finding may have bearing also on the Landes-Posner model. It can be interpreted as going against the assumption according to which independent judges are loyal to the enacting, rather than the current, Government. There is, though, a small difference with respect to the rate of decisions overturned by the House of Lords: a higher percentage of decisions given

by Conservatives' appointees was subsequently reversed by the House of Lords. This characteristic, as will be explained later, can be viewed as a measure of quality, and if this is the case one can tentatively conclude that Labour's appointees to the Court of Appeal are slightly better qualified than Conservatives' appointees.

The more significant differences between Labour and Tory appointees are in the rate of granting leaves for appeal to the House of Lords and in the rate of giving elaborate opinions. But these differences are probably (at least partially) a result of the recent long-term rule of the Conservatives. We noted before the decreasing percentage of cases in which leave to appeal was granted. The same applies also to the rate of elaborate opinions. It seems that, as a result of an explicit or implicit policy to increase the efficiency of the Court, judges have been writing less elaborate opinions in recent years. In these years the vast majority of the Court of Appeal judges were, obviously, Conservatives' appointees. This is probably the reason for the political-based classification differences in both variables.

The right side of Table 7 is more relevant to our research, as it is directly related to promotion policies. The interesting findings here are, again, the rate of overturning by the House of Lords and the percentage of decisions given against the Government. It seems that, altogether, the rate of overturning by the House of Lords did not make a major consideration in promotion decisions. This rate among the promotees to the House of Lords resembles the rate for all Court of Appeal judges. Nevertheless, there is a small difference between Labour and Tories with regard to this factor. The average reversal rate for judges promoted by Labour is 41.9%, below the average Court of Appeal percentage, while the equivalent percentage among the Conservatives promotees, 47.4%, is above the Court of Appeal average. If the percentage of reversals by the House of Lords can be regarded as a measure for quality of judges we may conclude, again tentatively, that Labour promotees (for both - the Court of Appeal, as can be deducted from the left side of the table, and the House of Lords).are 'better' judges than the Conservative promotees.

The more interesting figure is the rate of 'anti-Government' Court of Appeal decisions among the judges who were eventually promoted to the House of Lords. This rate among Tory promotees, 27.8%, is less than the average rate. The Labour promotees, on the other hand, gave 31.6% of their decisions against the Government - well above the Court of Appeal average. This finding may indicate that Labour Governments conform to a greater degree to the predictions of the Posner-Landes model of the independence of the judiciary. It should, however, be noted that since

Labour got the chance to promote only five judges from the Court of Appeal to the House of Lords during the period covered by this research, these findings ought to be interpreted with caution.

Turning to the other perspective on the political factor - the Court of Appeal's decision-making patterns under the rule of different Governments - Table 8 presents some of the variables introduced in previous tables, this time according to the Government in power at the time of the decision.⁶⁵ One interesting conclusion that can be drawn from the table is that the judges of both the House of Lords and the Court of Appeal tended to be more 'active' during Labour Governments than during Tory Governments. The total rate of overturns (the sum of the first two rows) in the Court of Appeal is 35.4% when Labour is in power and only 30% under the Conservatives. Similarly, the House of Lords overturning figures are 50.8% under Labour and 42.5% under the Tories. Furthermore, the Court of Appeal decision-making rate against the Government (the sum of the first and third rows) reveals that judges decided a higher proportion of the cases against Labour Governments - 31.7% - than against Conservative Governments - 26.7%. The latter figures can be related, at least partly, to the 'second and third terms in office effect', rather than to the political factor).

Table 8
*Patterns of decision-making in the Court of Appeal
according to periods of Governments in power / L.C in office*

Years Govt.	51-54 T	54-62 T	62-64 T	64-70 L	70-74 T	74-79 L	79-83 T	83-86 T	Labour (total)	Tory (total)
overturns* against govt.	14.9	13.8	22.7	18.9	15.9	22.8	16.0	19.0	21.0	15.7
overturns for govt.	19.1	20.0	19.9	19.1	9.9	11.9	11.1	13.3	14.4	14.3
affirmations against govt.	16.2	14.8	10.2	12.0	8.7	9.7	11.4	8.9	10.7	11.0
leave for ap- peal granted	14.7	24.7	37.2	24.0	15.0	15.5	8.1	5.0	19.2	14.7
overturns by H.L	40.0	34.2	50.0	40.0	66.7	65.2	45.5	30.0	50.8	42.5

* The first row refers to decisions overturned by the C.A and decided against the Government. In the same manner the second row refers to reversals and decisions for the Government, and the third row refers to decisions against the Government which affirmed the decision of lower court.

⁶⁵ The division of the table is according to full calender years, and therefore it is not fully accurate. An accurate division is difficult to present as it is not dependent solely on the date in which the decision was given but also on the identity of the defendant Government.

An important question, in the light of the differences between the Landes-Posner model and my explanation of the independence of the judiciary, is whether there are changes in the patterns of judicial decision-making between a Government's first term in office and subsequent terms in office (when the same party remains in power). According to the Landes-Posner model, and under two related assumptions: 1) that in a second or third subsequent period in power a higher share of the legislation in force is a product of the serving Government, and 2) that a Government would tend to violate its own legislation less than legislation of previous Governments, one would expect a lower rate of decisions against the Government in a second or third terms in office compared to the first term.

Posner and Landes argue that an independent judiciary would decide cases in accordance with the original legislature's intention. If this is the case, and under the two assumptions mentioned above, it is likely that in a first period of office many disputes would involve legislation of previous Governments which the current Government attempts to by-pass or indirectly overrule, and such disputes would be decided against the Government. In contrast, during subsequent terms in office it is likely that more disputes will involve legislation of the current Government, and therefore a higher percentage of the decisions would be given in favour of the Government. This prediction is not shared by my explanation of the independence of the judiciary which rejects the assumption regarding the conformity of an independent judiciary to the enacting legislature.

The relevant periods to examine are the Conservative rule of 1954-1964 compared to 1951-1954, and the Conservative rule of 1983-1986 compared to 1979-1983 (see Table 8). Although the percentage of decisions against the Government in the Court of Appeal decreased, in accordance with the Posner-Landes predictions, from 31.1% in 1951-1954 to 28.6% in 1954-1962, it increased again in the last stretch of the thirteen years of Tory rule (1962-1964) to 32.9%. The figure for 1983-1986, 27.9%, is almost identical to the 'anti Government' decision rate in 1979-1983, 27.4%. At first impression, therefore, Posner's-Landes' predictions can be rejected. However, we will return later to examine more precisely whether promotion policies were influenced by the second/third terms in office factor.

3. Decision-Making Patterns and Promotion to the House of Lords

So far we have looked at the general features of the Court of Appeal decision-making process. What we really should be interested in is not these average figures,

but their differentiation among the individual judges and their implications for promotion decisions. Moreover, by examining the differences between the relevant decision-making features among the judges we are able to by-pass important external factors that might have an influence on the general patterns of the judicial outcome, for example the decision of the disputing sides whether to litigate at all over their dispute or whether to launch an appeal.⁶⁶

As we are interested in explaining promotion decisions, the different variables will be classified in two archetype categories: those which can represent the **political 'loyalty'** of a judge, and those which can represent his **'quality'**, whereas quality is defined in terms of legal competence. I will, subsequently, try to examine to what extent promotion decisions are contingent upon the 'loyalty' of judges to the current Government and to what extent they are contingent upon their 'quality'.

The main proxy measuring the 'loyalty' of a judge to the Government is, as explained before, the percentage of decisions against (or for) the Government. We saw that this figure is on average around 29%, and it has not changed significantly over the period of this research (Table 6). This variable would be interesting for our purposes only if we discover significant differences in this rate between the various judges. Table 9 specifies the rate of decisions against the Government for the judges significantly deviating (in both directions) from this average of 29%. These figures are shown for the whole set of cases as well as for the core group of cases, and in each of the categories the table specifies a percentage relating to all opinions, and a figure which relates to the leading opinions only. My assumption is that there are some differences between concurring, or even writing a separate concurring opinion, and writing the main or leading judgment. There might be judges who tend to concur with opinions of more senior judges (regardless of the direction of the result), and reveal their real tendencies only when they have to write the leading judgment themselves. The table also indicates an artificially created average rate of deciding against the Government, comprised of these four mentioned statistics (or less if there were not enough decisions in any of the categories).

There are several important conclusions that can be drawn from this table. First, variation in the percentage of decisions against the Government certainly exists; in fact, this rate varies between less than 4.5% and 50%. Second, time does

⁶⁶ See: Priest & Klein [1984].

Table 9
Percentage of decisions against the Government among different judges*

Judge	decisions against the govt. (%)					total no. of dec.	promoted
	All cases		Core group		avr.		
	opinions		opinions				
	all	leading	all	leading			
Browne	50.0	50.0	53.3		51.1	34	-
Sachs	48.6		50.0		49.3	37	-
Glidwell	35.3		57.1		46.2	17	
Buckley	45.5	53.5	33.3		44.1	99	-
Pearce	33.9	53.8			43.8	62	+
Edmond Davies	45.8		40.0		42.9	24	+
Brightman	42.9		37.5		40.2	21	+
R.W. Goff	39.3				39.3	28	-
Devlin	38.9				38.9	18	+
Singelton	33.3	28.1	41.7	40.0	35.8	39	-
Fox	36.8	18.2	42.1		32.3	57	-
Danckwerts	36.4	36.4	20.0		30.9	77	-
Donovan	36.1		27.3		31.7	61	+
Somervell	35.7	35.7	22.6	22.2	29.2	28	+
Judges from High Court	39.2		39.4		39.3	72	
average	28.1	27.7	23.9	22.8	25.6		
Law Lords	14.3	25.0			19.7	10	
Orr	21.1	37.5	5.6		21.4	65	-
Cumming- Bruce	18.2	23.5	18.8	14.3	20.8	44	-
R.J Parker	23.1	0	38.5		20.5	26	-
Megaw	19.8	23.9	14.3	22.7	20.2	81	-
O'Connor	19.6	12.5	27.3	20.0	19.9	51	-
Brandon	17.4		20		18.7	23	+
Neil	10.0		25.0		17.5	20	
Lane	15.6	18.2	12.5	20.0	16.5	77	+
Roskill	22.2		8.7		15.5	54	+
Ackner	26.4	7.7	26.3	0	15.1	53	+
Hodson	23.6	7.1	7.1	20.0	14.5	55	+
Shaw	20.0		8.3		14.2	50	-
Dillon	23.7	0	16.7		13.5	59	
Watkins	17.8	10.0	19.0	0	11.7	45	
Goff	11.5		11.1		11.3	26	+
Cross	16.7		0		8.4	18	+
Tempelman	16.7		0		8.4	36	+
Brown	4.5	0	0		1.5	22	

- * - Percentages are indicated for five or more decisions.
 - If there is nothing under the 'promoted' rubric the judge is still serving in the C.A.
 - The figures for High Court judges and for Law Lords refer to decisions they gave while sitting in the Court of Appeal on an ad-hoc basis.

not seem to play a significant role in the distribution of judges along this scale and their deviation from the average; judges who served during different periods, including judges currently serving, are spread throughout the table. This affirms our previous finding according to which the rate of decisions against the Government was more or less stable throughout the period of the research. Third, at a first glance it seems that 'loyalty' to the Government does not play a crucial role in the consideration whether to promote. The ratio of promoted/non promoted judges is similar in the two presented extremes of the table, and approximately equals the general rate of promotion. Nevertheless, it seems that being on the most extreme side of the table can diminish the chances of promotion if it is the 'anti-Government' extreme (the first four most 'anti-Government' judges have not been promoted), but not if it is the 'pro-Government' side.

Another important feature of these results is that there is no necessary correlation between the rate of 'pro-Government' decisions when all decisions are taken into account and this rate when only the core group of cases is examined. While there are 'coherent' judges (like Browne and Brown) who have around the same rate in the two categories, there are judges who tend to show their 'independence' more in cases against a minister or a department (e.g. Singleton, Glidwell and Parker), and there are judges who show their independence specifically not in these cases (like Danckwerts and Somervell).

One of the interesting findings concerns the ad-hoc judges. It is customary that occasionally a Law Lord, who regularly sits at the House of Lords, or a High Court judge is invited to sit in the Court of Appeal. While collecting the data for this research I did not distinguish individually between the ad-hoc judges. Instead, two categories were created: one is of Law Lords who hear cases in the Court of Appeal, and the other is of High Court judges who hear cases in the Court of Appeal. The findings regarding these categories are interesting: while the Law Lords tended to be among the 'pro-Government' group of judges (with an anti-Government average of only 19.7%), the High Court judges tended to be among the 'anti-Government' judges (with 39.3% of the decisions against the Government). This finding is connected to other findings which indicate that, surprisingly, the House of Lords tends to be more conservative than the Court of Appeal in terms of 'loyalty' to the Government. A similar surprise is the relatively 'liberal' attitude of the High Court judges. We will return to these specific findings when dealing with the House of Lords decision-making characteristics.

The second important variable that merits examination is the percentage of Court of Appeal decisions reversed by the House of Lords. This variable can serve as the main proxy for the 'quality' of a judge. There are two main reasons for that - theoretical and practical. According to the English theory of 'the law', the Judicial Committee of the House of Lords is the highest judicial instance, and its decisions determine, by definition, what is the 'legal situation'. If the House of Lords, therefore, affirms a decision of the Court of Appeal, it can be inferred that the Court of Appeal was 'right' in its decision in the sense that it read the law correctly. If, on the other hand, the decision of the Court of Appeal is overturned, this decision can be taken - again, by definition - as 'wrong'.⁶⁷ This is the main reason why the rate of overturning decisions of a particular judge can be held as a proxy for his quality as a judge. Practically, the Law Lords are usually consulted when promotion from the Court of Appeal to the House of Lords is being considered.⁶⁸ Their professional view of the candidate is likely to be influenced by the rate of overturning of his decisions.

Table 10
The rate of overturning Court of Appeal judges' decisions by the House of Lords*

Judge	reversals by the H.L.(%)			Judge	reversals by the H.L. (%)		
	all dec.	core	pro- moted		all dec.	core	promoted
Morris	20		+	Shaw	100	100*	-
Pearce	25		+	Bridge	83.3		+
Willmer	25	33.3*	-	Craigs	83.3	50*	-
Donovan	27.3		+	Kerr	80		(-)
Salmon	30	0*	+	Lawton	72.7	80	-
Hodson	30.8		+	Sellers	69.2		-
Davies	33.3		-	Stephenson	66.7	66.7*	-
Donaldson	33.3	25*	+	Buckley	66.7	66.7*	-
Danckwerts	36.8	0*	-	Edmond			
Jenkins	37		+	Davies	60		+
Ormerod	37.5		-	Slade	57.1	50	(-)
				Eveleigh	55.6	50	-
Average	45.3	43.6			45.3	43.6	

* - Absent percentages indicate one or no cases. Whenever there were five or less cases an asterisk was added.

- Brackets in the "promoted" rubric mean that the judge retired (i.e was not promoted) after 1986.

⁶⁷ One can argue that this description is true only when the decision of the House of Lords is not overturning its own precedent. Since the Court of Appeal is bound by the precedents of the House of Lords, when the House of Lords overturns its own precedent this does not mean that the Court of Appeal, at the time it gave the decision, was wrong. This may be a valid argument, but the number of cases in which the House of Lords does deviate from its own precedents is so marginal that we can ignore them while dealing with such a large sample of cases.

⁶⁸ See the Lord Chancellor official account of promotions procedure - Judicial Appointments [1986].

Table 10 presents the overturning rate of the judges who deviated significantly from the average of 45.3%. At a first glance, it seems that there is a connection between the rate of reversal by the House of Lords and the chances to be promoted. Among the eleven least reversed judges six were promoted to the House of Lords and one was appointed as the Lord Chief Justice, while among the eleven most reversed judges only two were eventually promoted. It is interesting to note that the figures for High Court judges hearing cases in the Court of Appeal are close to the general average; they were overturned in 42.9% of their decisions and in two out of the three core group decisions to which they were part. We will have to verify these findings by a formal statistical analysis, which brings us to the next section of this chapter.

4. A Formal Analysis of the Decisions Whether to Promote Judges to the House of Lords

4.1 General Results

So far we have scrutinized some of the elements that may have effect when promotion decisions are being considered; we will now try to measure the combined influence of these factors using formal statistical analysis. The most suitable statistical tool for this purpose is **Cox's proportional hazards regression** model. This model examines the correlation between the various explanatory variables and the **conditional** probability of promotion, by utilizing data on the length of time in the Court of Appeal before promotion. The advantages of this method over alternative statistical tools based on unconditional probabilities (i.e. Probit and OLS regression) is that it examines not only the correlation between the variables and the decision whether to promote, but also the differences in time periods of service in the Court of Appeal until promotion. A second advantage is that the data about the judges still serving in the Court of Appeal in 1986 (the last year of our database) can also be taken into account, despite the fact that we do not know whether these judges are going to be promoted (or were promoted after 1986).⁶⁹ The tested proportional hazards model is as follows:

⁶⁹ Using both OLS and Probit regression analyses would lead to exclude from the tests of all decisions by judges who were still serving in the Court of Appeal in 1986, as the dependant variable for these cases was unknown. This would mean a loss of almost a third of the data. In contrast to these modes which measure the unconditional probability of getting promoted, the proportional hazards model measures the *conditional probability of promotion taking place after i years in the Court of Appeal given that the judge was not promoted or has not retired by the $i-1$ year*. For more on the proportional hazards model see: Kiefer [1988]. It is noteworthy that I have also tested the alternative statistical tools on the database of the

$$\text{PROMOTE}_t^i = f(\text{REVAGA}^i, \text{REVFOR}^i, \text{AFFAGA}^i, \text{LA.ARHL}^i, \text{LA.NHL}^i, \\ \text{NLA.ARHL}^i, \text{BOPINION}^i, \text{REVHL}^i, \text{FIRSTJA}^i, \text{APPOINTC}^i, \\ \text{DECYEAR}^i) \times \text{LAMBDA}_t$$

where:

PROMOTE_t^i = the conditional probability of promotion for the i^{th} judge in the t^{th} year of service in the Court of Appeal given that the judge was not promoted or did not retire earlier.⁷⁰

And f is the exponential function of:

REVFOR^i = the percentage of decisions given by the i^{th} judge which overturned (partially or fully) a judgment of a lower court and their outcome was in favour of the Government.

REVAGA^i = the percentage of decisions given by the i^{th} judge which overturned (partially or fully) a judgment of a lower court and their outcome was against the Government.

AFFAGA^i = the percentage of decisions given by the i^{th} judge which affirmed a judgment of a lower court and their outcome was against the Government.

LA.ARHL^i = the percentage of decisions in which leave for appeal to the House of Lords was granted by the i^{th} judge and the case was subsequently dealt with by the House of Lords.

LA.NHL^i = the percentage of decisions in which leave for appeal to the House of Lords was granted by the i^{th} judge but the case was not, subsequently, dealt with in the House of Lords.

NLA.ARHL^i = the percentage of decisions in which leave for appeal to the House of Lords was not granted by the i^{th} judge but the case eventually reached the House of Lords.

Court of Appeal decisions and the results were not significantly different from those of the proportional hazards regression.

For the sake of the proportional hazards model the original case-based database was transformed into a judge-based data set, with the various decision-making variables representing the average figures for each specific judge. Excluded from this database were only the decisions by retired judges or judges who sat ad-hoc in the Court of Appeal.

⁷⁰ In technical terms, the durations of service in the Court of Appeal are censored by retirement or continuation of office in 1986.

$BOPINION^i$ = the percentage of non-elaborated (i.e. merely concurrence and not reasoned) decisions given by the i^{th} judge.

$REVHL^i$ = the percentage of decisions by the i^{th} judge which were overturned (fully or partially) by the House of Lords.

$FIRSTJA^i$ = the age in which the i^{th} judge was appointed to his first high judicial position.

$APPOINTC^i$ = the age in which the i^{th} judge was appointed to the Court of Appeal.

$DECYEAR^i$ = The average number of decisions per year given by the i^{th} judge.

And $LAMBDA_t$ is the conditional probability of promotion in the t^{th} year for the average judge.

The first three independent variables are intended to measure **the loyalty to the Government**.⁷¹ The combination of the outcome of the decision (in terms of 'pro' or 'anti' Government result) and its relation to the decision of the lower court (affirmation or reversal) can be presented on a four-level scale of 'loyalty'. The most 'loyal' judge will overturn decisions that were given against the Government in the lower court and will, thus, decide in favour of the Government. The least 'loyal' judge will overturn decisions in favour of the Government given by the lower court, and will decide against the Government. In the middle we find the judges who affirm decisions of the lower courts, both against and for the Government. I expect that if 'loyalty' to the Government has an impact on the decision whether to promote a judge, as predicted by the traditional models of separation of powers, we will find that $REVAGA$ would be negatively correlated to $PROMOTE$ (and so will $AFFAGA$, but to a lesser degree), and $REVFOR$ would be positively correlated to $PROMOTE$. If, on the other hand, as predicted by the theoretical models presented in the previous chapters, the Government seeks to encourage 'independence' or to promote independent judges, the predictions ought to be reversed, i.e. $REVAGA$ will not be correlated or will be positively correlated to $PROMOTE$, and $REVFOR$ will not be correlated or will be negatively correlated to $PROMOTE$.

The next three variables focus on the route of the decision from the Court of Appeal to the House of Lords, and they are related to the other possible factor influencing promotion decisions - **the quality of the judge**. There are several interrelated assumptions here. First, it can be assumed that 'better' judges will tend

⁷¹ It should be noticed that the reference variable here is $AFFFOR$, which is omitted in order to avoid collinearity with the constant.

to grant more leaves for appeal to the House of Lords, because they usually deal with the more problematic cases, which naturally have a greater chance to be carried on to the House of Lords. Second, since litigation in the House of Lords is very costly, and taking into account the Priest-Klein model of litigation selection,⁷² it can be assumed that litigants, even when granted leave for appeal to the House of Lords, will be more reluctant to carry on and exercise this leave if they feel that the decision was competent, and that the chances for a reversal by the House of Lords are consequently small. Third, and in an opposite direction to the previous assumption, Court of Appeal judges whose decisions get to the House of Lords are better known in the legal community, and especially among those who might have an influence on their promotion decision (like the Law Lords who are being consulted on these issues⁷³); this might increase the chances for promotion. And last, cases that get to be heard by the House of Lords when leave to appeal had been refused by the Court of Appeal will decrease the promotion chances in a similar manner to the reversal of a decision to its merits. The Court of Appeal judge who refused leave to appeal would be seen as mistaken; and making professional mistakes, if quality is taken on board, may decrease the promotion prospects.

These considerations, under the assumption that 'quality' plays a role in promotion decisions, result in the hypothesis that the arrival of a case in the House of Lords will improve the promotion chances of the judges who gave the decision in the Court of Appeal, provided that leave to appeal was granted by these judges. In other words LA.ARHL would be positively correlated to PROMOTE. But when a case is heard by the House of Lords despite the fact that leave to appeal had been refused by the Court of Appeal, the promotion chances of the judges who decided the case in the Court of Appeal would decrease. I expect, therefore, a negative correlation between NLA.ARHL and PROMOTE. The direction of LA.NHL will depend on the strength of the conflicting effects mentioned above.

The next variable - BOPINION - can be perceived also as a quality indicator. I assume that better judges will tend to reason their decisions more than other judges. If quality is a significant consideration in promotion decisions we can expect BOPINION to be negatively correlated to PROMOTE. The most significant variable representing the quality of a judge, though, is REVHL. Bearing in mind the primary question - whether a decision of the Court of Appeal would arrive at all in the House

⁷² Priest & Klein [1984].

⁷³ See: Smith & Bailey [1984], p. 160.

of Lords - it can be assumed that if quality is a major consideration in promotion decisions, a negative correlation would be found between REVHL and PROMOTE. This prediction is based on what we indicated before - that a high reversal rate by the House of Lords is both an indication for a lower 'quality', as derived from the English doctrine of 'the law', and a likely lower subjective perception of quality by the reversing Law Lords who are usually consulted on promotion decisions.

The last three variables relate directly to the judge who gave the decision rather than to the judgment itself. DECYEAR measures the average number of decisions given by the judge per year; it is an indication of the judge's productivity. Regardless of the question whether this is also an indication of quality (if, for example, better judges are assigned more cases), it can be expected that the more productive judges will have better chances for promotion, and therefore DECYEAR to be positively correlated to PROMOTE. Earlier we mentioned the two remaining variables, FIRSTJA and APPOINTC - the ages of the judge at first judicial appointment and at promotion to the Court of Appeal. We will now examine whether the general regression yields similar results to what was tentatively found before - the younger the judge at first judicial appointment and at appointment to the Court of Appeal, the better chances he has to be further promoted, i.e. a negative correlation with PROMOTE.

Table 11 presents the results of this proportional hazards model for all the cases and for a database which includes only the core group of cases, i.e. only the cases in which the defendant was a minister or ministerial department.⁷⁴ Looking first at the general regression, we can notice that all three variables which are meant to measure 'loyalty' to the Government have a negative sign, but only REVFOR is significant.⁷⁵ Judges who tend to overturn decisions of the lower courts and decide in favour of the Government are **less** likely to be promoted to the House of Lords. This can be interpreted in line with, or at least in the direction of, the 'revisionist' approach towards the independence of the judiciary, i.e. in line with the Posner-Landes hypothesis and my own. When we look at the core group model we discover that REVFOR is still negatively significant, but so is REVAGA, and that AFFAGA is

⁷⁴ As to potential multicollinearity: inspection of Pearson Correlation Matrix revealed that the variables which are relevant for our study were found to have less than 0.5 correlation coefficient among them. Subsequently, running the model on the bases of various alternative specifications did not reveal any significant changes in coefficient values which might indicate the presence of multicollinearity.

⁷⁵ The level of significance is indicated by the third (and sixth) columns. The estimated correlation can be accepted at 0.05 level or below. Some scholars regard even a level of 0.05-0.1 as sufficient.

positive and significant. This means that reversing lower courts' decisions in cases which involve a direct attack on the top political echelon, regardless of their outcome, decreases the promotion chances; but deciding against the Government in those cases, by affirming decisions of the lower courts, enhances the chances of promotion.

Table 11
*Promotion to the House of Lords as a
function of Court of Appeal judge characteristics - general results*

independent variables	All cases			Core group		
	estimate	standard error	pr > Chi-square	estimate	standard error	pr > Chi square
REVFOR	-7.36	3.58	0.04*	-6.43	2.20	0.01*
REVAGA	-1.95	3.74	0.60	-4.38	2.22	0.05*
AFFAGA	-3.78	3.98	0.34	5.84	3.03	0.05*
LA.ARHL	3.26	3.87	0.40	-6.51	5.76	0.26
LA.NHL	-3.59	3.73	0.34	-11.04	7.06	0.12
NLA.ARHL	-3.10	8.04	0.70	-2.69	7.43	0.72
BOPINION	3.64	1.89	0.05*	1.80	1.08	0.10
REVHL	-0.48	0.98	0.63	-2.97	0.84	0.01*
FIRSTJA	0.06	0.08	0.43	0.01	0.08	0.86
APPOINTC	-0.16	0.08	0.05*	-0.11	0.08	0.14
DECYEAR	0.04	0.03	0.24	0.16	0.08	0.03*
P > Chi-square**	0.1428			0.0001		

* Significant at 5% or less. Very small figures were approximated to 0.01.
** Calculated on a basis of a log-likelihood test

These results indicate that the traditional view, according to which 'loyal' judges have better chances to be promoted, ought to be rejected. But they also hint at a more complex story than the one told by Posner and Landes and myself. According to this story the Government promotes those judges who show independence by deciding against it; it clearly disadvantages those judges who demonstrate blunt 'loyalty' by reversing lower courts' decisions given against the Government. However, in the more high-profile or sensitive cases in which the attack is launched directly against a minister or his/her department, being too independent (by reversing decisions given both for and against the Government) can work against the chances of promotion.

Moving on to the next three variables which examine the relations between promotion, granting leave to appeal and the actual hearing of the case in the House of Lords, it can be noticed that for both regressions none of the variables is

significant, although in the general - all cases - regression the signs of the variables are in the predicted direction. In the core group model all three variables have a negative sign, LA.ARHL not in the predicted direction. This might be connected to our previous finding and indicate that in the more sensitive 'public law' cases the Government wants to avoid the publicity and embarrassment of litigating at the House of Lords.

One of the surprising findings is the positive direction of BOPINION, which is significant in the general model and is in 0.1 level of significance in the core group of cases. This means that, contrary to our prediction, refraining from an elaborate opinion, i.e. merely concurrence, increases the chances of promotion. If writing an elaborate opinion can be regarded as a proxy for quality, then the hypothesis, according to which quality is taken on board when promotion is being considered, is weakened. However, a possible alternative explanation for this result may derive from the fact that our database includes only part of the decisions of the Court of Appeal; private law cases and criminal cases are excluded. Judges may tend to write elaborate opinions only in their field of specialty, which may be private law or criminal law; and if this is so BOPINION, when measured only on the basis of the 'public law' decisions, cannot tell us much about the connection between the general rate of elaborate opinions and promotion. If this is the case we may nevertheless conclude from the results that 'public law' decisions count less than criminal or private law decisions for the purpose of assessing the quality of a judge.

This explanation for the sign of BOPINION is supported by the result of REVHL, the most important proxy for 'quality', which is in the predicted direction, although significant only in the core group of cases. Confirming what was also found among the judges most deviating from the average rate of reversal by the House of Lords (Table 10), it seems that a higher rate of reversal by the House of Lords tends to diminish the promotion chances. This result could be interpreted as supporting the theories according to which promotions are on merit rather than political basis, but this interpretation should be treated with caution in light of the pro-Government decision-making patterns of the House of Lords, as we shall see in more detail later. DECYEAR, the average number of cases decided annually by the judge, has a positive sign, though it is not significant in the general model, only in the core cases regression. This falls into line with our prediction that the productivity of a judge seems to be taken into account when promotion is considered.⁷⁶

⁷⁶ Similarly to BOPINION it is difficult to draw decisive conclusions about the connection between productivity and promotion, because the information about judges' productivity, where private law and criminal cases are excluded, is partial.

Finally, while appointment to the Court of Appeal at a younger age improves the chances for an eventual promotion to the House of Lords, this is not the case with regard to the age at appointment to the first high judicial position (i.e. to the High Court). In both regressions FIRSTJA is not significant, and its estimate is close to zero (and in fact positive). APPOINTC, on the other hand, is negative in both models and is significant in the general group of cases.

4.2 First Term in Office Versus Second / Third Terms

Our findings so far tended to support one of the key elements common to both the Landes-Posner and my explanation of the independence of the judiciary, namely that we have an independent judiciary because it is in the interests of the Government of the day. One possible test to confront the two explanations is the comparison between judicial decision-making during a Government's first term in office and its decision-making during second and third terms, as related to policies of promotion.

Posner and Landes argue that governments prefer an independent judiciary because it increases their profits from legislation sold to interest groups. Their assumption is that while an independent judiciary interprets the law, or, rather, enforces the 'contract' in accordance with the original legislature's intentions, a dependent judiciary would decide according to the wishes of the current Government. Governments can remain in power for long periods of time. It is likely that the longer the same Government is in power, the greater volume of legislation is a product of the current regime, rather than the previous one. On the basis of the Landes-Posner model one would then assume that while in the first years in office a Government will encourage decisions 'against' it, it is less likely to do so during later years in office, as the legislation at stake is more likely to be of its own. The next set of regressions is meant to examine this point.

I divided the data-set into two. The first segment consists of the cases decided during the first (and usually the only) terms in office of British Governments, and the second segment consists of cases decided in the second and third terms. During the period of this study only the Conservatives had a chance to serve consecutively

However, the significant positive correlation in the core group of cases can show that being on the panel on these sensitive decisions improves the chances of promotion (or, alternatively, if quality is a consideration for promotion, that the better judges are assigned these cases).

more than one term. This happened twice: between 1954 and 1964, and from 1983 until today (for the research purposes - until 1986). Since Labour is not represented in the second and third period group one could argue that the results of these proportional hazards regressions represent political differences in promotion policies between the two ruling parties rather than differences in attitudes between first term and second / third terms in office. However, when I examined directly the differences between Labour and Conservative Governments, the findings did not resemble those of the present division of the database.⁷⁷ This argument can, therefore, be rejected.

The results, which are specified in Table 12 only for the general group of cases, are interesting. Let us look first at the three variables which measure the 'loyalty' to the Government. In both regressions all three have a negative sign, but only REVFOR is highly significant. However, in the first term model REVAGA and AFFAGA are at 0.08 and 0.09 levels of significant respectively, while in the second and third model they are not significant at all.⁷⁸ If we can conclude anything from the differences between the two periods, the conclusion must lie in the opposite direction from that of Landes-Posner. From our findings it seems that during the first term in office British Governments disadvantaged those judges who overturned decisions more than the average, as well as those who decided cases against the Government more than the others, while in the second and third terms the Governments disadvantaged only those judges who were 'too loyal' by reversing and deciding for the Government more than the average.

The picture of granting leave for appeal and the actual arrival of the case to the House of Lords as related to promotion is less clear. In both models LA.ARHL and LA.NHL are positive, but save a 0.7 level of significance of LA.ARHL in the first term regression the results are not significant. NLA.ARHL have a negative sign in the first terms model, while taking a positive sign and being highly significant in the second and third terms regression. The possible interpretation is that the actual

⁷⁷ Since Labour Governments got to promote only five judges during the period of the research I could not examine statistically their promotion policies. However, I ran proportional hazards regression for the Conservative promotees only. The only significant result there was a negative sign of APPOINTC. On the basis of this result (and especially the lack of significance of any of the variables measuring 'loyalty' for the Government, in contrast to the all judges regression), one could argue that Conservative Governments are slightly less independent judiciary orientated than Labour Governments, a result which emerged also from the findings of section 3.

⁷⁸ When the individual characteristics of the judges (APPOINTC, FIRSTJA and DECYEAR) were excluded from the proportional hazards, the significance of REVAGA and AFFAGA in the first term model rose to 0.05 and 0.04 respectively.

arrival of a case to the House of Lords is the more significant factor, having a positive influence on the judge's chances of promotion in both periods. This factor was predicted to be a proxy for 'quality' but also for the familiarity of the judge in the legal community. It seems that granting leave for appeal, which was mainly a proxy for 'quality', has much less impact, and its impact is limited to Governments' first terms in office.

Table 12
*Promotion to the House of Lords as a function of Court of Appeal
judges' characteristics - Government's first term in office versus subsequent terms.*

independent variables	All cases-first term			All cases - second & third terms		
	estimate	standard error	pr > Chi- square	estimate	standard error	pr > Chi square
REVFOR	-6.18	2.79	0.03*	-10.93	5.20	0.04*
REVAGA	-5.82	3.27	0.08	-5.16	3.76	0.17
AFFAGA	-4.62	2.69	0.09	-1.54	4.14	0.71
LA.ARHL	3.44	1.90	0.07	11.19	10.98	0.31
LA.NHL	0.43	2.86	0.88	0.40	4.49	0.93
NLA.ARHL	-10.85	8.82	0.22	12.99	5.15	0.01*
BOPINION	1.26	1.39	0.37	2.42	1.94	0.21
REVHL	-1.08	0.84	0.20	-3.08	2.15	0.15
FIRSTJA	0.09	0.08	0.26	-0.05	0.13	0.70
APPOINTC	-0.10	0.06	0.13	-0.06	0.09	0.51
DECYEAR	0.06	0.04	0.09	0.45	0.12	0.01*
P > Chi- square**	0.0622			0.0023		

* Significant at 5% or less. Very small figures were approximated to 0.01.

** Calculated on the basis of a log-likelihood test

This interpretation is supported by the results of BOPINION, which is positive but not significant, and by the insignificance of REVHL, despite its predicted negative sign, in both regressions. From these findings it seems that the 'quality' of judges does not play a significant role in promotion decisions, regardless of the timing within the Government's life-cycle in power.

Moving on to the judges' individual characteristics, DECYEAR, the average number of decisions per year, is positively correlated to promotion in both models, and is highly significant in the second and third terms regression (it is at 0.09 level of significance in the first terms regression). The productivity of a judge seems to play a role in the decision whether to promote him, regardless of timing. The age at appointment to the Court of Appeal has a negative sign, and the age at first judicial

appointment has a positive sign in the first terms model and negative sign in the second and third terms model, but neither variable is significant in both regressions.

The conclusion from the comparison between first terms and second and third terms promotion policies harks back to the first three variables, the results of which do not lend support to the Landes-Posner explanation as to why Governments prefer to have an independent judiciary. The durability enhancement explanation, when tested on promotions from the Court of Appeal to the House of Lords, ought, therefore, to be rejected.

5. Patterns of Decision-Making After Promotion to the House of Lords

So far we have focused mainly on the Government side, by examining the considerations which are taken into account when a decision regarding judges' promotion is at stake. But the picture would not be complete without examining the other side of the pitch, the behaviour of the judges after promotion.

What will be interesting to examine here is whether the patterns of decision-making of the House of Lords are different from those of the Court of Appeal; and on the individual level, how does the behaviour of a judge change once he is promoted to the House of Lords? Since we concluded that 'loyalty' to the Government does not contribute to the judge's chances to be promoted - quite the contrary - one would expect that the decision-making characteristics of the House of Lords would be similar to those of the Court of Appeal, and if they are not similar that the House of Lords would be more 'anti-Government' orientated. Table 6 above showed that this is not exactly the case. At a first glance it indeed seemed that the House of Lords is more 'liberal' in terms of 'anti-Government' decisions, as it reverses on average 43.4% of the Court of Appeal decisions and decides 35.1% of the cases against the Government, while in the Court of Appeal these rates are 32% and 28.8% respectively. But these figures are misleading, since only a small portion of the Court of Appeal decisions get to be litigated in the House of Lords, and the figures obviously depend on the nature of these cases.

In fact, among the cases that do arrive in the House of Lords 42.5% are decisions of the Court of Appeal against the Government. This means that the Government tends to appeal on decisions against it more than those who challenge the Government's action, or that the Government is more likely to be granted a leave to appeal than those who challenge its actions. 57.3% of these Court of Appeal 'anti-

Government' decisions are subsequently reversed by the House of Lords, i.e. decided in favour of the Government. By contrast, among the Court of Appeal decisions in favour of the Government which reach the House of Lords, only 34.7% are reversed by the House of Lords and result, therefore, with a decision against the Government. These statistics are even more striking when we focus on the core group of cases. Here, among the 41.8% of the Court of Appeal decisions against the Government which arrive to the House of Lords 71.8% are overturned by the House of Lords, i.e. decided in favour of the Government. Among the 58.2% of the Court of Appeal decisions for the Government, only 28.1% are subsequently overturned by the House of Lords. These differences between the Court of Appeal and the House of Lords are even more significant in light of the fact that the Government is more likely to appeal on Court of Appeal decisions against it than those who are challenging the Government when they lose their case.

The bottom line is that the House of Lords is **diminishing** the total percentage of final decisions against the Government, and even more significantly so with regard to decisions against a minister or ministerial department. These findings are somewhat surprising: first, as we noted above, since 'loyalty' to the Government in the Court of Appeal does not contribute to promotion chances, quite the opposite, one would have expected similar patterns of decision-making in the two courts, or more anti-Government decisions in the House of Lords. Second, it ought to be remembered that the Law Lords are structurally more independent than their colleagues in the Court of Appeal because they do not seek further promotion. One would suppose, therefore, that if their decision-making patterns are different from the Court of Appeal's it would be in a direction exactly opposite to our findings, i.e. more decisions against the Government.

There are possible social-cultural explanations for these findings. It can be argued, for example, that judges arrive in the House of Lords after 35 years of 'socializing' pressures in the conventions of the judicial role, at an age in which they are no longer open to innovative thinking,⁷⁹ and that they become at that point even more associated and identified with the ruling elites and further remote from the ordinary people.⁸⁰ These observations are beyond the scope of this research, but I think that the findings speak for themselves and are relevant to the analysis of the

⁷⁹ See: Atiyah in Katzman [1988], pp. 145-146.

⁸⁰ See: Griffith [1985], especially pp. 222-235.

judiciary and its relations with the other branches of government, and especially to the question of judicial independence.

If judges side more with the Government once they reach the House of Lords, not through an institutional mechanism or a sanction system which creates a structural dependency, it is difficult to conclude that the Government really prefers an independent judiciary. It is possible to build, on the basis of these findings, a counter-argument according to which the Government does not want an independent judiciary, but since it knows that judges, when they reach the top judicial post, conform with the views of the establishment anyhow, there is no need to use the 'loyalty' measure in promotion decisions. In a similar way one can argue that other institutional mechanisms perform the job of keeping a judiciary which conforms to the Government's will; one such mechanism is the initial opening of the higher judiciary to a very limited group of people. Be that as it may, the findings with regard to the House of Lords' decision-making pattern should bring us to the conclusion that things are not as simple and straightforward as suggested in previous chapters, especially in the Landes-Posner model.

To conclude this section, an individual account of the effects of promotion from the Court of Appeal to the House of Lords is specified in Table 13, which includes only the judges who were promoted to the House of Lords. The figures in the table measure the deviation of each judge from the Court's average rate of 'anti-Government' decisions, encompassing all decisions and the core group decisions. Several interesting phenomena can be observed.

First, it can be noticed that the range of individual 'anti-Government' decision-making rates in the House of Lords is as wide as in the Court of Appeal (see Table 9 for the Court of Appeal account), in fact even wider - between 0% of Lord Lane and 61.1% of Lord Pearce for the general set of cases, and yet wider for the core group of cases. In a way, this finding contradicts, or at least unsettles, the belief that the Law Lords are made of the same skin, forged by a process of socialization and uniformity prior to reaching the House of Lords. Second, and again similar to the equivalent Court of Appeal statistics, the division between the Law Lords according to the 'anti-Government' decision rate cuts across periods of time and promoting Governments.

The more interesting finding here, though, is the consistency in the patterns of behaviour of individual judges. Most of the Law Lords whose rate of 'anti-Government' decisions in the Court of Appeal was above the average, maintain a higher rate of 'anti-Government' decisions also in the House of Lords, and vice versa

- judges who decided in the Court of Appeal against the Government less than the average continue to behave in the same manner in the House of Lords. The outstanding exceptions are Lord Hodson, who crossed the pitch from the 'pro-Government' side to the 'anti-Government' side after the promotion to the House of Lords, and Lords Brightman and Diplock (and to some extent Lord Russell) who took the opposite route. It should be remembered that the table does not reflect the overall trend of 'conservatism' of the House of Lords compared to the Court of Appeal's; it reflects only the deviation of individual judges from the Court's average.

Table 13
*Decisions against the Government in the
Court of Appeal and the House of Lords -
deviations from the Court's average percentage*

Judge	% decisions against the govt. (deviations from the Court's ave.)			
	Court of Appeal		House of Lords	
	general	core	general	core
Average	28.1	23.9	36.6	25.7
Lane	-13.2	-11.4	-36.6	-25.7*
Tempelman	-12.4	-23.9	+1.8	-9.0
Brandon	-11.4	-3.9	-11.6	-3.5
Cross	-10.1	-23.9	-3.3	-25.7
Upjohn	-7.2	-23.9*	-0.2	+40.9
Somervell	-6.9	-1.7	-5.8	
Roskill	-6.5	-15.7	-17.6	-15.7
Hodson	-5.2	-16.8	+15.1	+40.9*
Scarman	-0.9	-5.7	-1.8	+16.0
Denning	-0.2	-2.6	-3.3*	
Bridge	+0.7	-18.3	-11.6	-3.5
Cohen	+22.2*	+26.1	-4.5	+74.3
Edmond				
Davies	+19.8	+16.1	-1.3	+16.1
Brightman	+14.1	+13.6	-6.2	-25.7
Devlin	+10.1	+9.4	+12.4	+74.3*
Donovan	+7.3	+3.4	+17.8	+74.3*
Pearson	+4.5	-11.4	+7.8	+41.0
Pearce	+4.5	-23.9*	+24.5	+40.9
Russell	+3.2	-0.8	-28.9	-25.7*
Diplock	+2.7	+3.9	-17.2	-17.4
Evershed	+1.0	+12.5	-8.0	+40.3*
Jenkins	+0.8	+12.5	+19.0	+74.3
Salmon	-2.8	+6.1	+14.4	-25.7*
Morris	-2.2	+14.6	+7.6	+7.6

* Figures for less than five decisions are marked with an asterisk.

6. Conclusion

This chapter put to empirical test some aspects of the debate between the traditional and the revisionist' models of the independence of the judiciary, and more specifically, some aspects of the Posner-Landes model and my explanation regarding the independence of the judiciary. We focused on what seems to be the weakest component of the English judiciary's structural independence - the mechanism for appointments and promotions of judges - and tried to examine the connections between substantive independence of the Court of Appeal judges and their chances of promotion.

In an economic analysis or a public choice world the underlying assumption is that every player, be it a customer in a shop, a potential litigant, a judge or the Government, is acting rationally to promote his or her utility, or welfare, or well-being, or any similar notion of self-goal choice.⁸¹ In this kind of world, if the judiciary is structurally dependent upon the Government, and the Government seeks to encourage its substantive independence, it means that it is in the interest of the Government to have an independent judiciary. Landes and Posner offered a model to answer the question, why do governments prefer to have an independent judiciary; I tried to offer an alternative explanation. In this chapter we have not fully contrasted the two. We have focussed, though, on the preliminary question - is it really true that Governments promote the independence of the judiciary?

Had the Government preferred a dependent judiciary, i.e a judiciary that decides according to the Government's will, we would expect this to be shown in its promotion policy. By promoting according to 'loyalty' to the Government, the Government would have achieved a more 'loyal' House of Lords, and a more 'loyal' Court of Appeal. On the other hand, a Government that prefers an independent judiciary would either promote judges who tend to decide against it, or would not take into consideration at all 'loyalty' to the Government in its promotion policy. In this way the Government would create more independent courts, whose judges are signalled that anti-Government decisions would not affect, and may even increase, their promotion chances.

⁸¹ See our discussion in Chapter 1, section 2.3.

The findings emerging from this chapter, despite their overall statistical limitation, support (at least partly) the view according to which British Governments prefer an independent judiciary. Although significant differences in the degree of 'loyalty' to the Government among the different Lord Justices of Appeal were indeed found (the percentage of deciding against the Government varied between 4.5% and 50%; see Table 9), the hypothesis that deciding against the Government decreases the chances of promotion was rejected (Table 11). In fact, those judges who were 'too loyal' by reversing decisions of lower courts and deciding them for the Government were disadvantaged in promotions. However, we also discovered that these findings exclude the judges who are located on the extreme side of the 'anti-Government' decision-makers camp (Table 9). You may decide against the Government without affecting (and at time even increasing) your promotion chances, but if you cross a certain borderline this may operate against you.

As to the question why Governments prefer an independent judiciary, our findings with regard to the differences between promotion policies of Governments in their first term of office and promotion policies in second or third terms (Table 12) did not lend support to Landes-Posner contractual-durability explanation. We discovered that while deciding against the Government during first term of office tends to reduce promotion chances, this is not the case in the Government's second and third terms in office. This finding tends to contradict the Posner-Landes predictions, which derive from the fact that during the first term more legislation is a product of the previous Government and therefore needs durability protection by the courts.

As a by-product of this statistical analysis we discovered that the 'quality' of judges, measured by the reversal rate of their decisions, tended to correlate with promotion. This was exemplified when we found that the most reversed judges in the Court of Appeal were not promoted to the House of Lords (exceptions were Lords Denning, Bridge and Edmond Davies - see Table 10), though the proportional hazards model (in which a significant negative correlation between the rate of reversal and promotion was found only with regard to the core group of cases - see Table 11) was less decisive.

The factors found to be correlating to promotion are: the age of the judge at appointment to the Court of Appeal - the younger he was, the better his chances for promotion (this was not the case with the age at first judicial appointment) and, to

some degree, the productivity of the judge (more decisions per year, better chances for promotion). Other factors such as the familiarity with the judge in the House of Lords, measured by the percentage of his decisions litigated in the House of Lords, and refraining from writing elaborate opinions, have not produced decisive results.

The surprising results of this research, which complicate the straightforward conclusions regarding the Government's preference for independent judges, are the decision-making patterns of the House of Lords when compared to those of the Court of Appeal. Despite the fact that the Law Lords are institutionally more independent than the Lord Justices of Appeal, and although no correlation emerged between 'loyalty' to the Government and promotion, the Law Lords were found to be much more 'pro-Government' decision-makers than their colleagues in the Court of Appeal. This became apparent when we compared the House of Lords reversal percentage of Court of Appeal 'pro-Government' decisions to the reversal percentage of Court of Appeal 'anti-Government' decisions. Same results also emerged when the patterns of Law Lords' decision-making when hearing cases (on an ad-hoc basis) in the Court of Appeal were examined (Table 9). Their rate of 'anti-Government' decisions was lower than the Court of Appeal average.

These last findings place a question mark on the causal links portrayed in the Landes-Posner model and my explanation of the independence of the judiciary, and I even suggested in the previous section that it is possible to construct on the basis of these findings a contradicting argument. However, the wider context of the relations between the judiciary and the legislature and executive in Britain ought to rule out such a contradicting argument and lend support to the initial conclusions of the empirical testing. This wider context is beyond the scope of this chapter, but it is useful to make a note of the items it might comprise.

The last thirty years have witnessed an English judiciary which is becoming slightly more active in its willingness to review acts of the administration and the Government.⁸² This trend has not triggered a negative reaction on the part of the Government or legislature; quite the contrary. During this period Parliament and the Government extended the powers of the judiciary, including the powers to review the administration. Some milestones along this path are the controversial establishment of the Restrictive Practices Court in 1956;⁸³ the increasing employment of judges in

⁸² See: Aldous & Alder [1985], p. 9; Jowell [1988], p. 410.

⁸³ On the Restrictive Practices Court from the perspective of the judiciary and its independence see: Bell [1983], pp. 132-155.

commissions and inquiries and the enactment of the *Tribunals and Inquiries Act 1971*; the short-lived (1971-1974) Industrial Relations Court; and the *Supreme Court Act 1981* plus the 1977 and 1981 amendments to Order 53 of the *Rules of the Supreme Court*, which gave the courts new powers in the realm of public law, acknowledging its existence and distinctiveness, and compelling the courts further to develop a separate notion and rules of public law.⁸⁴

These changes, which according to my terminology amount to more delegation of powers to the courts, are accompanied by the recent proposals initiated by the Government to expand the pool of potential high judges to include any person who has held a general advocacy certificate (i.e. solicitors as well as barristers) for the minimum length of time specified in the law as required for the various judicial positions.⁸⁵ The addition to the pool of candidates for high judicial posts can be seen as an increase in structural judicial independence.⁸⁶

We can thus see, on the one hand, an increase in judicial powers, at least partly initiated by the Government, and on the other hand proposals of the Government to increase structural judicial independence. This, I think, can support the initial conclusions of the empirical research reported in this chapter, and especially my model of judicial independence, although the question of the decision-making patterns in the House of Lords remains an open one. In the next chapter a similar path of an increase in structural judicial independence, initiated by the Government, alongside an increase in substantive judicial independence, will be explored in the context of the Israeli legal system. A more detailed attempt will be made to substantiate the delegation theory of the independence of the judiciary offered in this thesis.

⁸⁴ See: Cane in Eekeler & Bell [1987]; Aldous & Alder [1985], pp. 3-11.

⁸⁵ Lord Chancellor's Department Green Paper [1989]. In this direction see the amendments to the *Courts and legal services Act 1990* (s. 71) with regard to the qualifications for judgeship in the High Court and the Court of Appeal.

⁸⁶ The Green Paper falls short of proposing changes to the method of appointment and promotion of judges. Futuristic visions of the British (written) constitution assign more powers to the judiciary, e.g. powers of judicial review of legislation, and propose to increase its structural independence, mainly by reforming the procedure for judicial appointments and promotions. See: *The Constitution of the United Kingdom* [1991], articles 92-113 and pp. 16-20; Justice [1992].

Chapter Eight

Structural and Substantive Independence of the Judiciary and the Theory of Delegation of Legislative Powers - The Case of Israel

..[T]he judges, and in particular the judges of the Supreme Court, appear to be dynamic, innovative and sometimes even daring to an extent uncommon in many countries. I find it difficult to explain this, except possibly that it goes with the dynamic nature of a young state, which has not as yet crystallized its institutions and traditions, and partly reflects the nature of the society in Israel.

Itzhak Zamir¹

Introduction

This chapter will examine empirically parts of the theoretical discussion on the independence of the judiciary in the context of the Israeli legal system, focusing on the interrelations between the Israeli Supreme Court and the other branches of government: the Knesset - the Israeli legislature, and the Government - the Israeli executive. I will inquire whether the judges of the Israeli Supreme Court are indeed "daring" as suggested by Professor Itzhak Zamir, a leading Israeli legal scholar and the former Attorney General, and, if so, why. A special emphasis will be given to the phenomenon of the independence of the judiciary in Israel, i.e. to the gap between structural and substantive independence, and to the delegation theory as the main explanatory factor for this phenomenon.

The case of the Israeli judiciary may be interesting also beyond its immediate scope, as the Israeli political and legal system is an intriguing combination of a Westminster and a Continental-European type of parliamentary democracy, with an increasingly effective American flavouring.² As **Section 1** of this chapter will elaborate, the State of Israel emerged from a British rule of Palestine, and it inherited major components of the British structure of government and of the English legal system. Thus, as in Westminster, there is no real separation of powers between the Israeli legislature and executive,³ and the Government has, in practice, full control

¹ I. Zamir, Rule of Law and Civil Liberties in Israel, 7 *Civil Justice Quarterly* (1988), 64, pp. 67-68.

² For general surveys of the Israeli democracy and legal system see: Arian [1985]; Maoz [1988b]; Medding [1990]; and Shimshoni [1982].

³ In fact, from the establishment of the State until the enactment of the *Transition Law* in 1949 the Government was an organ of the legislature. It gained a formal position of a separate entity only in 1968 with the enactment of the *Basic Law: the Government* which also provided for collective responsibility of the Government to the Knesset. See: Klein [1973], pp. 320 ff; Arian [1985], p. 157

over Parliament. But, unlike the British system, the Israeli Government does not have the power to dissolve Parliament. This is linked to another difference, more significant in our context - the structure of representation.

Proportional representation in Israel means a multi-party system and coalition governments. This is an important factor from a public choice perspective for, among other issues, a positive analysis of the judiciary. In the American case such an analysis is firmly founded on the fact that collective-public decisions are the result of an agreement between the President, Senate and House of Representatives, each based on a different structure of representation and thus having different ideologies, interests and motivations. The outcome is a degree of freedom or discretion of the judiciary to have the final say within a defined area of possible decisions (subject to structural independence components). This has significant bearing on the explanation of the differences between the American and the English judiciaries: in Britain, due to the parliamentary system, the judiciary has far less freedom to make decisions immune to reversal by the other branches.⁴

The coalition structure of government in Israel compensates for the lack of separation of powers, because collective public decisions require the consent of different parties with diverse ideologies, interests and motivations (instead of the consent of different sources of power as in the U.S.A). In this respect the model developed in Chapter 6 (figure 7) can fit not only the American legislative process, but also the Israeli one, whereas players 1, 2, and 3 represent the different coalition parties rather than the different branches of government taking part in the legislation process.

Indeed, this might provide an important explanation for the fact that the Israeli judiciary, and especially the Supreme Court, despite the organizational similarities,⁵ has been distancing itself from the English judiciary in its judicial thinking and its growing activism and involvement in political matters.⁶ Scholars point to three eras

⁴ For an account of the differences between the judiciary-legislature relationships in Britain and the U.S.A see: Atiyah in Katzman [1988]; Atiyah & Summers [1987].

⁵ For example: the panel structure rather than a full court decision-making, non-collegiate decision-making rather than a collegiate one and more. See: Deutsch [1990].

⁶ See, for example: Friedman [1985], p. 530; Lahav [1981]. According to Maoz [1988], p. 824, the annual number of prerogative writs issued by the Israeli High Court of Justice is ten times more than the number issued by the High Court in England. Criticism of these trends was made by Landau, the retired President of the Supreme Court [1981/82], p. 510 & [1989].

in the Supreme Court's judicial ideology: until the beginning of the Fifties - English-type formalism; from the Fifties to the Seventies - a slight departure from English formalism with preservation of self-restraint; and from the late Seventies - American-style judicial activism.⁷ The coalition government factor may account for the activism and daring of the Court, but it cannot provide us with a sufficient explanation as to **why** we find an independent judiciary in the first place - a judiciary which is, moreover, said to be a-political and thus idiosyncratic to the Israeli political landscape?⁸

This question is especially interesting in the Israeli case, because unlike the structural independence of the American judiciary which derives mainly from rigid constitutional provisions, and unlike the independence of the English judiciary which is, at least partly, the result of prolonged historical developments and struggles of powers, the structural independence of the Israeli judiciary, whose objects are both the Knesset and the Government,⁹ was created consciously by politicians alongside increasing judicial activism. **Section 2** of the chapter will elaborate on the creation of this structural independence of the Israeli judiciary in general, while **Section 3** will concentrate on the Supreme Court and its almost unlimited powers. I will try to show that the Israeli case supports the analysis of both the Landes-Posner model and my explanation for the independence of the judiciary, according to which there is an independent judiciary because it is in the government's and legislature's interests to have one.

While Sections 2 and 3 will deal with the legislature-government side of the story, **Sections 4 and 5** will focus on the judicial side, and especially on the substantive independence of the Israeli Supreme Court sitting as a High Court of Justice and its interrelations with the Knesset and Government. I will try to demonstrate the gap between structural and substantive independence and verify the delegation theory of the independence of the judiciary offered in Chapter 6. To place the discussion in its relevant context, this chapter will open with brief general notes on the Israeli constitutional and legal system.

⁷ See: Barak [1988]; Landau [1981/82], [1989]. In the latter article Landau writes (p. 6) that a fourth era might have begun, in which the pendulum is swinging back towards greater judicial restraint.

⁸ Arian [1985], p. 177.

⁹ The Knesset in a limited way, since there is no written Constitution in Israel. See: Albert [1969], p. 1249, who views the Israeli Supreme Court as lacking formal powers.

1. The Israeli Legal System - Notes on its History and Background

1.1 Up to the Establishment of the State of Israel

In order to understand the Israeli legal and political system one ought to travel in time some years before 1948 - the year in which the State of Israel was established. For about four hundred years before the break of the First World War, Palestine was part of the Ottoman Empire and its law was the general law of the Empire. At the end of the period, this law consisted mainly of the *Mejelle* - the Ottoman code (1864-1876) which was based on the law of Islam and on Civil codes, mainly the French. In addition, the religious law of each community was applicable as to personal status matters (family law) of its members.

In 1917 Palestine was conquered by Britain and a military rule replaced the Ottoman law. The same year saw the *Balfour Declaration* - a letter sent by the British Foreign Secretary to Lord Rothschild endorsing the policy to "view with favour the establishment in Palestine of a national home for the Jewish people".¹⁰ The San-Remo conference of 1920 entrusted Great Britain with a Mandate on Palestine (the term 'Mandate', which was formulated in the 1919 Versailles conference, means a foreign rule where the occupant is a trustee for the League of Nations). This Mandate was part of the fourth category of mandates, applied to previously Ottoman territories which were fairly developed and on their way to independence.

On the level of international law the Mandate gave Great Britain the power to rule Palestine. Internal British legislation - *The Jurisdiction in Foreign Countries Act 1890* - delegated these powers to the Privy Council, which, in turn, enacted the *Palestine Order in Council 1922*.¹¹ This constitution-type document determined Palestine's structure of government. The executive power was given to the High Commissioner who was to be nominated by the British Government and had been granted the main ruling powers. It also established a Legislative Council, but since the Arab residents of Palestine refused to sit in such a council the order was amended in 1923, the legislative council was abolished and a toothless Advisory Council was established. Thus the High Commissioner came to hold both the legislative and executive powers.

¹⁰ For the full text of the Declaration see: Laqueur and Rubin [1984], p. 17.

¹¹ 3 *Laws of Palestine* (rev. ed.), 2569, 2580.

Courts, and the substantive law directing them, were regulated in articles 38-67 of the Order, but there was nothing there with regard to the judiciary. Until 1940 judges were appointed and subject to dismissal by the High Commissioner as any other public officials.¹² The *Courts Ordinance 1940*¹³ specified (section 14) that judges were to be appointed by the High Commissioner in accordance with such instructions as he may receive from His Majesty, and they were to hold office during the pleasure of His Majesty. Despite this institutional dependency judges were able to maintain some degree of independence from the executive. The more significant incidents in which this independence came to the fore were confrontations with the High Commissioner following reports of investigation committees headed by judges (like the 1921 Hikrapt Committee), and several controversial judicial decisions (such as the High Court decision following the demolition of a house in Arab Jaffa in the aftermath of the 1936 riots¹⁴). Some of the British judges were perceived by the Jewish Community to be very hostile to the Jewish causes, but, in general, the judicial system gained the confidence of this community.¹⁵ From the late Thirties the High Commissioner made his judicial appointments after a consultation with a committee comprising judges and lawyers, and the number of locals (Jews and Arabs) appointed to the Bench increased. By the end of the Mandate one out of the seven Supreme Court judges, nine out of 20 District Court judges and 13 out of 41 Peace Court judges were Jewish.¹⁶

As to substantive law, Article 46 of the *Palestine Order in Council* provided that:

- 1) The Ottoman law that was in force on 1st November 1914 (the date of the outbreak of hostility between Turkey and Britain) will continue to be in force, in addition to later Ottoman legislation as may be declared to be in force by public notice.
- 2) The Privy Council and the Mandate authorities were given the power to enact new legislation (that is: ordinances and regulations).
- 3) A court, when faced with a problem solved by neither the Ottoman law nor

¹² Article 14 of the *Palestine Order in Council 1922* empowered the High Commissioner to appoint officials, determine their roles and scope of power and dismiss them. This was applied also to judges.

¹³ 1940 *Palestine Ordinances*, (vol. 1), 143.

¹⁴ HC 44/36 *El Qasir v. Attorney General*, 3 *Palestine Law Reports* 121.

¹⁵ See: Rubinstein [1980], p. 18.

¹⁶ *Ibid*, p. 25.

the Mandate legislation (a lacuna), should apply the Common Law and the doctrine of Equity which are in force in England, subject to the circumstances of Palestine and its inhabitants.

On 29 November 1947 the General Assembly of the United Nations approved the *Partition Resolution*, which paved the way to the establishment of the State of Israel.¹⁷ This resolution can be seen also as the starting point of the development of Israel's (unwritten) constitution, as it lays down the transitional stages from Mandate rule to sovereign governments in the two states to be established. These included setting a date (1.4.1948) for the establishment of a provincial council of government in each of the two new states, and a deadline (1.8.1948) for the withdrawal of British forces from Palestine and the termination of the Mandate. The two states were expected to gain independence by the 1st of October 1948; by then, according to the resolution, democratic elections for constitutional assemblies were to be held. The resolution also laid down constitutional principles which the states were to adopt: universal, proportional and secret elections to the legislative body; an executive body responsible to the legislature; and guarantees for equality of rights and fundamental freedoms. A UN implementation commission was charged with completing the preparations for the transfer of powers from the Mandate authorities to the new bodies of the two states.

Despite its unwillingness to cooperate with the implementation of the UN resolution, the British Government decided to terminate its rule of Palestine on midnight the 14th of May 1948. Meanwhile the Jews in Palestine started independently to prepare for the establishment of a Jewish state. Negotiations between the political parties resulted in the establishment, on April 1948, of a Provisional Council of Government comprising 37 members, and an executive body of 13 members chosen from the Council. Although there were some discussions as to the future judicial branch, and several committees were even set for that purpose, this was not a top priority issue, and it was decided that for the time being the existing courts system will continue to operate.¹⁸

¹⁷ For its text see: Laqueur and Rubin [1984], p. 113.

¹⁸ See: Rubinstein [1980], pp. 33-49.

1.2 From the Establishment of the State of Israel

A few hours before the termination of the Mandate the Provisional Council met in Tel-Aviv and decided that due to the danger of chaos following the withdrawal of British forces it would declare immediately the establishment of the State of Israel. The result was *The Declaration of Independence*.¹⁹ It was read by the chair of the Provisional Council, David Ben-Gurion, and signed by all 37 members. Commencing with an historical survey of the events that led to the establishment of the State, the Declaration goes on to announce its establishment and its name - the State of Israel. This is followed by setting a date (1.10.1948) for the adoption of a constitution by an elected Constituent Assembly, until which the council of the 37 - now labelled the *People's Council* - is assigned as the provisional council of the state, and its executive organ - the *People's Administration* - is assigned as the provisional government. The third part of the Declaration proclaims the basic principles that ought to guide the new state. These include equality of social and political rights to all inhabitants irrespective of religion, race or sex, and freedom of religion, conscience, language, education and culture.

Following the Declaration of Independence the Provisional Council published a Proclamation in which it declares itself the legislative authority.²⁰ As in the transition from Ottoman rule to the Mandate, the substantive law, as well as the institutions and their authorities, were preserved as they were during the Mandate with only slight adjustments. This line of continuity was reinforced when a week later the Provisional Council enacted the *Law and Administration Ordinance*, which deals with the continuity of the law, the validity of orders, directives, obligations etc., the continuity of companies and other legal personalities, the continuity of the courts and that of local authorities.²¹

The continuity of substantive law included the incorporation (through Article 46 of the *Palestine Order in Council*, which was itself incorporated to Israeli law through section 11 of the *Law and Administration Ordinance*) of the English Common Law and Equity. Only in 1980 were these links severed, when the Knesset enacted the *Foundations of Law Act 1980* which abolished Article 46 altogether. Instead of

¹⁹ *The Declaration of the Establishment of the State of Israel*, 1 Laws (1948) 3.

²⁰ 1 Laws (1948) 6.

²¹ 1 Laws (1948) 7, sections 4, 11, 17, 19, 20.

the English Common Law the judges are called upon to use Israeli common law - "the principles of freedom, justice, equity and peace of Israel's heritage".²²

Elections to the Constituent Assembly were held on 25.1.1949. The principles set to guide these elections were similar to the election system of the Mandatory Jewish community government (Va'ad Leumi), and followed the lines of the Partition Resolution.²³ They formed the election system that is still in force today: direct secret elections for parties offering a ranked list of candidates, competing on the basis of a single national constituency. The 120 places in the Constituent Assembly were to be allocated proportionally according to the election results, whereas the threshold for representation was only one percent of the votes.²⁴ No fixed term of office was set for the Constituent Assembly.

It seems that the intention was to establish an original, sovereign (as opposed to limited, referendum-requiring) constituent assembly. But it also seems that the Provisional Government foresaw that the elected Assembly would not draft a constitution, and instead would become the legislative body. Indeed, one of the first acts of the Assembly was to enact the *Transition Law*,²⁵ which established the structure of government that has been in force in Israel since.

The *Transition Law* named Israel's legislative body the *Knesset*, and its future enactments - *laws*. The Constituent Assembly became the First Knesset; it was given, therefore, legislative power. The Law also dealt with the role of the President of the State, who was given only nominal powers and was to be elected by the Knesset through a secret ballot. The procedure for the formation of a Government was determined as well, in a form very similar to the English model. The President, following new elections or the Government's resignation, was to appoint (after consulting representatives from all parties elected to the Knesset) a

²² 34 Laws (1980) 191, section 1. In fact, this Law was preceded by a gradual repeal of the applicability of Article 46 in fields of law in which original Israeli legislation was enacted (e.g. contracts). In 1969 an amendment to the *Law and Administration Ordinance* was enacted; it stated that any provision that ordered the interpretation of legal norms according to the English cannons of interpretation was no longer binding.

²³ The election arrangements were regulated in the *Constituent Assembly Election Ordinance* 1948, 2 Laws (1949) 24; and in the *Constituent Assembly (Transition) Ordinance* 1949, 2 Laws (1949) 81.

²⁴ Recently (March 1992) an amendment to *Basic Law: the Government* was passed which increases the representation threshold to 1.5% (already in the 1992 elections this diminished the number of lists which managed to get elected). The more radical change of this amendment to Israel's system of government is that as from the next election (1996) the Prime Minister is to be elected directly.

²⁵ 3 Laws (1949) 3.

member of the Knesset to form a new Government.²⁶ The Government is established if it gains the confidence of a majority of Knesset Members, and it is collectively responsible to the Knesset. The Knesset can vote no-confidence in the Government, upon which it is to resign and the ball returns to the President's court. The *Transition Law* called upon the Provisional Government to resign as soon as a new Government is established according to the new procedure. Such a Government was indeed established, headed by Ben Gurion and based on a coalition between Mapai, the United Religious Front, the Progressive Party and the Sepharadim.²⁷

The First Knesset formed a committee for constitutional and legal issues that was supposed to prepare a draft of a constitution. But already in those early stages it was quite clear that Israel would not have a constitution in the foreseeable future. The main opposition to a constitution came from the religious parties, who argued that the only acceptable constitution is the Bible or the Judaic creed. Others argued that it is too early to adopt a constitution, since a great wave of immigration is due to come and it should take part in such crucial decisions. Ben Gurion, who needed the religious parties in his coalition, agreed to drop the idea of a constitution. It is likely that he himself opposed the idea, fearing possible judicial review that was likely to result from the enactment of a constitution, and desiring to emulate the English model of government.

Finally, on June 13, 1950 the Knesset adopted a compromise motion known as the *Harari Decision* (rejecting an opposing motion known as the *37 Decision* which called for an adoption of a constitution within the current Knesset's term of office). It stated that Israel should have a written constitution, but opted against its immediate enactment. Instead, the Constitution, Law and Justice Committee of the Knesset was ordered to prepare chapters of a constitution to be enacted separately as *Basic Laws* and eventually to be incorporated into a written constitution. Neither time limits nor a specification of the distinction between a Basic Law and an ordinary Law were stipulated. The first Basic Law was enacted by the Third Knesset.

Ten Basic Laws have been enacted so far: *The Knesset* (1958);²⁸ *Israel Lands* (1960);²⁹ *The President of the State* (1963);³⁰ *The Government* (1968);³¹

²⁶ As indicated in footnote 24 this arrangement is to change from next elections.

²⁷ For more on the *Transition Law* see: Medding [1990], pp. 32-37.

²⁸ 12 *Laws* (1958) 85.

²⁹ 14 *Laws* (1960) 48.

The State Economy (1973);³² *The Army* (1974);³³ *Jerusalem - the Capital of Israel* (1980);³⁴ *Judicature* (1984);³⁵ *The Freedom of Occupation* (1992) and *Human Dignity and Freedom* (1992).³⁶ Two major basic laws are still waiting to be enacted - the important Bill of Rights, and the Legislation Law which is meant to incorporate all Basic Laws into a rigid constitution.³⁷

In February 1951, following a coalition crisis over the education of Yemenite children, Ben Gurion submitted to the President the collective resignation of the Government. This was followed by the enactment of the *Second Knesset (Transition) Law 1951*, and the *Second Knesset Election Law 1951*,³⁸ which regulated the elections to the Second Knesset and the dissolution of the First Knesset. They also transferred the First Knesset's powers, rights and duties to the Second Knesset and the following Knessets,³⁹ fixing a four-year term of office for the subsequent Knessets. Arrangements for the transition period were also included - a transitional Government which cannot be impeached by the Knesset, and its members cannot resign. These arrangements, with minor amendments, hold to this day.

³⁰ 18 Laws (1963) 111.

³¹ 22 Laws (1968) 257.

³² 29 Laws (1974) 273.

³³ 30 Laws (1975) 150.

³⁴ 34 Laws (1980) 209.

³⁵ 38 Laws (1984) 101.

³⁶ Yet unpublished in English.

³⁷ Bills of these two Basic Laws were already put on the Knesset's agenda; the Legislation Law in 1975 and 1978 (failed to pass first reading), and the Bill of Rights in 1963 (did not pass first reading), 1973 (passed only first reading), 1982 (did not pass first reading) and 1989 (has not passed first reading yet). See Rubinstein [1991], pp. 704-707. The two 1992 Basic Laws can signify a change of tactics; the civil rights lobby now perceives the enactment the Bill of Rights bit by bit as potentially more successful.

³⁸ 5 Laws (1951) 94 and 5 Laws (1951) 99 respectively.

³⁹ A theoretical controversy arose over the the question whether the First Knesset could legally have transferred its Constituent Assembly powers to the subsequent Knessets. Several scholars, for example Nimmer [1970], argue that these powers could not have been delegated by the elected Constituent Assembly which declared itself "the First Knesset". Implied in this approach is the view that the current Knesset cannot bind itself by entrenched laws. This view, however, was rejected by the Supreme Court in H.C 98/69 *Bergman v. The Minister of Finance and Others* 23(1) PD 693; 4 Isr.L.R (1969) 559, in which the Court recognized the Knesset's powers to enact Basic Laws and to entrench them. The situation, therefore, is that the Knesset has triple powers: an original constituent power (to enact a constitution), a derived constituent power (to amend it) and a legislative power.

2. Israel's Judicial Branch of Government - The Foundation of Structural Independence

2.1 Early Days - Up to 1953

The story of the Israeli judicial branch of government is fascinating, especially when one focuses on the question - why do we find an independent judiciary? As described before, the State of Israel emerged from a British mandatory regime which was authoritarian, suppressive, and lacking any real form of separation of powers. The High Commissioner held both the legislative and the executive powers, and the judicial branch was institutionally subordinated to him, as he could appoint and dismiss judges at pleasure. In practice, from the late Thirties the High Commissioner consulted an advisory committee before the appointment of judges, and from 1943 the members of this committee were themselves appointed by the Chief Justice, but this was only an informal arrangement.⁴⁰

In addition to this institutional background we may mention also the socio-cultural one: the ambivalent attitude of the Jewish community towards the judiciary. On the one hand, the judicial system gained more confidence in the community than any other branch of government, and adjudication was one of the only fields in which alternative institutional arrangements were not established by the community.⁴¹ On the other hand, the judiciary was part of the colonial regime, some of the judges were perceived to be very hostile to the Jewish causes, and many members of the community were engaged in various activities by-passing the law and the courts, such as the illegal immigration. An untranslatable Hebrew expression - 'creating facts on the ground' - was coined; it expresses disregard for the law. (This expression is still used today by the settlers in the occupied territories). With this background the prospects for an independent and significant judicial branch of government, and for rooting the idea of the rule of law, were not great.

With the establishment of the State the principle of continuity was applied also to the courts system.⁴² However, since all but one of the Supreme Court judges

⁴⁰ See: Rubinstein [1980], p. 24.

⁴¹ See also: Lahav [1989], pp. 479-482.

⁴² Section 17 of the *Law and Administration Ordinance*, 1 Laws (1948) 7.

were British, and since the Supreme Court was situated in besieged Jerusalem, it ceased to operate, and its jurisdiction was transferred temporarily to the District Court of Tel-Aviv.⁴³ The Provisional Council took this early opportunity to make other changes in the system, such as abolishing the Court of Criminal Assize and the Land Court.⁴⁴ But the changes more interesting for our purposes were three: the first was a new, more democratic, method of appointing judges to the future re-established Supreme Court. They were to be appointed by the Provisional Government on the recommendation of the Minister of Justice, subject to the approval of the Provisional Council. The second change was the removal of the government's immunity by repealing the Mandatory rule according to which no action can be brought against the government of Palestine or any of its departments without the written consent of the High Commissioner being previously obtained.⁴⁵

The combination of these two changes is interesting because the latter extends the authority of the courts, especially in the context of reviewing and balancing the other branches of government, while the former extends the structural independence of judges (relative to the situation during the Mandate). The third change went in an opposite direction: powers of the Mandatory Chief Justice to make procedural rules and to administer the courts were transferred to the Minister of Justice.⁴⁶ This was done because of the absence of a Chief Justice; but later on, when the Supreme Court was re-established, most of these powers remained with the Minister of Justice, and the power to make procedural rules in civil cases is in his hands to this day.

The first judicial appointments to the Peace (magistrate) and the District courts were made less than two weeks after the establishment of the State, and although they were decided solely by the Minister of Justice,⁴⁷ no political considerations were taken on board.⁴⁸ It is noteworthy that in the Israeli system all judges in the three

⁴³ *Courts (Transitional Provisions) Ordinance 1948*, 1 *Laws* (1948) 23, section 2. The time and place of the re-establishment of the Supreme Court were left to the decision of the Provisional Government.

⁴⁴ *Ibid.*, sections 7 and 8 respectively.

⁴⁵ The original Mandatory provision was in the *Palestine Order in Council 1922*, Article 50. This provision was repealed by section 9 of the *Courts (Transitional Provisions) Ordinance 1948*. See also: Klinghoffer [1983], pp. 44-45.

⁴⁶ The original powers were vested in the Chief Justice only from 1940, by the *Courts Ordinance 1940*, section 22.

⁴⁷ According to the *Mandatory Courts Ordinance (Amendment no. 31) 1940*.

⁴⁸ See: Rubinstein [1980], pp. 57-58.

instances' courts are expert jurists (there are no laymen) and there is no jury (all decisions - factual and legal - are made by judges). Meanwhile, the preparations to re-open the Supreme Court went ahead, and the Minister of Justice prepared a list of people to be among the first appointees. Here, it seems, there were some political considerations, and three out of the first five nominations could be identified with the coalition parties. The other two represented the religious community (but not identified with any specific religious party) and the right wing (although not a representative of the Revisionist stream). Their nomination was confirmed by a large majority of the Provisional Council, with probably only the left wing parties (which were not represented in the suggested list of nominees) opposing.⁴⁹ The Supreme Court was opened in Jerusalem on 13.9.1948. Two additional appointments were made soon after; this time the nominees were not politically identified.

It is interesting to go through the first decisions of the Supreme Court, given in the midst of the Independence War by judges whose structural independence at the time was almost non-existent. The very first case which was heard by the Court was a criminal appeal by an Englishman who was convicted in the District court for spying. The Supreme Court, in an unpopular decision, overturned this ruling and acquitted the man.⁵⁰ One of the other early cases was an application for Habeas Corpus of a man who was detained according to Regulation 111 of the *Mandatory Defence (Emergency) Regulations 1945*.⁵¹ The respondents in this case were the Minister of Defence, the IDF Chief of Staff and the Military Governor of Jaffa. The Court decided in favour of the applicant, on the grounds of the lack of an advisory committee which, according to the Court, was a necessary condition for using the detention powers.⁵²

Another case worth mentioning was a petition made by a teacher who was refused a job in a Tel-Aviv high school following an objection by the Ministry of Defence, due to his right wing - Revisionist opinions. The Court decided in his favour, making the order nisi against the Minister of Defence and the director of the

⁴⁹ For more details see: Lahav [1989], pp. 484-486; Ulshan [1978], pp. 205-208; Rubinstein [1980], pp. 58-75.

⁵⁰ Cr. A 1/48 *Sylvester v. the Attorney General*, 1 PD 5. For a personal account of the case by one of the judges who gave the decision see: Ulshan [1978], pp. 215-217.

⁵¹ These regulations were incorporated into Israeli law, as all other Mandatory legislation, through section 11 of the *Law and Administration Ordinance*.

⁵² HC 7/48 *Alkarbutli v. the Minister of Defence and Others*, 1 PD 97. See also: Ulshan [1978], p. 218.

education wing in the Ministry of Education absolute.⁵³ By this decision the Supreme Court gained the confidence of the right wing, but altogether, within a short period of time it managed to gain the confidence of most of the public as well as the politicians. High public regard is still one of the characteristics of the Israeli judiciary today.

The first clash between the Supreme Court and the Government and Knesset occurred early in 1952. Proposing to the Knesset a bill imposing minimum sentences on persons convicted of assaulting policemen, the Minister of Justice, Dov Yoseph, made a remark to the effect that the judges were "too merciful" and their sentencing policy was amounting to "an insult to the law". Following an uproar in the house the Minister added that "it is my right and my duty to express such thoughts. Are they [the judges] winged saints who descended from heaven, in the confidence of the Lord, who know right from wrong?".⁵⁴ In response, the President of the Supreme Court sent a letter on behalf of all the judges to the Speaker of the Knesset, expressing the concern of the Court for the relations between the branches of the government which were disrupted by the Minister's attack, and for the potential damage to the faith and respect of the public in the judiciary. It contained also an implicit criticism of the situation according to which the Minister of Justice had a monopoly on judicial administration and was the only political channel for a dialogue between the branches. The letter, although published in full in the daily paper *Ha'arertz*, was returned to the President unopened in order to emphasize the separation of powers and the sovereignty of the Knesset in its deliberations. This took place after the Minister of Justice rejected the criticism levied against him, and received the backing of the Prime Minister, whose motion to remove the issue of the letter from the Knesset's agenda gained the votes of the majority coalition members.⁵⁵

⁵³ HC 144/50 *Sheib v. the Minister of Defence and Others*, 5 PD 399; 1 SJ (1948-53), 1. On the effects of this decision see: Rubinstein [1980], p. 94.

⁵⁴ Quoted in Lahav [1990], p. 245.

⁵⁵ For more on the affair see: Rubinstein [1980], pp. 97-101; Lahav [1990], pp. 244-247; Ulshan [1978], pp. 243-244. Somewhat surprisingly, when the Minister of Justice post fell vacant following the 1961 elections (as the long-serving Pinhas Rosen refused to continue), Prime Minister Eshkol consulted the President of the Supreme Court, Itzhak Ulshan, who recommended Yoseph for the post. Yoseph became Minister of Justice, but apparently ignored the lesson of 1952, and the next few years saw increasing tension between the Supreme Court and the Minister, mainly on matters of court administration. See Ulshan's own account [1978], pp. 353-369.

2.2 Legislating Structural Independence - From 1953

The Knesset incident, which in itself did not have any significant long lasting implications (soon after the affair the previous Minister of Justice, Pinhas Rosen, took the post again as the Progressive Party rejoined the coalition), gave an important boost to the enactment of the *Judges Law 1953*.⁵⁶ This legislation, which applied to all three instances' courts, significantly increased the structural independence of the judges. It states that "a judge in judicial matters is subject to no authority other than that of the law".⁵⁷ But its most important innovation was a new procedure for the appointments of judges.⁵⁸

The appointment is to be made by the President of the State upon the recommendation of an appointment committee comprising three Supreme Court judges (The President of the Court and two other judges elected by all Supreme Court judges), two ministers (the Minister of Justice and another minister appointed by the Government), two Knesset Members (elected by secret ballot in the Knesset) and two members of the Israeli Bar (elected by the Bar Council). In addition to the fact that the committee represents all three branches of government plus the legal profession, it is comprised in such a way that there is a majority of 5:4 for non-politicians (the judges and the lawyers). The Knesset and the Government, which had had a monopoly on the appointments of judges according to the previous arrangement, decided to share this power or, in fact, to delegate it to the profession. The same method of appointment applies also to the selection of the President and Deputy President of the Supreme Court, who are to be chosen from among the Supreme Court judges.⁵⁹ During the first year of the *Judges Law* a new Supreme Court President was appointed, as well as five new Supreme Court judges.

Another important provision in the Law was the granting of tenure to judges with a mandatory retirement age of 70. The only way to remove a judge from office is a decision of a disciplinary tribunal comprising three or five members, a majority of whom are Supreme Court judges, appointed on an ad-hoc basis by the judges of the

⁵⁶ 7 Laws (1953) 124.

⁵⁷ Ibid, section 13.

⁵⁸ Ibid, section 5.

⁵⁹ Ibid, section 8. Nevertheless, so far the unchallenged tradition is that these appointments are made on the basis of seniority in the Supreme Court.

Supreme Court.⁶⁰ The Law also holds that the salary of judges is to be prescribed by a decision of the Knesset or its Finance Committee if it is empowered by the Knesset to fulfil this task.⁶¹ In addition, the Law specifies who is qualified to be appointed as a judge in each of the three instances. Interestingly, in addition to lawyers or judges of ten years of practice, eligible for the Supreme Court are also those who have been teaching in law schools for at least ten years, and also "eminent jurists".⁶²

Although the new arrangements of the *Judges Law* were a significant change in the structural independence of the Israeli judiciary, it would be inaccurate to conclude that they brought about a revolution. They were more of a legal guarantee for a tradition which had been developing since the establishment of the State. Nevertheless, some scholars argue that it was not a coincidence that the leading and revolutionary decision of *Kol-Ha'am*⁶³ - the cornerstone for the establishment of the Israeli judge-made bill of rights - was given two months after the enactment of the *Judges Law*.⁶⁴ Be that as it may, it is noteworthy that unlike the American case in which structural independence was enforced from above by the framers of the Constitution, and unlike the British case in which this independence was the result of a clash of powers between King and Parliament, in Israel structural independence was created quite straightforwardly by the legislature and Government.

Not all the provisions of the Law were welcomed by the judiciary. The administrative responsibilities for the courts, for example, which were taken from the judiciary when the State was established, were retained by the Minister of Justice, although the implementation of these administrative rules was entrusted to a judge responsible to the Minister, whose headquarters were to be located in the Supreme Court building.⁶⁵ The judges were not satisfied with this arrangement, but it was a compromise and an improvement on the previous situation.⁶⁶

⁶⁰ Ibid, sections 15-17 and 21.

⁶¹ Ibid, section 18.

⁶² Ibid, section 2.

⁶³ H.C 262/52 *Kol Ha'am v. the Minister of Interior*, 7 PD 871; 1 SJ (1948-1953), 90.

⁶⁴ See: Lahav [1990], p. 247.

⁶⁵ Section 14 of the *Judges Law*.

⁶⁶ On the judges' views see: Ulshan [1978], pp. 245-246.

The administrative issue remained the main source of controversy when four years later the *Courts Law 1957* was enacted, completing the transformation of the judicial system to be governed by an original Israeli legislation.⁶⁷ The debate was framed as the Continental approach, in which the administrative control of the courts is in the hands of the government, against the Anglo-American approach, in which these powers are in the hand of the judiciary (although it is inaccurate to view the Lord Chancellor in Britain as solely part of the judiciary). The result was a compromise suggested by the President of the Supreme Court. The administrative powers and the power to make rules of procedure remained with the Minister (while the actual administration, as mentioned above, is in the hand of a judge responsible to the Minister but working from the Supreme Court building). The judicial powers of the Mandatory Chief Justice were vested in the President of the Supreme Court and his or her deputy; this included the power to decide when a case will be heard, by how many judges (three or a higher odd number), and who will sit on the bench.⁶⁸

Another controversy around the *Courts Law* was related to the question who will have the power to determine the number of judges in the Supreme Court. This power can have an effect on the structural independence of the court, as was shown by the American experience (Roosevelt's plan to 'pack' the Court in order to reverse its stance towards the New Deal, preceded by a nineteenth-century phase in which changes in the number of Supreme Court Justices were in fact made for political purposes).⁶⁹ After lengthy debates the Knesset decided to allot this power to itself; a resolution of the Knesset can change the number of judges in the Supreme Court.⁷⁰

We may conclude that by the two pieces of legislation regulating the judiciary the Government and the Knesset gave up major control powers over the judiciary, and significantly increased its structural independence. This, however, refers mainly to the structural independence whose object is the Government, as these arrangements were not entrenched from future legislation.

⁶⁷ 11 Laws (1957) 157.

⁶⁸ Ibid, sections 4, 45, 46. See also: Rubinstein [1980], pp.113-114; Ulshan [1978], pp. 223-225, 247-252.

⁶⁹ See: Bator et al. [1988], pp. 30-42.

⁷⁰ *The Courts Law*, section 2.

Further institutional changes were made in 1984 with the enactment of the *Basic Law: Judicature*,⁷¹ and the *Courts Law (Consolidated Version) 1984*.⁷² In fact, the two laws are only an updated version of the *Judges Law 1953* and the *Courts Law 1957*, and the substantive changes in them are minor. Nevertheless, the changes which were introduced - a new division between the two laws and an elevated status for the former one, which is meant to be part of the future Constitution - increased yet again the structural independence of the Israeli judiciary, this time also vis-à-vis the legislature.

The first chapter of the *Basic Law: Judicature* includes some principles already specified in the previous legislation, e.g. the subordination of judges only to the law.⁷³ But it also contains additional points, like the publicity of legal proceedings and the rule against ad-hoc tribunals.⁷⁴ Chapter 2 of the Basic Law deals with the judges. It specifies the procedure for their appointment which remains as before, although the wording of the relevant section is slightly different. The appointment committee is dubbed "Judges Election Committee", and the appointment is to be made by the President of the State "upon election by a Judges Election committee" instead of "upon the proposal of an appointments committee", to stress the binding force of the committee's decisions.⁷⁵ A new subsection was added to the provision dealing with judges' salaries, according to which "no decision shall be passed reducing the salaries of judges only".⁷⁶ The third chapter of the Law deals with the Supreme Court and its jurisdiction, while other courts and their powers were left to be regulated by law (they were indeed regulated by the *Courts Law*, which was enacted subsequently). The Basic Law is immune from emergency regulations.⁷⁷

In addition to the minor substantial changes of the two laws, which tend to increase the structural independence of the judiciary whose object is the

⁷¹ 38 Laws (1984) 101.

⁷² 38 Laws (1984) 271.

⁷³ Section 2 of the *Basic Law: Judicature*.

⁷⁴ *Ibid*, sections 3 and 1(c) respectively.

⁷⁵ *Ibid*, section 4(a).

⁷⁶ *Ibid*, section 10(b).

⁷⁷ *Ibid*, section 22.

Government, one ought to notice the change brought by securing the more important part of these arrangements in a Basic Law. At present, the differences between Basic Laws and regular laws are minimal. Some of the Basic Laws have entrenched sections, and most of them, including *Basic Law: Judicature*, are secured from emergency regulations. The latter measure further increases the structural independence of the judiciary from the Government, as it is the Government which has the power to enact emergency regulations. But, as indicated before, in the future the Basic Laws are to be incorporated into a Constitution, and according to proposals of *Basic Law: Legislation* their amendments will require a qualified majority of the Knesset (There are two proposals, one for 51 percent of the Knesset Members and the other for a two-third majority). Securing the independence of the judiciary in a Basic Law, therefore, means an increase also in the structural independence of the judiciary whose object is the legislature.

Once again, the interesting point from the perspective of this thesis is that the legislature and the Government themselves worked out these constitutional arrangements of structural independence, in which their power is being restricted. This is a significant observation in the context of the debate between the traditional and the 'revisionist' views of separation of powers and the independence of the judiciary. Had an independent judiciary worked against the interests of the politicians, as it is portrayed by the traditional approach, the politicians would not have made such an effort to built an independent judiciary. Under the fundamental assumptions of the economic approach we may conclude that the independence of the Israeli judiciary works to the advantage of the legislature and the Government.

3. The Jurisdiction and Powers of the Supreme Court of Israel - a Special Case of Structural Independence

The individual independence of judges (in our jargon: the independence whose subjects are the individual judges and whose objects are the other branches of government) and the way it has been created by the legislature and Government would have been less impressive had the jurisdiction of the courts, especially of the Supreme Court, not been as extensive as it is. The history of the structural independence ought to be read, therefore, alongside the history of the Supreme Court's powers and the way in which they have increased.

The Israeli Supreme Court, which nowadays consists of twelve judges, hears civil and criminal appeals, and also acts as a High Court of Justice.⁷⁸ Since the Israeli judicial system comprises only three instances - Peace Courts, Districts Courts (five in number) and a Supreme Court, and since the more important civil and criminal cases are heard in a District Court, unlike other legal systems, the Israeli Supreme Court has to deal with a large number of appeals (currently more than 3000 a year), and usually it cannot choose the cases to be heard by it (save cases which began in a Peace Court, in which leave for a second appeal is required). The Court has, therefore, an extremely important role in the development of these fields of law. Because of the unmanageable load of cases a proposal for a reform in the courts system was recently put forward, according to which an additional instance will be established - a Court of Appeals - to be located above the District Courts and below the Supreme Court. If this proposal materializes the automatic right of appeal to the Supreme Court will not be sustained.

But the more significant power of the Supreme Court, especially in the context of separation and interrelation of powers, is in its capacity as a *High Court of Justice*. The origins of this jurisdiction lie in the Mandatory 1922 'Constitution' - the *Palestine Order in Council*. The second part of Article 43 of the Order reads: "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the administration of justice."⁷⁹ In 1940 the *Courts Ordinance* was enacted, and section 7 of it granted the High Court of Justice jurisdiction to issue prerogative writs against public officials or public bodies in regard to the performance of their public duties.

Without delving into the question of the nexus between the two provisions (the common interpretation is that the general source of authority is Article 43, and that section 7 is meant to interpret the Article but not to enlarge or diminish the jurisdiction it creates), it can be noticed that the jurisdiction granted to the Court was extremely broad, and it constituted a potential ground for a powerful body. These potential powers were not fully pursued during the British rule, mainly because of the composition of the Court - an overwhelming majority of British judges appointed by the High Commissioner - and the aforementioned provision according to which the High Commissioner's written consent was needed before any lawsuit against the

⁷⁸ The jurisdiction of the Supreme Court is specified in section 15 of the *Basic Law: Judicature*.

⁷⁹ 3 *Laws of Palestine* (rev. ed.) 2580.

government could be placed. In addition, the Supreme Court during the Mandate was subjected to the Privy Council in London, and naturally it followed the narrow approach of the British courts toward reviewing discretionary powers and involvement in political issues. Nevertheless, even then the Court flexed some of its muscles by showing a certain degree of independence: clashes between it and the executive did occur, and helped the Court, as we mentioned before, to gain a certain degree of respect among the local population.

The picture changed significantly with the re-establishment of the Court as the Israeli Supreme Court in September 1948. Although the Clauses specifying its jurisdiction were not replaced until 1957, in practice the Court, from the starting-point of an English 'Formal Style', has gradually shifted towards an American 'Grand Style' with a broad view of its jurisdiction.⁸⁰ From its earliest days it did not hesitate to issue orders against officials, including ministers,⁸¹ some of whom were reportedly offended by a court order against them.⁸² Although the first two Presidents of the Court tried to navigate it to a more conservative - British - style, and indeed some of the decisions in the early Fifties exemplify this policy,⁸³ the Court soon began deviating from the English tradition, and more and more American precedents appeared in its decisions. One of the more significant landmarks of the Court's expansionist attitude was the 1953 decision of *Kol Ha'am*, a case which can be regarded as the foundation of the Israeli judge-made bill of rights.⁸⁴ The decision in this case, on which we will elaborate later, imported the American constitutional attitude towards freedom of speech into Israeli law. It was written by Judge Agranat, an American-educated Lawyer, who later (in 1965) became the President of the Court.

The *Courts Law 1957* replaced the 1940 *Courts Ordinance* and Article 43 of the *Palestine Order in Council*. Despite the record of the High Court of Justice, which by 1957 was already loaded with controversial decisions and deviations from the restricted English tradition, the Knesset approved the Government's bill maintaining

⁸⁰ See Lahav [1981] discussing the American influence on Israel's jurisprudence of free speech; Rubinstein [1980], pp. 194-20. The terminology of 'Grand Style' and 'Formal Style' was first offered by Karl Llewellyn [1960].

⁸¹ For an account of the earlier cases see the text accompanying footnotes 50-53.

⁸² See the account of the President of the Court at that period, reported by Rubinstein [1980], p. 90.

⁸³ For several examples see: Rubinstein [1980], pp. 194-200.

⁸⁴ *Supra* note 63.

its broad jurisdiction.⁸⁵ In effect, if any change was made it was towards an increase of the Court's powers. Section 7 of the Law is constructed in a similar way to Article 43 and section 7 of the Ordinance - it has a general part and a detailed one. The general part, section 7(a), reads: "The Supreme Court sitting as a High Court of Justice shall deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal". Although the legislature's intention was to maintain the general jurisdiction of the High Court of Justice as it had been according to Article 43, the outcome was slightly different, probably due to mistranslation. The phrase "necessary to be decided for the administration of justice" in Article 43, became "necessary to grant relief in the interests of justice" in section 7(a). While Article 43 is talking about the administration of justice, probably referring to some sort of residual powers intended to secure the existence of an authorized court to deal with every legal issue, section 7 is much broader as it introduces the notion of justice as an independent component of the Court's jurisdiction.⁸⁶

To remove any doubt, the detailed part, section 7(b), specifies that it applies "without any prejudice to the generality of the provisions of subsection (a)". It includes the traditional prerogative writs - Habeas Corpus, Mandamus, Certiorari and Prohibition - whereas those subject to review are State and local authorities and other bodies and individuals who exercise any public function by virtue of law. At the demand of the religious parties a special subsection was added to limit the scope of review of religious tribunals, but the Supreme Court interpreted these limitations narrowly, or at least more narrowly than the wishes of those who pushed them forward.

After the enactment of the *Courts Law*, and coinciding with the appointment of Judge Agranat as the third President of the Court in 1965, an era of more significant judicial expansion began. The first 'new wave' was mainly with regard to administrative law, but the trend continued to constitutional law with the famous 1969 *Bergman* case, on which we will elaborate later. An additional boost to this trend came in the early Eighties under the presidency of Meir Shamgar and the leadership of Judge Aharon Barak, with further decisions in the fields of human rights and administrative discretion, as well as the liberalizing of procedural barriers such as

⁸⁵ Apparently some Knesset Members wanted to modify this jurisdiction by restricting the Court's powers to review executive bodies, but failed. See Albert [1969], p. 1251.

⁸⁶ For a comprehensive analysis of 'Justice' as a component of the jurisdiction of the High Court of Justice see: Zamir [1972]; Parush [1988].

standing and justiciability. The last decade witnessed direct power clashes between the Knesset and the Court.

Despite these developments, when the regulation of the courts was refurbished in 1984 by the *Basic Law: Judicature* and the *Courts Law (Consolidated Version) 1984*, the old section 7 dealing with the jurisdiction of the High Court of Justice was copied almost verbatim into the Basic Law (section 15). Not only did the Government and Knesset make a positive decision not to diminish any of the powers of the High Court of Justice, they even decided to frame these powers in a Basic Law, immune from emergency regulations, and a future part of a possibly entrenched constitution.

The most recent prospective 'award' of powers to the Supreme Court is the proposed *Basic Law: Legislation*. Section 12 of the original Bill, which was first placed on the Knesset's agenda in 1975, grants the Supreme Court, sitting in a bench of seven judges or more, the jurisdiction of a Constitutional Court, empowered to review the constitutionality of legislation. The bill, which was proposed by the Labour Minister of Justice Haim Zadock, was met by fierce criticism from many Knesset Members including its Speaker. Surprisingly, several Judges of the Supreme Court (mainly the more senior judges) opposed the bill as well, arguing that judicial review of legislation would draw the Court to an undesirable involvement in politics.⁸⁷ Since even a first reading of the bill was not completed during the term of office of the Eighth Knesset, it required a re-submission to the Ninth Knesset. Although the Government had changed hands in the meantime, the Likud Government's Minister of Justice, Shmuel Tamir, placed in 1978 a similar bill on the Knesset agenda. So far, though, the bill has not passed, due to the objection of the religious parties.⁸⁸

Nevertheless, even now, without the powers of judicial review of legislation, the powers of the Supreme Court sitting as a High Court of Justice are immense. Not only were they reconsidered by the legislature and Government three times during Israel's 45 years of existence and consciously left undiminished, but in fact the jurisdiction of the Court, the scope of its authority and the preliminary requirements

⁸⁷ Among the Supreme Court judges who objected to the bill were Haim Cohen, Zvi Berenson, Moshe Landau and the retired President Itzhak Ulshan. For more on the debate see: Rubinstein [1980], pp. 179-191.

⁸⁸ See: Rubinstein [1991], p. 463.

for being entitled to a relief (e.g. standing, justiciability) were basically left to the Court itself to decide. The next section will explore how it did decide.

4. Displaying Substantive Independence - Access to the High Court of Justice

So far we have examined how the Israeli Knesset and Government established a judicial branch of government, how the judges were given structural independence and how the courts, especially the Supreme Court, were given more and more judicial powers. The focus was mainly on the legislature's and Government's side of the story, but in order to understand the full picture and its import we ought to elaborate on the judicial side. This will be done by focusing on the Supreme Court's attitudes towards its powers as High Court of Justice.

We have discussed the formal jurisdiction of the High Court of Justice, but in order to understand its practical-social impact it should be viewed alongside the possibilities of day-to-day access to the Court. It can be very promising to have a court with power to review any activity of the authorities, but if the access to it is very complicated or costly its effectiveness fades. Unlike equivalent establishments in other legal systems, the access to the Israeli High Court of Justice is extremely easy, and the relief is fairly quick and efficient. One does not need to go through lower instances, and there are no witnesses or regular trial procedures. The application to the Court is very inexpensive, and one does not even have to be represented.

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

A successful application to the High Court of Justice must overcome three hurdles. First, the Court should be convinced that the matter is within its jurisdiction or competence. Second, since the powers of the High Court are discretionary, as we learn from the wording of the authorizing provision (currently section 15 of the *Basic*

Law: Judicature), the applicant has to convince the Court that the petition ought to be decided. This is the place in which questions of standing, justiciability, theoretical issues, clean-handedness etc. are dealt with. And third, the applicant has to show that the law had been violated by the defendant and that he or she are entitled to a relief. This division into three hurdles is somewhat artificial, as very often their resolution is inter-related (for example, the strength of standing rights can depend on the severity of the breach of substantive law). It is nevertheless useful to examine the record of the Court using these categories. The first two hurdles will be examined in this section, and the substantive law applied by the Court in the next one.

4.1 Jurisdiction / Competence of the High Court of Justice

We have seen how the legislature defined the jurisdiction of the High Court of Justice with a very broad, though vague, wording. Although there are important interpretation problems regarding the authorizing provision (section 15 of the *Basic Law: Judicature*), especially as to the relations between its two subsections, the High Court has avoided a comprehensive discussion of the issue. Instead it took a pragmatic approach, dealing with the particular cases brought to it. The general outcome, though, is a very 'liberal' interpretation of the Court's jurisdiction. Thus, the Court appears to see no limitations to its jurisdiction, other than questioning its discretion on whether to hear the case on its merits (the second hurdle). We cannot explore in full all the cases in which issues of jurisdiction or competence were dealt with, but the following examples can illustrate this trend.

4.1.1 Remedies

The detailed subsection dealing with the High Court's jurisdiction is structured according to the traditional English prerogative writs, although they are not mentioned by name in the provision. In the course of the years the Court decided to extend the reliefs which it is willing to grant, and to include, for example, a declaratory judgment,⁸⁹ and even damages (incorporating French administrative law principles).⁹⁰ It ruled that since its general authority comes from subsection 15(c)

⁸⁹ See: H.C 22/49 *Sabo v. The Military Governor of Jaffa*, 2 PD 701.

⁹⁰ H.C 101/74 *Binuy Upituach Ltd v. the Minister of Defence and Others*, 28(2) PD 449, a summary in English and remarks by Professor Klein in 10 *Isr.L.R* (1975) 582; H.C 688/81 *Migda Ltd v. the Minister of Health and Others*, 36(4) PD 85.

(formerly 7(b)), it is not restricted to the remedies specified in the detailed subsection, and the general subsection can be the source of authority for new remedies.

4.1.2 The Bodies Subjected to the High Court's Review

In a similar manner the High Court ruled that the list of bodies subjected to its review is not limited to those listed in the detailed subsection, i.e. individuals and bodies "carrying out public functions under law". Thus it was willing to hear cases against bodies which were not created by law, for example the Association For the Elderly,⁹¹ as well as bodies created by law but on matters in which they were not carrying functions under law.⁹² Furthermore, the High Court by-passed explicit restrictions on its review powers specified in the detailed subsection, on the basis of the general subsection. Thus it was willing to review judicial decisions of Peace and District Courts which are excluded from the bodies subject to review under the detailed subsection.⁹³ Similarly, it adopted a broad interpretation as to its competence to review decisions made by religious tribunals.⁹⁴

4.1.3 Judicial Review of Legislation

Perhaps the most striking example of the High Court of Justice's 'liberal' interpretation of its jurisdiction is connected to its role as a Constitutional Court. In this sense the Israeli equivalent to the famous American 1803 case of *Marbury v. Madison* is the 1969 *Bergman* case in which the Supreme Court appropriated the role of judicial review of legislation, without an opposition from the legislature or Government.⁹⁵ This case merits discussion.

We mentioned the First Knesset's decision to enact Basic Laws gradually rather than the immediate enactment of a Constitution. *Basic Law: The Knesset* was the first to be enacted. Its section 4 reads: "The Knesset shall be elected by general,

⁹¹ H.C 160/72 *Sherbat Brothers v. the Association for the Elderly*, 27(1) PD 620.

⁹² For example: H.C 262/62 *Peretz v. the Chairman of Kfar Shmaryahu Local Council and Others* 16(3) PD 2101; 4 SJ (1961/2), 191, a case which tested a refusal by a local authority to let one of its conference halls to a religious service organized by the Jewish Reform Movement.

⁹³ See: H.C 203/57 *Rubinski v. the District Court*, 12 PD 1668.

⁹⁴ See: H.C 202/57 *Sidis v. the President and Members of the Supreme Rabbinical Tribunal*, 12 PD 1528; H.C 10/59 *Levi v. The District Rabbinical Tribunal*, 13 PD 1182.

⁹⁵ H.C 98/69 *Bergman v. the Minister of Finance and Others*, 23(1) PD 693; 4 Isr.L.R (1969) 559, including commentary.

national, direct, *equal*, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by the majority of the members of the Knesset" (emphasis mine). Towards the 1969 general elections the Knesset enacted a law dealing, among other things, with the allocation of state funds to finance the coming election campaign. According to this law, parties not represented in the incumbent Knesset were not entitled to any financial assistance from the State. The bill passed three readings, but in two of them the voting majority was less than half (61) of the Knesset Members.

Aharon Bergman, a lawyer, petitioned to the Supreme Court asking it to order the Minister of Finance and the State Comptroller not to act according to the Law. This was an indirect attack on the validity of the Law (instead of a direct attack - asking the Court to invalidate the Law). One of his arguments was that the Law was ultra-vires because it violated the elections equality principle specified in section 4 of the *Basic Law: The Knesset*, which can be altered only by a majority of Knesset Members (i.e. 61) required in all stages of the legislation. The Attorney General, on behalf of the defendants, being assured in the solid case of the State, namely the validity of the Law, did not argue a lack of jurisdiction or non-justiciability. Instead he argued, to the merits of the case, that the requirement of equality should be interpreted as referring to the electoral system - meaning one vote to each voter - and not beyond that.

The Court, following the lack of an argument on behalf of the defendants, decided to table for future consideration the question whether it is authorized at all to examine the validity of Knesset legislation on the basis of its substance, a question that the Court dubbed 'justiciability'. On the merits of the case, it took a broad interpretation of equality, ruling that section 4 is about more than the mere technicality of carrying out the elections, and that the *Finance Law* contradicts the principle of equality because it discriminates between old and new parties.

The preliminary question in the Bergman case - whether the Court was authorized to deal with the legality or validity of a law - was, in fact, not a question of justiciability but of competence or *jurisdiction*.⁹⁶ The Court did not want to define the question as such because had it done so it could not have avoided dealing with it. A lack of jurisdiction invalidates a court's decision and, therefore, it ought to be dealt with by the court even if it is not raised by the parties. The Supreme Court, probably

⁹⁶ This was admitted explicitly by one of the Supreme Court judges. See: Sussman [1971], p. 216.

intentionally, set this question aside, as well as another important question, that of the applicant's standing, in order to create a precedent of judicial review of legislation. Although subsequent to this judgment the Knesset followed the recommendation of the Court and re-enacted the same *Finance Law* with the required majority, thus achieving its original plan, the precedent had been established.⁹⁷

Several petitions to the Supreme Court were made on the same basis after the *Bergman* case, and in all of them the Court treated the issues on their merits. The 1982 case of *Rubinstein* is one of the recent examples.⁹⁸ The issue was, again, the equality principle in section 4 of the *Basic Law: the Knesset. The Political Parties (Financing) Law*, enacted towards the Tenth Knesset elections, held, among other things, that parties will be entitled to financial support for their election campaign only if their total election campaign expenses would not exceed a certain amount. After the elections it became apparent that several parties, including the two big parties - Labour and Likud - exceeded those sums. The two big parties pushed forward a retroactive amendment to the *Financing Law*, which increased the ceiling of expenditure. The petitioners, several Knesset Members from small parties, argued that the law discriminates between the parties which kept their expenses within the original limit and those which exceeded it, and therefore it violated section 4 of the *Basic Law: the Knesset*; and since it was not voted for by the majority of Knesset Members it should be invalidated. The Court, sitting with a panel of five judges, accepted this argument and made the order nisi absolute, not dealing at all with the question of jurisdiction (or justiciability).

So far the Court has limited its review of legislation only to laws contradicting entrenched provisions in Basic Laws, which were not voted for by the required qualifying majority. Thus, in the case of *Kaniel*,⁹⁹ the petitioner attacked a law of the Knesset which established a new system of allocating the last seats (the surplus) in the Knesset following elections. The new system favoured the big parties, and Kaniel argued that this discriminated against the small parties and therefore contrasted section 4. This law, however, was voted for by a majority of more than 61 Knesset Members in all stages of legislation. The Court, rejecting the application,

⁹⁷ See also: *Bergman* [1971].

⁹⁸ H.C. 141/82 *Rubinstein M.K v. the Speaker of the Knesset and Others* 37(3) PD 141; English summary in 20 Isr.L.R (1985) 491.

⁹⁹ H.C. 148/73 *Kaniel V. the Minister of Justice*, 27(1) PD 794. English summary in 9 Isr.L.R (1974) 142.

held that the entrenched provisions of Basic Laws, but only them, are superior to ordinary legislation and can be contradicted only by the required special majority. But this can be done also implicitly. Thus, although the law in question did not say explicitly that it is valid despite section 4, it cannot be reviewed.

Similarly, the traditional approach of the Court since the establishment of the State had been that it is not authorized to review the Knesset's legislation as contradicting the Declaration of Independence or basic democratic principles, or as unreasonable, or indeed under any other heading.¹⁰⁰ A hint that this 'restrained' approach towards judicial review of legislation might be changed was given in a remark made by the President of the Supreme Court in the recent case of *Cohen*.¹⁰¹ The Knesset, in an amendment to the Penal Code, introduced a new substitute for light prison sentences in the form of communal work. It authorized the Minister of Labour and Welfare, in consultation with the Minister of Justice, to apply the Law gradually in all parts of the country. The petitioner, a convicted prisoner who could not benefit from the new arrangement since it had not been applied yet in his district, petitioned the High Court of Justice. Shamgar, P., observing that the petitioner was actually asking the Court to invalidate legislation of the Knesset on the basis of discrimination, held that since he did not find the law discriminatory he will leave as open the question whether judicial review by the Supreme Court extends also to Knesset legislation. Ben-Porat, DP. concurred with the result, but gave a different reasoning. She held that it is irrelevant whether the Knesset legislation is discriminatory or not - and prima facie it is indeed discriminatory - because the Court is not entitled to invalidate legislation of the Knesset even if it is discriminatory.

The revolutionary edge in President Shamgar's remark is that it dealt not with the authority of the Court to review legislation of the Knesset against entrenched provisions enacted by the Knesset itself, but with the question of judicial review of legislation against an unwritten bill of rights or constitution. What was implicit in Shamgar's remark was said quite explicitly three years later by Judge Barak, again as an obiter. He wrote:

In theory there is a possibility that a court in a democratic society will invalidate a law which contradicts basic principles of the system, even if these principles are not established in a rigid

¹⁰⁰ See, for example: H.C 10/48 *Ziv v. Gubernik*, 1 PD 85 and H.C 7/48 *El-Karbutli v. the Minister of Defence*, 2 PD 5 (with regard to the Declaration of Independence); C.A 450/70 *Rogozhinski v. the State of Israel*, 26(1) PD 129.

¹⁰¹ H.C 889/86 *Cohen v. the Minister of Labour and Welfare*, 41(2) PD 540. Summarized in English in 23 *Isr.L.R.* (1989) 513.

constitution or in an entrenched basic law; there is nothing axiomatic in the approach that law cannot be invalidated on the basis of its contents. In the invalidation of a law which severely violates basic principles there is neither a violation of the principle of the sovereignty of the legislature, as sovereignty is always limited; nor is there a violation of the principle of separation of powers, as this principle is based on the idea of checks and balances, which is meant to restrict each of the branches of government. Nor is there an injury to democracy, as democracy is a delicate balance between majority rule and human rights and basic principles; in this balance the mere safeguarding of human rights and basic principles cannot be perceived as undemocratic. Such invalidation does not harm the judiciary, as its role is to maintain the rule of law, including the rule of law over the legislature.

But Barak, J. added:

According to our social and judicial conventions, this Court does not take up the jurisdiction to invalidate laws which contradict basic principles of our system. We inherited this convention from the English doctrine, and we have developed it according to the realities of our own democracy. We have followed these lines for more than 40 years, they express the social agreement in Israel and enjoy the consensual support of our enlightened public. Only against this background can one understand the debate on the need for a rigid constitution and judicial review (my translation - E.S).¹⁰²

I think that these words of Judge Barak, in a way very typical of him, are meant to pave the way for a future change in the Court's 'restricted' approach towards judicial review. His words are also intended to signal to the other branches of government such possible change. So far the Knesset and Government have failed to respond. If this change comes about without any response, it may fit well with the past trend, on which we elaborated before, of granting more and more powers to the courts.¹⁰³ In the context of our model of the independence of the judiciary, offered in Chapter 6, this trend can be perceived as a delegation of legislative powers (in this case a negative - ex-post delegation) by the legislature and the Government to an independent judiciary, which is primarily the result of a responsibility shift. We will return to this point later.

¹⁰² H.C 142/89 *The L.A.O.R Movement v. the Speaker of the Knesset* 44(3) PD 529.

¹⁰³ For further discussion see: Kretzmer [1988].

4.1.4 The Jurisdiction of the High Court of Justice Over the Occupied Territories

It is difficult to conclude which of the powers that the Supreme Court decided to take up is more remarkable, but the decision to review applications from the territories occupied by Israel in 1967 is certainly a strong candidate. While the power to review legislation without a written constitution might be more innovative from the pure legal-theoretical point of view, the power to review applications from the Occupied Territories has been more important politically and more significant for the role of the Court among the other branches of government. Moreover, it was also a significant international legal precedent. Never before did an occupier allow its legislative or administrative acts to be challenged before its own courts by individuals from the territory it occupied. During the joint Anglo-French occupation of the Rheinland following the First World War, which was considered an enlightened occupation, it would have been unthinkable to grant one of the 40,000 deportees a right to appeal to any court, let alone a British or a French Court. Similarly, the military regimes established by the Allies in Germany and Japan following the Second World War were totally immune to review by courts in their own countries.

The very first case in which the High Court of Justice was asked to review a decision of the Territories' Military Commander was decided on 20 June 1967, less than ten days after the Six Day War.¹⁰⁴ Already then the State Attorney declared that he will not challenge the competence of the Court to review acts of the military authorities in the Administered Areas. Behind this decision stood Meir Shamgar, the current President of the Supreme Court, who was then the Military Advocate General. This policy was reinforced with the appointment of Shamgar to the position of Attorney General in September 1968. Lack of jurisdiction has never been argued by the State with regard to applications from the Occupied Territories, and this was extended to applications from southern Lebanon following the 1982 Israeli invasion to Lebanon.

Shamgar knew very well that an argument of lack of jurisdiction is very likely to be accepted by the Court. In fact, the Supreme Court has never ruled positively that it has the jurisdiction to hear applications from the Occupied Territories. On the contrary, some of the judges expressed their opinion that the Court lacks this jurisdiction.¹⁰⁵ The Court, however, avoided raising the issue at its own initiative;

¹⁰⁴ *Stekol v. the Minister of Defence* (unpublished), mentioned in Cohen [1986], p. 471.

¹⁰⁵ Alfred Witkon, the foremost judge to hold this view, expressed it in some of the decisions to which he was part. See, for example: H.C 302/72 *Hilu v. the Government of Israel*, 27 (2) PD 169; English summary in 9 Isr.L.R (1974) 128.

and, as we wrote before, since this is a matter of jurisdiction the Court could have - and maybe should have - raised the issue despite the lack of such argument on behalf of the State. It is possible that the reasons behind the Court's decision not to raise the issue of jurisdiction were similar to those of Shamgar's decision not to argue a lack of jurisdiction.¹⁰⁶

Shamgar adopted this policy, according to his own testimony, in order to safeguard human rights and the rule of law in the Occupied Territories. In his view it was necessary to have an external instance of appeal against the military authorities.¹⁰⁷ Shamgar also envisaged, and this proved to be so, that giving the inhabitants of the Territories access to the Israeli Supreme Court would force the authorities to consult with the military legal advisers and - more importantly - with the State attorneys on the legality of their actions before taking them. Indeed, such consultations have led the army to cancel many planned measures and moderate others following the objections of the State Attorney's office, and sometimes because of the sheer delays caused by these deliberations.¹⁰⁸ The involvement of the High Court of Justice, therefore, functions also as a mechanism of deterrence.

It is difficult to assess the contribution of the Supreme Court and its 'softening' effect for the developments in the Territories, and to speculate whether, for example, the 'Intifada' (the Palestinian uprising which began in December 1987) would have erupted earlier, or to what extent the Court has played a role in legitimizing the Government's policies. But one thing is quite clear: the price paid by the Government in the course of the years for the Supreme Court's involvement was very high, and it is constantly increasing with the steady 'liberalization' trend of the Court's rulings. I will try to illustrate this with several examples later. In spite of this high price, and although the Government changed hands several times, the basic attitude of the Knesset, Government and Attorney General towards the involvement of the

Other judges stressed their willingness to hear such petitions only because the defendants did not argue a lack of jurisdiction. See: Negbi [1981], pp. 20-22.

¹⁰⁶ See Negbi [1981], p. 21. Interestingly, Judge Witkon, the strongest opponent of the Supreme Court's involvement in the Territories, was probably a political dove. He opposed the Court's involvement, in contrast to the prevalent left-wing view, because, in addition to the legal-theoretical reasoning, he anticipated what became apparent only later: that this involvement will advance the integration of the Territories into Israel, delaying a political solution. See: Negbi [1981], pp. 19-20. It is difficult to assess whether Shamgar, whose past is connected to the right-wing Revisionists, had the opposite reasoning in mind.

¹⁰⁷ See: Negbi [1981], pp. 12-15.

¹⁰⁸ Dorit Beinisch, currently the State Attorney and formerly head of the High Court of Justice Division in the State Attorney's office, testified on these effects, as reported by Negbi [1981], pp. 15-16.

Court in the Territories has not changed. Shamgar's appointment as the Attorney General in 1968 proves that the Government was an active player in this delegation of powers to the Supreme Court. So does the Knesset, which could have intervened through limiting the Courts' jurisdiction by law, and refrained from doing so.

This inaction of the politicians, or, in our terminology, the negative - ex post delegation of powers to the Court, can fit well to the shifting responsibilities explanation for the delegation of powers and the independence of the judiciary. This is a clear case in which the Israeli Government is happy, on the one hand, to pass on the blame for unpopular decisions, which restrict harsh responses to terrorist acts, to the Court, and on the other hand to use the Court as a legitimizing mechanism for those who oppose these harsh measures including, in this case, the international community. This responsibility shift could not have taken place were the Israeli Supreme Court not perceived to be (as it indeed is) independent. The Israeli Government is paying an ever-rising price for the involvement of the Court in the Occupied Territories. Its inaction indicates that this price is still lower than the gains it makes from this involvement.

4.2 The Discretionary Powers of the Court

A court which has such a wide, almost unlimited, jurisdiction must have some mechanisms for closing its doors to some of the petitioners on certain issues. Some of the common reasons given to justify these mechanisms are: to prevent a flooding of cases into the courts; to prevent situations in which the courts might get involved in political issues; and to avoid cases which cannot be decided according to legal considerations. Indeed, following the English model, and for this matter also the American one, the wording of the authorizing provision of the High Court of Justice does grant the Court such discretion whether to hear a case or not ("it shall hear matters in which it deems it necessary to grant relief for the sake of justice"). The traditional headings for using this discretion, or closing the doors of the courts, are: Standing (*Locus Standi*), Justiciability, clean-handedness, theoretical issues and premature or belated petitions. I will elaborate here on the development by the Court of the rules under the first two headings.

4.2.1 Locus Standi

The rule regarding Standing, inherited from the Mandatory High Court, was extremely narrow. The applicant had to show that the attacked authority was

declining to fulfil an obligation towards the applicant which had been imposed on the authority by (a written) law.¹⁰⁹ This rule diminished to a minimum the number of successful applications to the Mandatory High Court, because there were very few obligations imposed on the Mandatory authorities with regard to the inhabitants of Palestine.

Already in the course of the Fifties the Israeli High Court of Justice unchained itself from the Mandatory precedents, and agreed to recognize the standing of applicants if they could show that the attacked authority harmed their **own** legitimate interest. Thus, for example, in the 1962 case of *Cohen*, in which this criterion was clearly stated by Judge Berenson, the court agreed to hear an application of a news reporter who was refused a status of military reporter by the Ministry of Defence, despite the lack of any written legal obligation on the Ministry to grant such a status.¹¹⁰ I emphasized the word 'own', which appears in Berenson's standing rule, because at that stage the doors were open only to petitions in which the applicant was specifically and individually harmed by the authority. In other words, 'public' petitions were not allowed. But this constraint was removed in a second significant change of the standing rules which matured in the early Eighties.

The old view was still expressed in the Seventies, for example in the 1970 case of *Baker*, which was about the military service of yeshiva students (students of rabbinical seminars). In Israel there is a compulsory military service; but the *Defence Service Law 1959* authorizes the Minister of Defence to defer the service of individuals, inter alia for reasons connected with the size of the forces, requirements of education, settlement, the national economy, or for family reasons. As early as 1948, following demands of the religious parties, the Government decided to defer (in practice - to waive) the military service of a fixed number of yeshiva students every year. This practice has been maintained, whereas from time to time the quota was changed. The petitioner asked the Court to impugn the Government's decision on various grounds (ultra vires, discretion, discrimination). Himself a student and a reserve officer, the petitioner claimed that the deferment increased the burden on those who had to do military service, including himself. The Court dismissed the application on the grounds of lack of standing. It concluded that the petitioner cannot show that he was personally harmed as a result of the deferment; his petition is of a

¹⁰⁹ See: Segal [1986], pp. 78-79.

¹¹⁰ H.C 29/62 *Cohen v. the Minister of Defence*, 16 PD 1023; 4 SJ (1961-62) 160. For references to other cases see: Parush [1988], p. 468.

collective-public nature and his interest with regard to it is equal to that of any other member of the public. Public petitions, save in matters of elections and local administration, are not heard by the Court.¹¹¹

Only a month after the *Baker* decision the Court softened its position, holding that the fact that the harmed interest is shared by others should not affect the petitioner's standing, and that the right of standing ought to be granted also to an organization if the harmed interest is a distinctive and exclusive interest of this organization.¹¹² But the real turning-point was the 1980 case of *Segal*. The religious Minister of Interior refused to use the powers granted to him by the *Mandatory Time Determination Ordinance 1940* to set summer time in Israel. The petitioner, a member of the public, asked the Court to invalidate the Minister's decision and order him to operate summer time.

The Court decided to make the order nisi absolute. Haim Cohen, J. held that standing is no longer an independent hurdle, but merely a function of the Court's role to make justice. Barak, J. wrote that the requirement of standing should remain, but that, for the sake of the rule of law, the Court ought to open its doors from time to time also to public petitions or to serious and sincere applicants who ask the Court to address a public problem in which it is necessary to grant relief for the sake of justice. (To the merits of the case Barak, however, dissented). Levin, J. also held the opinion that the requirement of standing should remain, but he concluded that the obligation of the Minister of Interior is directed towards every citizen and therefore every citizen has standing with regard to the summer time issue.¹¹³

It is noteworthy that following this ruling the Knesset, at the initiative of one of its religious members, amended the ordinance modifying the duty of the Minister of Interior to set summer time into a discretionary power.¹¹⁴ The matter got to the Court again, following a decision of the Minister not to set summer time. This time the petition was dismissed by a majority of two, against the opinion of Shamgar, DP. The Court held that a decision not to set summer time is reviewable in the same manner as a decision to use the powers of setting summer time, but the majority

¹¹¹ H.C. 40/70 *Baker v. the Minister of Defence*, 24(1) PD 238; English summary in 6 Isr.L.R (1971) 129.

¹¹² H.C. 287/69 *Meron v. the Minister of Labour*, 27(1) PD 337.

¹¹³ H.C. 217/80 *Segal v. the Minister of Interior*, 34(4) PD 429.

¹¹⁴ See also: Klinghoffer [1983], p. 40.

viewed the decision by the Minister as reasonable and therefore declined to intervene. The question of Standing was not really an issue any more.¹¹⁵ Subsequent to this decision the Minister of Interior accepted a summer time arrangement, which has been operated since. It is difficult to assess whether, being aware of the division of opinions in the Court, this was done in order to prevent further adjudication and possible quashing of future decisions. Be that as it may, despite the reversal of the first Court's decision by the legislature, the Government finally decided to follow it. Thus the Court definitely had a part in this final arrangement.¹¹⁶

Returning to the issue of standing, since the *Segal* case the Court has been willing to take on board public petitions whenever the gravity of the issue and the potential infringement of the rule of law demanded the hearing of the case and a decision to its merits. This change of policy by the Court encouraged a second attempt to challenge the deferment of yeshiva students' military service. This petition too was dismissed without getting to the merits of the issue, but this time the majority ruled that the standing of the petitioner ought to be recognised; it was dismissed on the grounds of lack of justiciability.¹¹⁷

It should be noticed that the Court, in this case of standing, expanded its powers without the positive assistance of the Attorney General, the Government or the Knesset (as we have seen in some of the jurisdiction cases). In other words, the lack of standing argument was raised by the State attorneys, but rejected by the Court. Nevertheless, this 'liberalization' of the standing rule, which brought to an expansion of the Court's powers, can be seen as a negative delegation of powers (by the legislature and Government), as the very fact that a rule of standing has not been created by legislation (or secondary legislation) can prove.

¹¹⁵ H.C 297/82 *Berger v. the Minister of Interior*, 37(3) PD 29; English summary in 20 Isr.L.R (1985) 504.

¹¹⁶ As these lines were being written, the Knesset passed an amendment to the law, obliging the Minister of Interior to set an annual summer time for at least 150 days. (Israel Radio, 11.12.1992).

¹¹⁷ Originally the Court ruled a lack of standing as well as a lack of justiciability - H.C 448/81 *Ressler v. the Minister of Defence* 36(1) PD 81 - but the petitioner asked for a further hearing. His request was rejected, but President Landau ruled that the petitioner has standing, although the issue is not justiciable - F.H 2/82 *Ressler v. the Minister of Defence* 36(1) PD 708.

4.2.2 Justiciability

With the extensive jurisdiction that the High Court of Justice took to itself and the relaxation of the standing requirements, one of the only mechanisms left with the Court to avoid deciding applications on their merits is justiciability. Interestingly, this threshold barrier was not an established part of the Mandatory legacy or of English law in general;¹¹⁸ it was imported by President Smoira from the American Law¹¹⁹ in the 1951 case of *Jabutinski*. Similarly to the powers of the Queen in Britain, the President of the State of Israel, following elections or the resignation of a Government, is to assign the role of forming a new Government to one of the Knesset Members. After the resignation of Ben Gurion in 1951, the President, Haim Weizman, asked Ben Gurion again to form a Government. When Ben Gurion declined Weizman informed the Speaker of the Knesset that the resigning Government would serve as a caretaker government until new elections are held. The petitioner asked the Court to order the President to assign the task of forming a Government to other Knesset Members before opting for new elections. The Court dismissed the application, holding that the matter was not justiciable, because it involved the relations between the President and Parliament which were beyond the judicial boundaries and cannot be resolved using the jurist sense of expertise.¹²⁰

Lack of justiciability has since been used by the Court to dismiss applications in various cases using various rationales. Thus, in some cases the Court used the doctrine on the basis of a lack of legal criteria or the unsuitability of the judicial process to resolve the case.¹²¹ In other cases the rationale was the doctrine of separation of powers and the courts' restraint from involvement in matters given exclusively to the discretion of the other branches of government, such as foreign

¹¹⁸ Because of the limited jurisdiction of the Mandatory High Court and the equivalent English courts, and because of a narrower substantive constitutional and administrative review, English public law in the past was probably not in need of this kind of barrier. But following recent expansion in the grounds of review the need for such a doctrine did eventually arise. Compare, for example, *Bromley LBC v. Greater London Council* [1982] 2 WLR 62 with *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374. See also: Harlow and Rawlings [1988], pp. 311-347; Witkon [1966], pp. 44-47.

¹¹⁹ The equivalent American doctrine, also called the Political Question, was introduced in the 1849 case of *Luther v. Borden*, 7 HOW 1. 12 LED 521 (1849). It applies mainly to issues in constitutional law and is firmly related to the doctrine of separation of powers.

¹²⁰ H.C 65/51 *Jabutinski v. Weizman*, 5 PD 801. See also: Witkon [1966], pp. 40-44. Following this incident and a similar one in 1960, the Law was changed. Now, if the President's candidate to form a Government fails to do so, a majority of Knesset Members can compel the President to assign the role to a specific Member. See Rubinstein [1991], p. 516.

¹²¹ For example: H.C. 319/65 *Albalada v. the Hebrew University*, 20(1) PD 204, in which the petitioner attacked a decision of the University to extend the duration of law studies.

and defence policies.¹²² Yet another source mentioned in the Court's decisions was the desire to protect itself from involvement in controversial issues which could diminish the public confidence in the courts and their status, and the desire to protect itself from a flooding of cases.¹²³

Already in the mid-Sixties, however, other voices were heard. In the 1965 case of *Oppenheimer* Judge Silberg stated, with regard to the doctrine of justiciability: "I am not ashamed to say that I have never understood the nature of this deformed fetus (my translation E.S)".¹²⁴ In this case the Court was asked to order the Minister of Interior and Health to issue regulations implementing a new legislation for environmental protection. The law authorized (but not ordered) the Minister to issue such regulations. The Court made the order nisi absolute, holding that the intention of the legislature would be hindered without the implementation of the Law by regulations.

In the early Eighties some judges made a new distinction between *justiciability*, which relates to the question of legal criteria to resolve the matter brought to the Court, and *self restraint* of the Court out of respect to the other branches of government or apprehension about the threat of politicization of the judiciary.¹²⁵ This distinction was later dubbed by Judge Barak "Normative Justiciability" and "Institutional Justiciability".¹²⁶ But the final blow to the concept of justiciability came in the third round of the yeshiva students' military service deferment case. The same petitioner of the 1981 case sensed the changing atmosphere in the Supreme Court and decided in 1986 to try again and challenge the decision of the Government to exempt an increasing numbers of yeshiva students from military service. The decision was delayed for several years; when it was finally given it turned out that justiciability as a threshold barrier had been abolished. Judge Barak, who wrote the decision, said:

¹²² For example: H.C 186/65 *Reiner v. the Prime Minister*, 19(2) PD 485, in which the petitioner attacked the government's decision to establish diplomatic ties with West Germany; and H.C 561/75 *Ashkenazi v. the Minister of Defence*, 30(3) PD 309, in which the petitioner asked the Court to order the Minister of Defence to conduct an inquiry into events which occurred during the 1973 Israeli-Arab war.

¹²³ See also: Witkon [1966] & [1967].

¹²⁴ H.C 295/65 *Oppenheimer v. the Minister of Interior and Health*, 20(1) PD 309, p. 328. English Summary in 1 Isr.L.R (1966) 479

¹²⁵ See H.C 89/83 *Levi v. the Chairman of the Finance Committee of the Knesset* 32(2) PD 488; and H.C. 652/81 *Sarid v. the Speaker of the Knesset* 36(2) PD 202, English summary in 18 Isr.L.R. (1983) 279.

¹²⁶ H.C 910/86 *Ressler v. the Minister of Defence* 42(2) PD 441, English summary in 24 Isr.L.R (1990) 133.

...there cannot be a situation in which there is no applicable legal norm, and this includes a political act or a matter of policy. Every act, be it a political or policy matter as much as it may, is captured in the world of law, and there is a legal norm which relates to it, determining whether it is permissible or prohibited. [...]

It is the principle of separation of powers which justifies judicial review of government acts, even if they are of political nature, because its task is to guarantee that each branch of government will operate within its boundaries according to the law, and through this the separation of powers will be maintained (my translation - E.S).¹²⁷

Despite this dramatic change the applicant did not walk out of the Court as a winner: the petition itself was dismissed. The Court held that the discretion of the Minister was within the boundaries of reasonableness. It indicated, though, that its stance might change should a change of circumstances, e.g. the number of exempted students, take place. President Shamgar also voiced dissatisfaction with the arrangement altogether. In an implicit way the Court warned the Government that if the arrangement were not reconsidered the next petition on this matter might be successful; I would not be surprised if this were to be the case.

Since the *Ressler* decision was given recently, and it is not sufficiently clear whether a majority of the Supreme Court judges support the repeal of the doctrine of justiciability, it is too early to conclude anything from the lack of response by the Government and Knesset. If, however, this repeal establishes itself and the other branches of government fail to respond, the High Court of Justice will emerge as an even more powerful body and a significant player in the political arena. We might then be able to conclude, similarly to our conclusions with regard to the standing issue, that a negative delegation of powers from the Government and the Knesset to the Supreme Court is in process.

4.2.3 The Supreme Court's Review of the Knesset and its Organs

In this section, dealing with the threshold barriers of the High Court of Justice, we have so far focused on two issues: standing and justiciability. For both, the Court 'liberalized' the requirements in a way that expanded its power of review, regardless of the identity of the body under review. The review by the Court of one special body - the Knesset - merits special attention; it involves, in the legal-theoretical context,

¹²⁷ Ibid, pp. 447 and 491-492 respectively.

mainly the question of justiciability. In the context of our discussion it is an example for a refusal by the Knesset to delegate its powers. Having discussed judicial review of legislation in the previous section, this section will be limited to acts of the Knesset and its organs which are not legislation.

The developments in the judicial review of the Knesset are especially interesting in the light of the English doctrine of Parliamentary Privilege, according to which the courts are barred from dealing with the internal matters of Parliament.¹²⁸ Indeed, from the early years of the State until the late Seventies, potential petitioners never bothered to challenge internal Knesset matters, and when applications to the High Court of Justice were made, the Court ruled that it is not intervening in the business or procedure of the Knesset or its committees.¹²⁹ Signs of change came in 1980 with two petitions of Knesset Members against decisions of the Knesset House Committee which had implications for the calculation of financial grants for parties. The High Court of Justice dismissed these applications on their merits, avoiding the questions of jurisdiction or justiciability.¹³⁰

A further signal was the 1981 petition of *Flatto Sharon*, a Knesset Member who was suspended from the Knesset by a decision of the Knesset House Committee after being convicted for a criminal offence. The State's attorney argued that this is not a matter for judicial review, but the Court decided, by a majority of four judges against the opinion of President Landau, to intervene. It held that since the Knesset House Committee is a body carrying out public functions under law, the Court has jurisdiction to review its decisions, and it ought to intervene in this case because the decision of the Committee was ultra vires and affected a substantial interest of the suspended Member and his voters.¹³¹

The next important decision was in the 1981 case of *Sarid*. Unlike the previous case, which dealt with quasi-judicial powers of a Knesset's organ, in this case the petitioner, a Knesset Member, asked the Court to quash a decision of the

¹²⁸ This doctrine was established by Article 9 of the 1689 *Bill of Rights* and expanded by the courts in *Bradlaugh v. Gosset* [1884] 12 Q.B 271. See: de Smith [1989], pp. 314-332; Phillips & Jackson [1978], pp. 234-255; Wade & Bradley [1985], pp. 210-228.

¹²⁹ H.C 96/81 *Abu-Hatzera v. the Speaker of the Knesset* (unpublished).

¹³⁰ H.C 248/80 *Cohen v. the Speaker of the Knesset* 34(4) PD 813; and H.C 753/80 *SHELI v. the Speaker of the Knesset* 35(2) PD 819.

¹³¹ H.C 306/81 *Flatto Sharon v. the Knesset House Committee*, 35(4) PD 118.

Speaker to postpone a no-confidence vote for a few hours. The delay was badly needed by the coalition in order to survive the vote, as several of its members were out of the country. Sarid argued that the delay contradicted the Standing Orders of the Knesset (a set of rules enacted by the Knesset which regulates its work and procedure). Judge Barak, on behalf of the Court, did not have any problem to rule that the Court had jurisdiction to decide the case, as the Speaker of the Knesset is a public authority carrying out public functions by virtue of law. The question, he said, is whether it is appropriate for the Court to go into the merits of the case.

The answer to this question had to balance two conflicting interests: the guaranteeing of the rule of law in the legislature, and the requirement that the Court respect the exclusive right of the Knesset to decide on its internal matters, a requirement which derives from the principle of separation of powers. Barak held that the right balance should take into account the degree of harm done to the Knesset's inter-parliamentary arrangements and the extent to which it affects the foundations of Israel's constitutional structure. He ruled that in this case, despite the far-reaching political implications (the prospective fall of the Government), the harm done to the inter-parliamentary arrangements and to the constitutional foundations is minor and, therefore, the independence and exclusiveness of the Knesset ought to prevail. The petition was, therefore, dismissed.¹³²

The *Sarid* case opened the door for a period of unprecedented involvement of the Supreme Court in the internal affairs of the Knesset, the most significant cases being the five petitions of Meir Kahane, an extreme right-wing Knesset Member. This set of cases is especially interesting because this time, in an untypical manner, the Knesset fought back and eventually the Court retreated.¹³³

In the first case, Kahane asked the Court to quash a decision of the Speaker of the Knesset to deny him the right to place a no-confidence motion on the Knesset agenda. The Speaker explained his decision by pointing to the fact that Kahane was

¹³² H.C 652/81 *Sarid v. the Speaker of the Knesset*, 36(2) PD 197; English summary in 18 Isr.L.R (1983) 279. For criticism see: Kretzmer [1988], pp. 126-130.

¹³³ Two other Kahane cases will not be discussed here, because they do not involve the Knesset, but ought to be mentioned. The first is Elections Appeal 2,3/84 *Naiman v. the Chairperson of the Elections Committee*, 39(2) PD 225, in which the Supreme Court sitting as a Court for Elections Appeals allowed an appeal by Kahane against a decision of the Central Elections Committee not to approve his list for the Eleventh Knesset. The second case is H.C 399/85 *Kahane v. the Broadcasting Authority*, 41(3) PD 255, English summary in 23 Isr.L.R (1989) 515, in which the Court allowed a petition of Kahane and quashed a decision of the Broadcasting Authority not to broadcast anything relating to Kahane, save news items.

a one-man faction, and traditionally, according to past decisions of the Knesset House Committee, one-man factions are not entitled to propose no-confidence. The Court made the order nisi absolute, although the particular disputed matter was by that time merely a theoretical issue. Judge Barak rejected the argument of the Knesset's attorney according to which the review powers of the High Court of Justice extend only as far as deviations by the Knesset from its functional authority. Subsequently he applied the *Sarid* test as to the self-limitation of the Court with regard to petitions against the Knesset. Barak ruled that the current case involved allegedly significant harm to parliamentary life and substantive constitutional values, and therefore the rule of law consideration outweighs the respect for the sovereignty of the Knesset and the separation of powers considerations. He concluded that the Court ought to decide the case on its merits, and that it ought to have the last word with regard to interpretation, including interpretation of the Knesset's own Standing Orders. Barak ruled that the correct interpretation of the Standing Orders is that a one-man faction does have the right to place a no-confidence motion.¹³⁴

In the second case, Kahane petitioned to the Court after the Speaker and the Presidium refused to place two of his bills on the Knesset's agenda. The Standing Orders stated that a Member's bill (in contrast to Government bills) is to be submitted to the Presidium, which will place it on the floor of the house after certifying it. The Speaker and the Presidium refused to certify Kahane's bills because of their racist contents. Judge Barak, on behalf of the Court, again applied the *Sarid* test as to the intervention of the Court and held that the expected damage to the parliamentary system and constitutional foundations from the Presidium's decision is too great to justify judicial non-intervention. As to the merits, Barak ruled that the discretion of the Presidium and the Speaker in tabling a bill is only technical - to ensure that the bill is phrased and drafted in such a way that it could be a law if accepted; they do not have discretion over its substance. After remarking that "...we too, as they (the Speaker and his Deputies - E.S) do, believe that the petitioner's two bills are an affront to basic principles of our constitutional system, arouse horrifying memories and damage the democratic character of the State of Israel", the Court proceeded to allow the petition, but it granted only a declaratory judgment (rather than a mandamus), stating: "if, despite this, we believe that they should be placed on the agenda of the Knesset, it is precisely because of those same democratic values held

¹³⁴ H.C 73/85 *Kach Faction v. the Speaker of the Knesset*, 39(3) PD 141, English summary in 22 Isr.L.R (1987) 219. See also: Kretzmer [1988], pp. 130-133.

dear by the Speaker of the Knesset and his Deputies, and which the petitioner seeks to harm".¹³⁵

But the decision of the Court was not so dear to the Speaker of the Knesset and he refused to follow it. Instead, he strove to pass an amendment to the Standing Orders, and succeeded: the Presidium was authorized not to place on the Knesset's agenda racist bills or bills contradicting the idea of the State of Israel as the state of the Jewish people. It is quite exceptional that a ruling of the High Court of Justice is not carried out; but the almost consensual delegitimation of Kahane and his movement, and the almost consensual support for the Speaker by the Knesset Members and the public at large, were also exceptional circumstances. The Court found itself isolated, and this can serve as a plausible explanation for the subsequent Kahane cases.

Following the continuous refusal of the Speaker to place Kahane's bills on the agenda, Kahane again petitioned the High Court, asking, on the basis of the *Contempt of Court Ordinance*, to compel the Speaker to comply with the previous decision or to face imprisonment or a fine. This time the Court dismissed the petition on the grounds that its previous decision granted only a declaration and not an instruction to the respondents to take certain action.¹³⁶ Unyielding, Kahane placed yet another petition, in which the Court was asked to annul the amendment to the Standing Orders. He argued that such powers to block bills on the basis of their substance should be conferred only by a constitution or a law and not by secondary legislation such as the Standing Orders. The five judges who heard the case dismissed the application, but their reasonings differed.¹³⁷

Shamgar, P. joined by Ben Porat, DP. and Barak, J., implemented the *Sarid* test, and held that although the Court has the power to review Standing Orders of the Knesset it will do so only in extreme circumstances where there is a substantial defect which harms the foundations of the constitution and the democratic principles of the State. Since it is the Standing Orders that establish the right of a private member to put forward bills on the Knesset agenda, restricting this right through

¹³⁵ H.C 742/84 *Kahane v. the Speaker of the Knesset and his Deputies*, 39(4) PD 85, English summary in 22 Isr.L.R (1987) 219. The citation is from p. 96 of the judgment.

¹³⁶ H.C 306/85 *Kahane v. the Speaker of the Knesset and his Deputies*, 39(4) PD 485; English summary in 22 Isr.L.R (1987) 219.

¹³⁷ H.C 669/85 *Kahane v. the Speaker of the Knesset*, 40(4) PD 393.

amendment to the Standing Orders does not amount to such extreme circumstances in which the Court intervenes. Dov Levin, J. dismissed the petition, holding that Kahane was not a petitioner who deserved relief for the sake of justice, and that he would not have granted Kahane relief in the previous petitions either. Eilon, J. dismissed the petition by rejecting the *Sarid* test for the intervention of the Court in the Knesset's affairs. He held that the test for intervention ought to be the deviation from functional authority. If the Knesset operated within its functional authority the Court ought to restrain itself and not review its acts. This was the first time since the *Sarid* decision that judges called for its reversal and for limitations on judicial review of the Knesset.

The fifth *Kahane* case was about a requirement made by the Speaker of the Knesset that Kahane swear allegiance to the Knesset once again and without any additions to the set text. This requirement was made after Kahane's declaration in an American court that in order to reserve his first allegiance to God, he had not sworn allegiance to the Knesset according to the set text when becoming a Knesset Member. The Court dismissed the petition to annul the Speaker's requirement on the basis of lack of clean-handedness. Eilon, J. restated his opinion that the Court ought to restrain itself from intervening in the affairs of the Knesset altogether.¹³⁸

The *Kahane* affair is one of the most interesting interactions between the Supreme Court and the Knesset. The Knesset decided to fight the Court back, but this reprisal was not in the form of limiting the Court's jurisdiction or competence to review the Knesset; it was a fight on the merits of the Court's rulings.¹³⁹ The Court, on the other hand, realised that the Knesset acted almost unanimously, and that most jurists (for example the Association for Civil Rights) may have sided with the Knesset in this affair.¹⁴⁰

In the terminology of the delegation theory of the independence of the judiciary, the *Kahane* affair is an example for a decision of the Knesset **not** to delegate its powers because there was no need for shifting responsibilities, as the vast majority of the public opposed Kahane and what he stood for, and there were no

¹³⁸ H.C 400/87 *Kahane v. the Speaker of the Knesset and his Deputies*, 41(2) PD 729.

¹³⁹ However, several Knesset Members did call for the Knesset to consider the introduction of jurisdictional limitation on its review by the courts. See: Rubinstein [1991], pp. 159-160.

¹⁴⁰ For criticism of the Court's rulings see also: Kretzmer [1988], pp. 132, 140-144; Rubinstein [1991], pp. 161-163; Landau [1989].

collective decision-making problems either. It took the Court some time, though, to realize that it is not welcome to participate in the social decision-making process on this particular issue. This is a plausible explanatory factor for the last three Court decisions. Be that as it may, these decisions have not changed the trend of the Court towards allowing itself to intervene in the internal matters of the Knesset, and the most significant intervention was yet to come. This was in the 1987 *Miari* case, in which, for the first time, the Court overturned a decision of the Knesset's plenary session.¹⁴¹

Miari, a Knesset Member, applied to the High Court of Justice to quash a decision of the Knesset's plenum withdrawing his immunity as a Knesset Member. The decision of the Knesset passed in accordance with the procedure laid down in the *Knesset Members (Immunity, Rights and Duties) Law 1951*.¹⁴² It was adopted following the petitioner's participation in a rally commemorating Fahed Kawasme, one of the leaders of the PLO, in which Miari gave a speech identifying himself with Kawasme's views. The opinions of the five judges who sat on the panel were divided. The majority applied the *Sarid* test, holding that when the issue is the exercise of quasi-judicial powers by the Knesset the scope of judicial review ought to be broad, and the review of the decision ought to be on its merits. To the merits, the majority opinions differed: Shamgar, P. held that since the alleged activity of Miari was part of his substantive immunity (rather than his procedural immunity) the Knesset did not have the authority to withdraw it. Barak, J. did not share this view of lack of authority, but he did hold that the Knesset failed to take the legitimate and relevant considerations. In other words, he quashed the decision on the basis of reviewing the discretion of the Knesset. Judge Levin's reasoning was based on the procedure in the Knesset which, to his view, was ultra vires. In the minority, Ben-Porat, DP. rejected Shamgar's interpretation as to the scope of the substantive immunity and held that since the Knesset acted within its authority its decision should stand. Eilon, J. repeated his view that as long as the Knesset operates within its functional jurisdiction the Court should not intervene in its decisions.

In our theoretical context the case of Miari can be viewed as a 'shift-responsibilities' type of delegation. It seems that the voters of the coalition parties would have wanted to see Miari stand trial, and the Knesset did the first step towards meeting these demands. The invalidation of the decision by the Court shifted the

¹⁴¹ H.C 620/85 *Miari v. the Speaker of the Knesset*, 41(4) PD 169, English summary in 23 Isr.L.R (1989) 518.

¹⁴² 5 *Laws* (1951) 149.

responsibilities to itself, while the coalition parties could claim some credit - if not for a trial, at least for trying. The case of Miari might be regarded as a climax of the Supreme Court intervention in the affairs of the Knesset, but it was certainly not the last word. The political crises of 1990 brought several more petitions against the Knesset and its organs, and it would not be a wild guess to predict that there are more to come.

5. The Substantive Law Applied by the High Court of Justice

So far we have covered two thirds of the way an applicant to the High Court of Justice has to go in order to get relief - convincing the Court that it has jurisdiction to hear the case, and that the matter brought to it is such that the Court ought to hear. But the most important stretch of the way is yet to come. This is the stage in which the Court is to be convinced that the applicant has a cause, that the defendant violated his or her rights, and that the substantive law is on his or her side. In the coming pages I will try to show that the path taken by the Supreme Court in interpreting the existing legal norms and in creating new judge-made law is similar to its path with regard to jurisdiction and the discretion whether to use its powers: expansionist and activist.

I suggested that the distinction between the three theoretical stages of a petition is not always clear. Some of the cases which will be mentioned below involve also questions of jurisdiction, justiciability, standing, etc. The division is nevertheless important, not only for legal-theoretical reasons but also for our purposes. When looking at the Court's decisions with regard to its jurisdiction, justiciability and standing we were also looking for a response from the legislature or Government in the form of limiting the powers of the Court, and we found none; when discussing the substantive law applied by the Court we should look for an additional type of possible response by the Knesset or the Government - a response to the merits of the decision. In other words, we should examine whether, and in what sort of cases, the other branches of government do respond to the Court's decisions by changing the substantive law applied by it. This is another sort of test from which we may be able to deduce whether or not powers are being delegated to the courts, and whether the reality of delegation matches the theory which was put forward in Chapter 6. Following are several selected fields of enquiry.

5.1 Protection of Human Rights - Freedom of Expression and Derivative Liberties

Israel does not have a written Constitution or a Bill of Rights. Although some human rights are protected by law, for example the right for privacy,¹⁴³ and, as from 1992, the right to work,¹⁴⁴ the more fundamental rights are not guaranteed even in ordinary legislation.¹⁴⁵ Against this background it is interesting to see how the Supreme Court created a judge-made bill of rights without the interference (arguably with the approval) of the legislature and Government. In this process the Court has used as its guidance the *Declaration of Independence*, which does not have a normative status within the Israeli legal system,¹⁴⁶ international documents on human rights and basic principles of democracy and liberalism.¹⁴⁷

Although the protection of human rights is pledged by the Declaration of Independence, surprisingly it does not mention freedom of speech, a right which is also ignored by all other sources of written law. It is interesting, therefore, that the first leading case in human rights in Israel dealt with freedom of expression. This was the 1953 case of *Kol Ha'am*.¹⁴⁸ The application in this case was to quash an order issued by the Minister of Interior suspending the publication of two communist newspapers for periods of 10 and 15 days. The order was issued following an editorial in these newspapers calling to "increase the struggle against the anti-national policy of the Ben-Gurion Government, which is speculating in the blood of Israel's youth" (in *Kol-Ha'am*) and "we will not allow them to speculate in the blood of their sons in order to satisfy the will of their masters" (in the Arab *Al-Itihad*). It was based on the powers granted to the Minister of Interior by section 19(2) of the

¹⁴³ *Protection of Privacy Law* 1981, 35 Laws (1980/81) 136; *Secret Monitoring Law* 1979, 33 Laws (1978/79) 141.

¹⁴⁴ *Basic Law: Freedom of Occupation* (yet unpublished in English).

¹⁴⁵ Recently (1992), the first step to change this was made with the enactment of the *Basic Law: Human Dignity and Freedom* (yet unpublished in English).

¹⁴⁶ The Declaration's status was considered by the Supreme Court very shortly after the establishment of the State, when it was still believed that a Constitution was imminent. In H.C 10/48 *Ziv v. the Provisional Governor of Tel-Aviv Area*, 1 PD 85, the Court rejected the argument that Mandatory emergency legislation was no longer in force because it was ultra-vires to the third section of the Declaration, holding that the Declaration has no normative status and cannot set aside legislation. As time went by and neither constitution nor bill of rights were introduced this precedent was softened, and the Court held that although the Declaration does not have the status of a constitution or a law, it nevertheless expresses the credo of the newborn State, and hence statutes ought to be interpreted according to it. See, for example: H.C 73/53 *Kol Ha'am v. the Minister of Interior*, 7 PD 871, 1 SJ (1948-53) 90; H.C 262/62 *Peretz v. the Local Council of Kfar Shmaryahu*, 14 PD 2101, 4 SJ (1961-62) 191.

¹⁴⁷ See: H.C 112/77 *Fogel v. the Broadcasting Authority and Others*, 31(3) PD 657.

¹⁴⁸ Supra note 146.

Mandatory Press Ordinance, authorizing him to suspend the publication of a newspaper for such period as he may think fit "(a) if any matter appearing in a newspaper is, in the opinion of the High Commissioner in council, likely to endanger the public peace ...".

Agranat J, an American-educated jurist, opens the judgment with a lengthy section about the importance of freedom of expression in a democratic society and its desired scope. Subsequently, Agranat actually incorporates the American discussion about the First Amendment into the Israeli law, adjusting its interpretation to the special circumstances of Israel. He identifies the conflict of interests involved in this case as freedom of speech versus public security in the light of Israel's emergency situation. This results with the question, "what test should the Minister of Interior use when he considers whether the published material is 'likely to endanger the public peace'?" After the consideration of the 'bad tendency approach' and the 'clear and present danger' test, Agranat adopts the 'near certainty' test. In applying it and the accompanying guidelines to the case at hand the Court finds that the orders of the Minister were unlawful and it sets them aside.¹⁴⁹

It is noteworthy that a few months earlier an almost identical case was brought to the Court. The same newspaper, *Kol Ha'am*, petitioned against a suspension order which was issued after the publication of a pamphlet titled "Israeli cannon fodder in Korea - this is the purpose of the unemployment policy and the anti-Soviet crusade". The brief judgment in this first *Kol Ha'am* case, to which Judge Agranat was party, dismissed the petition without even mentioning freedom of speech, on the grounds that the Court does not substitute the discretion of the empowered authority for its own.¹⁵⁰ Shortly after this decision the *Press Ordinance* was amended by the Knesset, but the extensive powers it granted to the Minister of Interior were neither touched nor discussed.

It has been argued that the change in the Court's attitude from the first to the second case was due to a change in the political climate. The first *Kol-Ha'am* case was in the midst of the Jewish doctors' trial in Moscow and following the break of diplomatic ties between the Soviet Union and Israel; the second case took place following the release of the accused doctors, the death of Stalin and a new crisis in the Israeli-American relationship. According to this reading the Court's rulings

¹⁴⁹ for further discussion see: Lahav [1981]; Barak [1988].

¹⁵⁰ H.C 25/53 *Kol Ha'am v. the Minister of Interior*, 7 PD 165.

reflected the changing national consensus.¹⁵¹ Be that as it may, what is more interesting in our context is that the Court changed direction despite the legislature's tacit approval of the first ruling, and that the legislature gave similar tacit approval to the Court following the second ruling as well. In fact, the specific section in the *Press Ordinance* has not been changed since, and the Ministers of Interior have adjusted their discretionary power to suspend publication of newspapers to the Court's standards.¹⁵² Moreover, other decisions of the Court given on the basis of *Kol Ha'am* have not been reversed by subsequent legislation. In other words, the legislature and Government left the entire field to be regulated by the Court.

The Court, indeed, proceeded to regulate related rights in the same manner. Thus, in the 1962 case of *Filming Studios* the Court extended the 'near certainty' test to the screening of news bulletins in cinemas.¹⁵³ In the 1986 case of *La'or* this criterion was extended to the Censorship Board's approval of theatre plays. The Board refused to approve a play drawing similarities between IDF soldiers in the Occupied Territories and the Nazi regime because of its allegedly pejorative, instigating and hurting character. The Court quashed the decision. Barak, J. narrowed the 'near certainty' test even further by holding that only near certainty for a serious and severe harm to the public order will justify a censorship of a play.¹⁵⁴ Subsequent to this decision, which limited to minimum the discretion of the Censorship Board, the Knesset enacted a law which abolished censorship of plays altogether for a trial period of two years.¹⁵⁵ The same criterion used in the *La'or* case was later applied also to film censorship, when the Court quashed a decision of the Censorship Board not to approve the screening of the film "The Last Temptation of Christ" as hurting (Christian) religious feelings.¹⁵⁶ Censorship of films, however, has not been abolished.

¹⁵¹ See: Shapira [1973].

¹⁵² Only in 1981 did the Minister of Interior use again the same power, deciding to close down a newspaper because of repeated incitement and praise for terrorism and murder. The Court applied the 'near certainty' test and upheld the Minister's order. See: H.C 644/81 *Omar International v. the Minister of Interior*, 36(1) PD 227.

¹⁵³ H.C 243/62 *Filming Studios in Israel Ltd v. Gerri and the Films and Plays Censorship Board*, 16 PD 2407.

¹⁵⁴ H.C 14/86 *La'or and Others v. the Films and Plays Censorship Board*, 41(1) PD 421. The decision was unsuccessfully challenged in Further Hearing 3/87 *The Films and Plays Censorship Board v. La'or*, 41(2) PD 162.

¹⁵⁵ *Penal Law (Amendment No. 35) 1991*, 1366 SH 1991.

¹⁵⁶ H.C 806/88 *Universal City Studios Inc v. the Films and Plays Censorship Board*, 43(2) PD 22.

In the 1988 case of *Schnitzer* the Court intervened in the discretion of the Military Censorship and overturned its decision to bar the publication of a newspaper article about the Director of the Mossad. This kind of censorship is regulated by section 87 of the *Mandatory Defence (Emergency) Regulations* 1945.¹⁵⁷ The Court rejected the Censor's argument that the publication can harm the Mossad and physically endanger its director, holding that the implementation of the 'near certainty' test leads to the preference of freedom of speech.¹⁵⁸

The 'near certainty' test was extended in the 1979 case of *Sa'ar* also to freedom of assembly and demonstration. According to section 85 of the *Police Ordinance* a licence from the police is required for a political procession or assembly of more than 50 people. The considerations whether to issue a licence and under what conditions are not specified in the authorizing law. A licence application for a demonstration was made by an organization of young couples. They asked to march through the main streets of Jerusalem and end their demonstration in front of the Knesset. In previous demonstrations of the same group violence had erupted and some public buildings were trespassed. The police, therefore, refused to grant the licence as requested, offering the organizers an alternative plan which included only an assembly (without a procession). The official reasoning of the police was a concern that the demonstration would disrupt the public order and create a significant traffic problem. It was also indicated that were the demonstration to take place the police would have to allocate a large number of policemen to keep the public order and the safety of the demonstrators, and that current duties involving anti-terrorist activity left the police no time for handling such demonstrations so frequently. The organizers refused to accept the alternative plan and petitioned the High Court of Justice.

Making the order nisi absolute, Judge Barak applied the 'near certainty' test, ruling that the authority of the police to refuse a licence can rest only on the grounds of danger to the public safety. The disruption of traffic and police manpower shortage cannot be independent valid grounds for the police decision. As to the concern for the public safety, Barak held that the burden is on the police to prove that there was a real, near-certain danger.¹⁵⁹

¹⁵⁷ These draconian powers were somewhat softened by a 'gentlemanly' agreement on self-censorship between the Minister of Defence and the Newspapers Editorial Board, but not all the newspapers joined this agreement.

¹⁵⁸ H.C 68/88 *Schnitzer v. the Chief Military Censor*, 42(4) PD 617.

¹⁵⁹ H.C 148/79 *Sa'ar v. the Minister of the Interior and the Police*, 34(2) PD 169.

The same principles were reinforced in the 1983 case of *Levi*. The police refused to grant a licence for a demonstration of the Committee Against the War in Lebanon, claiming that there was a probable serious danger to the demonstrators' safety (a month earlier a hand grenade assault on a demonstration of the same group resulted with one fatality). The Committee petitioned the High Court, which quashed the decision, holding that the police can refuse a licence only on the basis of near-certain danger, and that this test should be applied only after the police adopted all the possible measures to eliminate the danger. To the 'near certainty' test Barak, J. added an additional constraint, that the measure to eliminate the danger should be the least drastic that is possible from the viewpoint of human rights.¹⁶⁰

It is noteworthy that following the *Levi* case the 'near certainty' test was applied in almost all cases involving freedom to demonstrate,¹⁶¹ and that most of the petitions were dismissed on its basis.¹⁶² This may mean that the police adjusted its discretion to grant, refuse or qualify demonstration licences to the Court's criteria. Be that as it may, in the framework of our model of delegation of powers and the independence of the judiciary we may conclude that the whole field of balancing between the freedom of speech and other principles, such as public safety and security, was delegated by the legislature and the Government to the courts. It can be argued that this delegation corresponds to our discussion of uncertainty and lack of information connected to responsibility-shift. It is very difficult to assess, on the one hand, how the opinion of voters on the right balancing principle with regard to freedom of speech is distributed. On the other hand, it is also difficult to predict what will be the distribution of opinions among the voters with regard to specific future cases in this field. This makes the field ideal for delegation to an unbiased body, such as the judiciary.

¹⁶⁰ H.C 153/83 *Levi v. the Southern District Police Commander*, 38(2) PD 393; 7 SJ 109, English summary in 22 Isr.L.R (1987) 107. See also: H.C 292/83 *Ne'emanai Har Habait v. the Commander of the Jerusalem Police District*, 38(2) PD 449, English summary in 22 Isr.L.R (1987) 107.

¹⁶¹ But see: H.C 496/85 *Sarvetman v. the Commander of the Tel Aviv Police District*, 40(4) PD 550, in which the Court failed to intervene against the denial of licence to demonstrate in front of the Egyptian Embassy without mentioning the 'near certainty' test at all.

¹⁶² See, for example: H.C 606/87 *Marziano v. the Commander of the Southern Police District* 41(4) PD 449; H.C 411/89 *Ne'emanai Har Habait v. the Commander of the Jerusalem Police District* 43(2) PD 17; H.C 5647/90 *Cohen v. the Commander of the Southern Police District*, 25(1) PD 306.

5.2 The Involvement of the Supreme Court in Matters of Security and in the Occupied Territories

One of the two most controversial, disputed and sensitive issues in Israeli political and social life is the Arab-Israeli conflict, with its implications for the Government's foreign policy and its defence and security policy. With a history of more than five wars during Israel's 44 years, and a formal state of emergency in force since its establishment,¹⁶³ the area of defence and security has not been the easiest or most natural field for applying judicial review. But the Supreme Court did not hesitate, from the very beginning, to employ such a review, though (relative to other fields of judicial review) a limited one.¹⁶⁴ As time went by, however, the Court expanded its scope of review, which gained an additional and extremely significant aspect with its decision to hear applications from and about the Occupied Territories. The scope of review of security and defence matters has been broadened to such a degree that they are now being handled in a way almost similar to other administrative law issues. Without attempting comprehensive cover, I hope to demonstrate by a few examples how even in this charged area the legislature and Government have delegated extensive powers to the Court.

5.2.1 Judicial Review of Emergency Regulations

One of the two main legal tools to deal with the emergency situation within Israel is the power of the Government during an emergency situation to issue Emergency Regulations according to section 9 of the *Law and Administration Ordinance 1948*. These regulations can only be for the purposes of state defence, public security or the maintenance of supplies and essential services. Such emergency regulations have the power to alter any law, suspend its effect or modify it, unless its (or some of its) provisions are entrenched from emergency regulations, as are some of the provisions in the Basic Laws. An emergency regulation expires three months after it is enacted, unless it is revoked or extended at an earlier stage by a law of the Knesset. In the former case it is elevated to the status of a regular law.

¹⁶³ According to the *Law and Administration Ordinance 1948*, the Provisional Council (and later the Knesset) is empowered to declare a state of emergency. Such a declaration was made by the Provisional Council on 19 May 1948 and has not been lifted since.

¹⁶⁴ See: Gavison [1991], 15.

Similar powers, and even more draconian, based on the emergency declaration according to the *Law and Administration Ordinance*, are granted by the *Commodities and Services (Control) Law 1957*. This Law authorizes the Government to empower a minister, during a period of emergency, to issue Control Orders concerning the production, safekeeping, storage, transport or transfer of a product, if this order is required for a necessary action; the necessity, according to the Law, refers to the State's defence, public security, the maintenance of a regular supply of products or services, the increase of export or production and more. These orders too have priority over regular legislation, but unlike emergency regulations they are not restricted to three months.

The Supreme Court ruled that in principle emergency regulations and control orders can be attacked in the High Court of Justice in the regular procedure of judicial review, similar to the review of secondary legislation.¹⁶⁵ In practice, though, the number of such petitions is marginal due to the short duration in which the regulations are in force (if after three months a regulation becomes a law the grounds for its review are very limited). In addition, the Court has traditionally employed a very narrow approach for the review of emergency regulations and control orders. Until recently the leading precedent was the 1963 case of *Ostreicher*.¹⁶⁶

On the basis of the power delegated to him according to the *Commodities and Services (Control) Law 1957*, the Minister of Health issued a Control Order which stated that bread must be transported in a close, dry, clean, and ventilated case. The defendant, Ostreicher, was accused of transferring bread in open boxes on the top of a car. He admitted the facts, but argued that the Order is ultra-vires because it was not required for a necessary action. The Peace Court rejected this argument and convicted him. The District Court reversed the decision, holding that the power delegated to the Minister is connected to the state of emergency and there must be a link, which did not exist in this case, between the state of emergency and the purpose of the Order. The Attorney General was granted leave to appeal and the Supreme Court reversed the decision yet again.

¹⁶⁵ H.C 269/67 *Paca Investment Co. v. the Minister of Agriculture*, (unpublished), which was also one of the few cases in which emergency regulation was annulled by the Court.

¹⁶⁶ Cr.A 156/63 *The Attorney General v. Ostreicher*, 17 PD 2088; 5 SJ (1963-65) 19.

Judge Agranat wrote that the fact that the Order dealt with an arrangement necessary also in times of peace does not mean that it cannot be enacted by emergency legislation. The purpose of this tool of emergency legislation is to provide an efficient mechanism to deal with important issues that in times of peace it would be unjustified to regulate by secondary legislation. In addition, Agranat ruled that the legality of an emergency legislation is dependent on its being required for a necessary action, but this necessity is a matter for the Minister to decide and the Court will not substitute his discretion.

The *Ostreicher* case limited to a minimum the possibility to attack emergency regulations and control orders. A real change came only recently in the 1988 case of *Medianwest* and the 1990 case of *Poraz*.¹⁶⁷ The latter dealt with Emergency Regulations issued by the Minister of Housing which shortened the process of granting building permits, by-passing the regular planning procedure. This was done to enable the immediate construction of some 3000 units for new Soviet immigrants. During the same time the Knesset was working on special legislation for the same purpose, and this was known to the Minister. His regulations were challenged at the High Court, which reversed the *Ostreicher* precedent and held that the Minister was not entitled to use the tool of emergency regulations in matters not connected directly to emergency situations, and in cases where the same goal could be achieved through legislation of the Knesset. The Court annulled the regulation also on the grounds of unreasonable discretion.¹⁶⁸

In the *Medianwest* case the Minister of Health, by-passing the regular legislation (the *Health Order*), issued a Control Order which prevented a group of investors from opening a private hospital. Annuling the Order on the grounds of unreasonable discretion and policy, President Shamgar also launched a fierce attack on the legal structure of the *Commodities and Services (Control) Law*. He held that the existing arrangement according to which Control Orders are superior to any law contradicts basic democratic notions of separation of powers between the legislature and the executive and confuses between primary and secondary legislation.¹⁶⁹

¹⁶⁷ A pending change was signalled by H.C 790/78 *Rosen v. the Minister for Industry and Tourism* 33(3) PD 281, in which Judge Haim Cohen, in a minority opinion, ruled that the necessity of an action should be examined by an objective test and Judge Barak, on behalf of the majority, held that this test involves objective as well as subjective elements.

¹⁶⁸ H.C 2944/90 *Poraz v. the Government of Israel*, 44(3) PD 317.

¹⁶⁹ H.C 256/88 *Medianwest Medical Centre Herzliya Ltd v. the Minister of Health and Others*, 44(1) PD 19, English Summary in 26 Isr.L.R. (1992) 65. See also: H.C 344/89 *H.S.H - International Trade Ltd v. the Minister of Trade and Industry*, 44(1) PD 456.

The two cases are a rare examples in the Israeli political system for a clash between the Government and the Knesset. The decision-making powers were, therefore, delegated to the Court as a result of a collective decision-making problem, in a way similar to our theoretical description of Figure 6 in Chapter 6. This can also explain the Court's departure from its precedents in this field. It is noteworthy that following the Court's criticism, the Knesset amended the *Commodities and Services (Control) Law*.¹⁷⁰ The amendment holds that although the provisions of the Law are still superior to any law the regulations and control orders which are issued according to it will no longer enjoy this status; they will be inferior to Knesset legislation. The Court's decision in the *Medianwest* case was mentioned in the explanation part of the bill. By this significant change the Government gave up some of its powers following criticism of the Supreme Court.

5.2.2 The Defence (Emergency) Regulation 1945 and the High Court of Justice

The main legal tool which has been used to deal with security problems is the *Defence (Emergency) Regulations* enacted by the British High Commissioner in 1945.¹⁷¹ These Regulations have the status of a law (as originated from the Mandatory pyramid of norms) and they were incorporated into the Israeli law as other Mandatory legislation. They are valid also in the Occupied Territories (the Gaza Strip and the West Bank), since Egypt and Jordan adopted, similarly to Israel, the Mandatory legal situation existing in 1948, and like Israel they have never repealed the Emergency Regulations. But the legal situation in Israel and the Territories is not entirely identical, because since 1948 the Knesset has made changes in the Defence Regulations, most of which were not introduced the Territories.

The Regulations include wide discretionary powers to introduce various administrative measures, as well as a penal code to deal with security-related offences. Many of these offences have equivalents in the general - 'civil' - penal code, but usually the maximum punishment in the Regulations is heavier, and the jurisdiction is in the hands of military courts rather than the general courts. Originally there was no right to appeal (as the original section 30 of the Regulations explicitly stated), but this was changed in 1963 by the Knesset, which established a Military

¹⁷⁰ The *Commodities and Services (Control) Law (Amendment no. 18) 1990*.

¹⁷¹ 1945 *Palestine Regulations and Rules* (2) 1055.

Court of Appeals.¹⁷² Such a change was not introduced in the Territories by Jordan and Egypt, nor for many years by the Israeli Military Commander.

In 1985 the Association for Civil Rights in Israel petitioned the High Court of Justice asking it to order the Military Commander to establish an appeal instance in the Territories, arguing that the right of appeal is a basic human right. The Court did not issue such an order, but it fiercely criticised the existing situation and recommended that it be changed.¹⁷³ Although the Court did not formally allow the petition, the wording of the judgment signaled to the Government that a change ought to take place. In this sense the Association for Civil Rights won the case. Indeed, the Minister of Defence subsequently, announced that he was willing to accept the recommendation, and in 1989 an appeal instance was introduced.

The more problematic part of the Regulations, at least from a human rights point of view, is the part dealing with administrative measures. These include deportation, detention, demolition of houses and more. The Supreme Court has been reluctant to exercise wide judicial review on the operation of these powers. It limited the review to examining whether the Minister (within Israel), the Military Commander (in the Territories), or other authorized officials had acted within their powers, in integrity and according to due procedure. However, in recent years the approach of the Court has changed and it has been willing to broaden its review, though not yet to the level in which it scrutinizes other administrative decisions.¹⁷⁴

The first Supreme Court decision regarding the *Defence Regulation* was the 1950 case of *Al-Ayubee*. It dealt with Regulation 110 which empowers a military commander to issue an order to restrict a person's freedom of movement and to put him under police supervision for any period not exceeding a year, if the commander "is of opinion that it is necessary or expedient to make the order for securing the public safety, the defence of Israel, the maintenance of public order or the suppression of mutiny, rebellion or riot". The petitioner applied against such an order which restricted him from leaving his village. The Court, rejecting the petition, held that it can review the authority and the integrity of the Military Commander, but it

¹⁷² *Military Penal Law (Military Tribunals - Appeals)* 1963.

¹⁷³ H.C 87/85 *Argub v, the Military Commander in Judea and Samaria*, 42(1) PD 353.

¹⁷⁴ For different evaluations of the Court's involvement see: Gavison [1991], pp. 15-17.

cannot scrutinize his discretion as to whether the petitioner is endangering the security of the State.¹⁷⁵

This precedent was reversed some years later when the Court held, in the 1971 case of *Al-Asmar*, that it can review the discretion of the Commander. In this case the Court found that the discretion was exercised properly. It therefore dismissed the petition of Al-Asmar who was restricted to the town of Lydda because he was suspected of involvement with a terrorist organization.¹⁷⁶ In the 1981 case of *Baransa* the Court dismissed a similar petition, again on the basis of reviewing the discretion of the Commander. In an obiter Shamgar, DP. held that the use of Regulation 110 is valid only as a preventive measure and not as a punishment or a substitution to criminal proceedings, and that the Court should be convinced that the evidence which was presented to the Commander prior to his decision was sufficient to substantiate a danger to the security of the State. Shamgar indicated that the discretion ought to be examined by an objective test and not by a subjective one.¹⁷⁷

Another harsh administrative measure is specified in Regulation 119 which empowers a military commander to order the forfeiture, and later the demolition, of any house that has connection to persons who, to the Commander's satisfaction, committed an offence according to the Defence Regulations. This connection does not have to be direct; it is sufficient that the house is in a village of which some inhabitants committed an offence according the Regulations. This measure has been used almost exclusively in the Occupied Territories, but there were very few cases in which this use of the demolition power was challenged in the Court. The main reason for this scarcity was that in most occasions the demolition was immediate and the person whose house was about to be demolished did not have the chance to approach the Court, as one of the purposes of this measure is to serve as a prompt response to terrorist acts.¹⁷⁸

This was precisely the cause of a 1988 petition of the Association for Civil Rights in Israel. Responding to the Association's application the Court held that save

¹⁷⁵ H.C. 46/50 *Al-Ayubee v. the Minister of Defence*, 4 PD 222.

¹⁷⁶ H.C. 89/71 *Al Asmar v. the Commander of the Central Command*, 25(1) PD 197.

¹⁷⁷ H.C 554/81 *Baransa v. the Commander of the Central Command*, 36 (4) PD 247.

¹⁷⁸ One of the exceptions, in which the suspect's father managed to approach the Court and an interim injunction was issued, is H.C 361/82 *Hamri v. the Commander of the Area of Judea and Samaria*, 36(3) PD 439.

in rare cases of operational military needs, the person against whom a demolition order is being issued should be given the right to appeal against the order to the Military Commander himself, and subsequently to the High Court of Justice.¹⁷⁹ The legal grounds for this decision by President Shamgar were not the applicable Public International Law but the principles of Israeli administrative law which, according to Shamgar, ought to direct also the Military Commanders in the Territories. This reasoning could have enabled the Government (through the Military Commander) to reverse the decision, but this has not been done, despite the fact that the ruling of the Court had a significant impact on the efficacy of this measure. Indeed, since that ruling the number of demolition orders has sharply decreased.

The two more severe administrative measures are detention and deportation. In 1979 the measure of deportation (originally specified in Regulation 112) was abolished, and the arrangement concerning administrative detention (formerly Regulation 111) was amended and liberalized by the *Emergency Powers (Detention) Law 1979*.¹⁸⁰ These changes, however, apply only to Israel; a parallel liberalization of the two measures was introduced in the Territories, but suspended upon the beginning of the Intifada in 1987.

According to the old arrangement, which is still valid in the Territories, there is a quasi-judicial advisory committee to whom the person who is issued a detention or deportation order can appeal. This committee has only recommendation powers, and the final decision is in the hands of the Military Commander. The High Court of Justice, due to the existence of such an advisory committee, has traditionally restrained itself from scrutinizing the decisions of the Military Commander. However, this approach has gradually changed, and the Court's impact, especially with regard to deportations, has increased. Some would even argue that this issue has been the prime cause for friction between the military authorities and the Government on the one hand and the Supreme Court on the other hand.¹⁸¹

The measure of deportation was part of the defence policy of the Labour government between 1967 and 1974. It is estimated that 1400 people were

¹⁷⁹ H.C. 358/88 *The Association for Civil Rights in Israel v. the Commander of the Central Command*, 43(2) PD 529.

¹⁸⁰ 33 *Laws* (1978/79) 89.

¹⁸¹ See: Negbi [1981], p. 78.

deported during that period without any legal process.¹⁸² It was common, for example, to deport those who finished serving a jail sentence for security offences. Such was one of the only cases which reached the High Court of Justice in that period - the 1971 case of *Merar*. The affair took place while King Hussein of Jordan was conducting a bitter offensive against the Palestinians (the onslaught which began in September 1970 was dubbed 'Black September', as was a terrorist organization named after it). The petitioner, an alleged Palestinian terrorist, finished a term of detention and was issued a deportation order by the authorities. He petitioned the High Court asking to be allowed to stay in detention in Israel, as he was facing a fate equivalent to a death sentence in Jordan, which was the deportation's destination. In those years the Court still had complete faith in the security reasoning of the military authorities and the petition was rejected on this basis. The Court did not examine the discretion of the authorities, though it held that they had to do everything to prevent risking the petitioner's life.¹⁸³

A serious confidence crisis between the Court and the security authorities was caused by the 1976 *Natshe* affair. The background was a controversial 'liberal' decision of the Defence Minister, Shimon Peres, to hold elections for local authorities in the Territories. This decision was not made at an ideal timing, as Palestinian unrest was mounting. When it became apparent that in several towns the challenging candidates, PLO supporters, have good chances to oust the incumbents, moderate pro-Jordanian mayors, a decision was made to deport two of them on the grounds of alleged responsibility for instigating the unrest.

The defence authorities insisted that the deportations were required immediately for security reasons, but when the deportees were taken from their homes they insisted that they be given the right to appeal to the Advisory Committee, and the deputy Attorney General instructed the military authorities to act accordingly. When the hearing of the Advisory Committee ended and the orders were upheld, the attorneys of the deportees applied urgently to the High Court of Justice. The judge on duty, Judge Etzioni, set an immediate hearing, but when it began the State's attorney announced that the petitioners had been deported a short while earlier. In an angry-toned decision the judge criticised the military authorities and instructed the Attorney General to hold an investigation and report to the Court how such a thing

¹⁸² This figure is especially striking in light of the fact that during the ten years of Likud Defence Ministers only 11 people were deported. The figures are taken from Dayan [1992], p. 21.

¹⁸³ H.C 17/71 *Merar v. the Minister of Defence*, 25(1) PD 141. See also: Negbi [1981], pp. 80-82.

could have happened.¹⁸⁴ Later it became apparent that the Attorney General himself, Aharon Barak, gave his approval to go ahead with the deportations because the petitioners' attorney did not ask for an interlocutory injunction. This was the lowest point in Barak's career and he even considered resigning, but, more important for our analysis, this can be considered as a turning point in the Court's attitude towards the military authorities. Another consequence of the case was that following the incident and until 1979 no more deportations were ordered.

In the two 1979 cases of *Abu-Ayad* and *Basam Shakaa'* the deportees' attorneys, having learnt the lesson, petitioned the High Court of Justice for an interlocutory injunction even before the hearing of the Advisory Committee. The former case turned to be a tactical victory for the State, as, after the endorsement of the order by the Advisory Committee, the Court rejected the petition preferring the affidavits of the military authorities to those on behalf of the petitioner, and, more importantly, rejecting the argument that deportations of this kind contravened Article 49 of the Geneva Convention.¹⁸⁵ Nevertheless, the wishes of the security authorities to operate a quick measure of immediate response did not come about due to the intervention of the Court.

The *Shakaa'* affair happened during the aftermath of the Haifa-Tel Aviv Coastal Road terrorist attack in which 22 men, women and children were murdered. The deportation order was issued against the Mayor of Nablus who voiced sympathy with the terrorists' act. As in the previous case, the Court declined to annul the deportation order prior to the Advisory Committee procedure, but it prohibited the execution of the deportation in order to give *Shakaa'* the opportunity to apply to the Court again after the decision of the Advisory Committee. The delay triggered a public debate around the deportation, in which the Minister of Defence revealed that he - in contrast to the Government's view - opposed it. This debate, together with the impact of previous Court decisions, brought to the first ever recommendation of an Advisory Committee not to deport. It was followed by the Military Commander.¹⁸⁶

The most publicized affair involving deportations was the *West Bank Mayors* case. In 1980 tension in the Territories was mounting, and on May 2nd six Jews who

¹⁸⁴ H.C 159/76 (unpublished). For more on the case see: Dayan [1992], pp. 21-23; Negbi [1981], pp. 82-88.

¹⁸⁵ H.C 97/79 *Abu Ayad v. the Commander of the Area of Judea and Samaria.*, 33(3) PD 309. See also: Negbi [1981], pp. 88-93.

¹⁸⁶ See: Negbi [1981], pp. 93-100.

returned from praying at the Machpela Cave in Hebron were attacked and murdered. The Military authorities wanted a quick response, and decided to deport the Mayors of Hebron and Halhul and the religious leader of Hebron for incitement which allegedly led to this murder. The Military Commander decided to by-pass all the legal requirements and failed to consult the Attorney General's office, as used to be the practice. Thus the deportees were not given the opportunity to appeal to the Advisory Committee; they were flown to the Lebanese border and deported. The attorney of the deportees petitioned the High Court of Justice asking for an invalidation of the deportation orders.

The opinions of the judges were divided. Haim Cohen, DP, held that in contrast to the State Attorney's argument (which was based on the British practice during the Mandate) the law requires the Military Commander to give deportees the right to appeal to the Advisory Committee **prior** to the deportation, and the fact that this right was denied invalidated the deportation order as a whole. President Landau was of the same opinion as to the right of appeal to the Advisory Committee, but his conclusion was that the deportation order was still valid; only the act of the deportation itself was invalid. Kahan, J. held that the right of appeal **prior** to the deportation is granted not by the Regulation but by general administrative principles which do not grant an absolute right, and in this case it was justified to deny this right. Since the petition was for the invalidation of the deportation orders, the opinions of the President and Judge Kahan determined the outcome - a dismissal of the application. Nevertheless the Court strongly recommended, rejecting the State's argument that the return of the deportees could seriously endanger peace and security in the area, that two of the deportees should be given the opportunity to return and appear in front of the Advisory Committee.¹⁸⁷

Following the decision the two deportees were given the right to return and to appear in front of the Advisory Committee, but the Committee approved the deportation. The matter came back to the Supreme Court, which sat in the same panel as in the first case. Again, by a majority decision the deportation orders were upheld and the view of the military authorities as to the security risks being created by the deportees was adopted. In his minority opinion, Judge Cohen expressed the view that deportations contradict Article 49 of the Geneva Convention and are therefore an illegal measure. Although the petition was dismissed, President Landau recommended that the issue would be re-examined at the Government's

¹⁸⁷ H.C. 320/80 *Kawasma v. the Minister of Defence and Others*, 35(3) PD 113.

level, taking into account the peace-orientated declarations given by the deportees in front of the Advisory Committee.¹⁸⁸ This recommendation was widely criticized as a trespassing by the Court into the executive's territory, but Prime Minister Begin promised to follow the Court's decision, including its recommendation. The affair came to an end a day later when the Government discussed the issue and decided to go ahead with the deportation. However, the 'lesson' was learnt, and no more deportations were ordered for five years, until Itzhak Rabin came to the Defence Ministry.¹⁸⁹

The story of deportations is very much a representative example of the Court's attitude towards the exercise of power on the basis of the *Defence (Emergency) Regulations*. Statistically one will not find a large percentage of decisions against the authorities,¹⁹⁰ and the Court still appears to rely, to a certain extent, on the considerations of the security authorities and their sincerity. At the same time we are witnessing a decline in the absolute faith which the Court had in the discretion of the authorities and an increasing willingness to examine this discretion. The statistics of successful petitions do not give the full picture, as the Court has had a tremendous influence on the usage of these emergency measures and on their effectiveness. To say that the Court tied the hands of the Government in these matters would not be an overstatement.

Despite all this, the Government and the Knesset have not responded to the Court's interventionism either by limiting its jurisdiction or by limiting the grounds for its review. On the contrary, the *Emergency Powers (Detention) Law 1979*, which replaced, within Israel proper, Regulation 111 of the *Defence (Emergency) Regulations* and established a far more liberal arrangement, delegated much more powers to the courts to review decisions of the military authorities.¹⁹¹ The cases surveyed above and the lack of governmental response, should be viewed alongside our earlier discussion of the initial involvement of the Supreme Court in the Occupied Territories. We indicated before that this involvement serves the Government as a mechanism for shifting responsibility, and that its benefits outweigh the costs. The earlier cases in which the Court has refrained from overturning the

¹⁸⁸ H.C. 698/80 *Kawasma v. the Minister of Defence and Others*, 35(1) PD 617.

¹⁸⁹ See also: Dayan [1992], p. 23; Negbi [1981], pp. 100-116.

¹⁹⁰ See: Cohen [1986], p. 496, with statistics about petitions from the Territories in 1979/80.

¹⁹¹ For details see: Rubinstein [1991], pp. 284-289.

decisions of the security forces can demonstrate why this was so. But as we have seen above, the tide is turning towards increasing review by the Court. There might be a point in which the calculations of the Government will change, and in this case it is not unlikely that the Court will be constrained. But if the judges themselves make similar calculations, they are likely to confront the Government just up to that point.¹⁹²

5.2.3 The Supreme Court Involvement in the Debate about the Settlements

Since all Israeli Governments have always viewed settling the Land of Israel as one of the core principles of Zionism, the issue of the Settlements in the Occupied Territories is possibly the chief bone of contentment in the relationship of the Supreme Court and the Government. The Court's involvement in this issue began in the 1972 case of *Hilu*.

The disputed area was the Rafach Approach, which is situated between the Gaza Strip and the pre-1967 Israeli-Egyptian border. This area was the basis for many terrorist attacks in the years following the Six-Day War. The military authorities decided, therefore, to close the area and evacuate its Bedouin inhabitants in order to create a buffer zone between Israel and the Gaza Strip. The Bedouins were to be resettled in other places and compensated, while Jewish settlements were to be built in the area. The man in charge of the operation was Ariel Sharon, then the Commander of the Southern Military Command, and the press reported a brutal evacuation.

In 1972 nine Bedouin Sheikhs petitioned the High Court to quash their evacuation orders and to restore their lands. They argued that the motivation behind the evacuation was a political one, part of an overall settlement policy, and not of military necessity, and therefore the orders were illegal. The State presented an affidavit of an Army General stating why this action was necessary for security reasons. The petition was dismissed. The judges held that if the military authorities act within their powers the Court is bound to accept claims of military necessity unless disproven or shown to be spurious or disguise for other motives. However, already in this early case the Court noted that this decision ought not to be seen as a

¹⁹² The recent decision of the Court in the case of the deportation of 400 Hamas activists may substantiate this.

total legitimization of settlements in the Territories; military necessity is requisite for the confiscation of lands for this purpose.¹⁹³

The next case, the 1978 case of *Anata village*, was brought to the Court shortly after Likud Government took power promising many more settlements in the Territories. The petition in this case was dismissed, again, only after the Court was convinced that the requisition was not for civilian settlement purpose. The judges emphasized that international law allows requisition only for military purposes.¹⁹⁴

A few months later, on the eve of the signature of the Camp David agreement between Israel and Egypt, the Supreme Court issued another interlocutory injunction to halt further construction in the newly established settlement of Beit El. The settlers, who were in bitter disagreement with the Government due to the Camp David accords, asked the Court to be allowed to join as a party to the trial. Apparently, at the same time, they violated the interim injunction, and also lobbied for a change in the law which would prevent the High Court from dealing with such issues. The judges were furious about the contempt of court and rejected the settlers' request. They also rejected the State's request to relax the injunction and allow the building of a fence around the disputed lands. The atmosphere was electric.

In this case the State could not deny that the confiscated lands were going to serve a civilian settlement, and its representative therefore opened the hearing by arguing lack of justiciability, grounded in the fact that the issue of the Territories was the object of international negotiations in Washington. The argument was rejected contemptuously by the five judges who heard the case. There was no other option but to argue the merits of the issue. The State's line, which was supported by an affidavit of an Army General, was that a civilian settlement was necessary to serve security functions. During the hearing the judges asked the State Attorney what would happen to the settlement should the military necessity disappear, as it is in the nature of military needs to be temporary and changing. The reply of the Attorney was that the settlers were in the Territories only in the context of the Military Government, and upon its termination their right to remain there will expire. This reply paved the way for the dismissal of the petition.

¹⁹³ H.C 302/72 *Hilu v. the Government of Israel*, 27(2) PD 169. English summary in Zemach [1974], pp. 128-138. See also: Cohen [1986], p. 498; Negbi [1981], pp. 29-33.

¹⁹⁴ H.C 834/78 *Slama v. the Minister of Defence and Others*, 33(1) PD 471.

Four months later the judgment was given and the petition was dismissed, again on the basis of the acceptance of the military reasoning, which was not disproven by the petitioners. The judges hinted, though, that had the petitioners brought contradicting evidence the Court would have considered it seriously.¹⁹⁵ The judgment was accepted by the settlers with joy, and Prime Minister Begin, who declared that "there are judges in Israel", ordered its translation and distribution in Israel's embassies around the world. Apparently the judgment was not read very carefully by the jubilant, as it indicates explicitly that the settlements are temporary and that there is an absolute ban on building permanent settlements.¹⁹⁶

The hint given by the Court about contradictory evidence was taken on board. In the next case involving requisition of private land the petitioners presented a counter-affidavit to the one submitted by the military, written by a retired Army General. In this 1979 case of the Settlement *Matityahu*, the Court preferred the affidavit of the State, determining that in such a disagreement the Court will hold the persons who are currently responsible for the security as sincere, unless disproven by the counter-affidavit. The petition was, therefore, dismissed.¹⁹⁷ But the next case, the 1979 case of the *Eilon Moreh* Settlement, was a different story.

Following mounting pressure from Gush Emunim - the political organization of the Settlers - the Government decided by a marginal majority (against the opinions of the Defence and Foreign Ministers) to establish a new settlement in Samaria on confiscated lands. This decision attracted a mass of criticism and protest, local as well as foreign, and the owners of the lands petitioned the Supreme Court. In the preliminary hearing on whether to issue an order nisi the petitioners' attorney surprised the State with two affidavits, one of them from the former Chief of Staff, then a Labour Knesset Member, stating that the planned settlement did not contribute to the security of Israel. The Court issued an order nisi, and at the request of the petitioners also an interlocutory order prohibiting any construction on the disputed site.

In the main hearing the State presented an elaborate affidavit from the Chief of Staff. The petitioners' attorney asked to cross-examine the Chief of Staff, and in

¹⁹⁵ H.C 606/78 *Ayub and Others v. the Minister of Defence and Others*, 33(2) PD 113.

¹⁹⁶ See: Negbi [1981], pp. 39-47. On the legal aspect of the decision see: Stone [1980]; Cohen [1986].

¹⁹⁷ H.C 258/79 *Amira v. the Minister of Defence*, 34(1) PD 90.

an a very rare decision the Court allowed such cross-examination, to be conducted in writing. The answers to this questionnaire revealed inconsistencies with regard to the original affidavit, mainly as to the question of who initiated the Settlement - the military or the politicians. It took the five judges three weeks to reach a unanimous decision to make the order nisi absolute and to order the dismantlement of the Settlement within 30 days.¹⁹⁸ There was nothing innovative in the decision from a legal point of view, save maybe the importance of the question of who initiated the settlement as an evidence for the existence or absence of a security necessity. For the first time, though, the Court had been convinced by the attempts to disprove the security reasoning. As this was also the opinion of the Defence and the Foreign Ministers, the conclusion of the Court cannot be seen as revolutionary from this point of view either.

What was indeed revolutionary was the outcome: for the first time the Court ordered the dismantling of a Jewish settlement. Despite fierce criticism against the involvement of the Court (including criticism by some of the leading newspapers), calls to limit its jurisdiction, calls to limit the applicability of the relevant international law provisions in the Territories and calls for retroactive legislation to legalize the requisitions, Prime Minister Begin decided to comply with the judgment and to refrain from changing the legal situation; thus the settlers were evacuated from the area. This has not put an end to the construction of settlements in the Occupied Territories, but in the years to follow the authorities altogether avoided requisitions of private lands. Instead, public (or State-owned) lands have been used. The methods in which public lands are being determined as such are beyond the scope of this work.¹⁹⁹

The last case is interesting also in our theoretical context. The issue of the Settlements and the involvement of the judiciary can be analyzed mainly in the terms of responsibility-shift, in the context of both the national constituency of the Likud Government (this is one of the most controversial issues in Israeli politics) and its international 'constituency'. But the last case involved also collective decision-making problems within the Government. This latter factor was the one which allowed the judges a greater manoeuvre space, and which eventually produced the revolutionary decision.

¹⁹⁸ H.C 390/79 *Dwikat and Others v. the Government of Israel and Others*, 34(1), 1; English summary in 15 Isr.L.R (1980) 131. See also: Stone [1980]; Cohen [1986].

¹⁹⁹ See: Negbi [1981], pp. 50-79; Rubinstein [1991], p. 95.

5.3 The Supreme Court and the Issue of State and Religion

The second sensitive and charged issue in Israeli society is the relation between State and religion.²⁰⁰ I will not profess to provide here a comprehensive account of the field; instead, I will focus on a few examples for the Supreme Court's role in the national debate and policy making in this field. The perplexity of the issue is the result of a unique combination of four factors which characterize the State of Israel and its society. First, the official character of the State of Israel as a *Jewish* state as prescribed by the *Declaration of Independence* and implemented by many pieces of legislation. Two of the most important provisions in this context are the first section of the *Law of Return*, which grants every Jew "the right to come to this country as an *oleh* (immigrant)",²⁰¹ and the 1985 addition to the *Basic Law: The Knesset* (section 7A) which denies the right to be elected for the Knesset to lists which negate the existence of the State of Israel as the state of the Jewish people.²⁰²

The second factor is the official definition of Israel as a multi-religion state. Unlike countries which separate state from religion (like France and USA), and countries which have one official religion (like Britain) Israel belongs to the large group of countries in which there are several recognized religions. The source of this arrangement goes back to the Ottoman Capitulation Rule, which granted autonomy to the different religious communities, and it was developed further under the British Mandate. Thus the High Commissioner (now the Minister of Interior) was empowered to grant recognition to religious communities and to regulate their organization upon their request. The consequence of such recognition was legal autonomy in matters of personal status.²⁰³

The third element is a consequence of the Israeli proportional representation system, and the fact that religion has always been a ground for political organization.

²⁰⁰ Most Government crises were connected to this issue. See: Arian [1985], p. 165.

²⁰¹ *The Law of Return* 1950, 4 Laws (1949/50) 114. See also: *Nationality Law* 1952, 6 Laws (1951/52) 50.

²⁰² 1155 SH (1985) 196.

²⁰³ *The Religious Communities (Organization) Ordinance* 1926, 1933 *Laws of Palestine* (2) 1292. The Jewish community was the only one to apply during the Mandate for recognition and organization, and following this application the High Commissioner enacted the *Israeli Knesset (Community) Regulations - 1927*, which deal with both the secular-political organization of the Jewish community and its religious organization. The latter included the establishing of the *Chief Rabbinate Body* headed by the *Chief Rabbinate Council* and the *Chief Rabbies*, which are still recognized as the official supreme Jewish religious institutions. Today there are ten recognised religions.

Since never in the history of Israel has one of the parties gained an absolute majority in the Knesset, coalition Governments are part of the political reality, and some of the religious parties have always been partners to these coalitions. Moreover, traditionally the portfolios of Interior and Religion, which, naturally, embody significant influence on issues of religion and State, have been held by ministers from religious parties.

The fourth element, and not the least important one, is the human rights aspect of the issue, namely - freedom of and from religion, and religious equality. The *Declaration of Independence*, alongside the characterization of the State of Israel as a Jewish state, also guarantees "freedom of religion, conscience, language, education and culture, and the safeguard of the holy places of all religions", as well as ensuring the "complete equality of social and political rights... irrespective of religion, race or sex". Unlike other liberties freedom of religion in Israel is granted also by law - Article 83 of the *Palestine Order in Council* - which reads: "All persons in Palestine shall enjoy full liberty of conscience, and the free exercise of their forms of worship subject only to the maintenance of public order and morals...". Although freedom of religion is not explicitly mentioned, the Supreme Court ruled that it is included in freedom of conscience.²⁰⁴

These four elements are blended together in a situation of so-called 'status quo' which dates back to 1947, the eve of the establishment of the State. In response to demands of religious groups concerning the position of the Jewish religion in the future State, Ben Gurion wrote a letter to the religious party Agudat Israel, in which he indicated that the future State of Israel will not be a theocracy, that all its citizens, Jews and non-Jews, will be granted equal rights and freedom of religion, but that some demands of the Jewish groups will be met: maintaining the Sabbath, Kashrut, and autonomy in education.²⁰⁵ The *Declaration of Independence* was framed along these lines (not using the authority of God with regard to the establishment of the State and granting freedom of religion on the one hand, but using Jewish characteristics and symbols on the other hand), and so do many pieces of legislation and even rulings of the courts. The 'status quo' has been the starting-point for various debates on the issue. As indicated above, our context does not

²⁰⁴ C.A 450/70 *Rogozhinski v. the State of Israel*, 26 (1) PD 129; English summary in 5 *Israel Yearbook of Human Rights* (1975) 366.

²⁰⁵ For the full text of the letter see: Shimshoni [1982], p. 478.

allow even a full account of the more interesting court rulings on the issue. I chose to focus on two selected topics within this wide field.

5.3.1 The Law of Return and the Question of 'Who is a Jew'

The term 'Jew' appears in several pieces of legislation,²⁰⁶ but it was in the context of the *Law of Return* and the *Population Registry Law* that the most heated legal disputes have occurred. According to religious law a Jew is a person born to a Jewish mother or converted to Judaism in accordance with the religious law. In *The Law of Return 1950*, however, the term 'Jew' was not defined, and this was done deliberately after rejecting demands by some of the religious parties to define the term according to religious law.

In 1958, the question arose when Hevre-Kadisha, the body that takes care of Jewish burial, refused to bury a person in a Jewish cemetery, on the grounds that according to religious law the deceased was not a Jew. The Minister of Interior issued a directive according to which a person can register as a Jew upon personal declaration. Accordingly, he ordered Hevre-Kadisha to follow the subjective criterion and bury the deceased. In response, the religious party Agudat Israel decided to quit the coalition, the Government fell and new elections were held. In the coalition agreement signed following the elections it was accepted that the disputed directive would be replaced by a directive determining that a Jew is a person born to a Jewish mother and is not a member of another religion, or a person converted to Judaism according to religious law.

The issue arrived to the Supreme Court in the 1962 case of *Rufeisen*. The petitioner was born in Poland to Jewish parents and brought up as a Jew. During the War he was imprisoned by the Germans twice, but managed to escape and to obtain a certificate stating that he was a Christian German. In his new status he assisted the local Jewish population. In 1942 he found refuge in a monastery, where he converted to Christianity. After the war he asked to emigrate to Palestine, but only in 1958 was he allowed out of Poland after waiving his Polish citizenship. He came to Israel, applied for Israeli nationality under the *Law of Return*, and was refused on the grounds of the Government's directive, as he belonged to another religion. Rufeisen petitioned the High Court of Justice.

²⁰⁶ See: Rubinstein [1991], p. 164.

The Court dismissed the petition against the dissenting opinion of Judge Haim Cohen. All the judges agreed that the interpretation of the term 'Jew' in the *Law of Return* should not be according to religious law, but according to a secular meaning. (Had the religious law been accepted as the right interpretation the petitioner would have been considered as a Jew). The majority opinion, written by Judge Silberg, an orthodox Jew, held that the secular test ought to be an objective one, and a Jew who converted into Christianity cannot be considered a Jew according to such a test. In his minority opinion Judge Cohen examined the language of the Law and concluded that the fact that the legislature did not include any definition of a Jew must lead to the assumption that the legislature intended to content itself with the subjective test. Thus the Governmental directive which excludes people professing other religions, according to Cohen, cannot stand.²⁰⁷

The most important case in this series was the 1968 case of *Shalit*. The petitioner, an Israeli born to Jewish parents, got married while studying in Scotland to a woman born to Christian parents, who viewed herself as agnostic. The couple had two children and when they returned to Israel Shalit went to the Ministry of Interior to register them as required by the *Population Registry Law 1965*. Among other details the registration includes nationality, religion and '*Leom*' (nation or ethnic group). Shalit asked the registration officer to write 'no religion' under the rubric of religion and 'Jewish' under the rubric of *Leom*. The officer refused to register the children's *Leom* as Jewish on the basis of the 1960 directive. Shalit petitioned the High Court of Justice.

Unlike the *Rufeisen* case, which had implications on the right of the petitioner to receive Israeli citizenship, this case had no 'real', practical implications; it was just a matter of principle. This makes the two precedents brought about by the case particularly surprising; they can show how loaded the issue is. Never before did the Supreme Court sit in a bench of nine judges, and this was the only known case in which the Court wrote, prior to the decision, to the Prime Minister, Golda Meir, asking her to consider changing the law by abolishing the rubric '*Leom*' from the population registry altogether. The Government rejected the proposal, and the Court had to decide the case. The petition was allowed by a majority of five to four.²⁰⁸

²⁰⁷ H.C 72/62 *Rufeisen v. the Minister of Interior*, 16 PD 2428, SJ (special volume) 1. Despite the decision, the petitioner was allowed to settle in Israel.

²⁰⁸ H.C 58/68 *Shalit v. the Minister of Interior*, 33(2) PD 477, SJ (special volume) 35.

The strongest dissenting opinion was that of Judges Silberg and Kister, both orthodox Jews. Silberg held that belonging to the Jewish nation is not equivalent to having an Israeli nationality, because the Jewish nation includes the thirteen million Jews in the diaspora. There is no such thing as a separate Jewish-Israeli nationhood, and a search for a new criterion of national identity amounts to an absolute denial of the continued existence of the Jewish people. It signifies a desire to build on the eastern shores of the Mediterranean a new state with neither past nor tradition, no longer Zionist. In short, Silberg identified Jewish nationhood with Jewish religion, and thus, in fact, departed from his own secular test applied in the *Rufeisen* case.

President Agranat and Judge Landau wrote a milder dissenting opinion, avoiding the loaded question of 'who is a Jew' by ruling that the petition was unjusticiable. Landau, J. held that the petition raised issues of policy in matters of social ideology and the Court, in fulfilling its judicial role, has no sufficient basis to invalidate the instruction of the Minister of Interior. Agranat, P. pointed out that the High Court of Justice, according to the definition of its powers, interferes with executive acts only when 'justice' requires it. Here the interest of justice did not require the Court to take a stand on the ideological issue, since clearly there was no consensus of opinion among the enlightened section of the community, and the Court's position could be based only on the judges' private opinion.

The five majority judges also avoided a direct confrontation with the question of 'who is a Jew' and the relations between state and religion. Their decision endorsed the subjective principle according to which the registration officer is obliged to register 'Leom' in accordance with the declaration of the person asking to register, when such a declaration is made in good faith, and unless the officer has reasonable grounds for assuming that the notification is incorrect. They concluded that the 1960 instructions of the Minister of Interior were in conflict with the Law, and therefore the registration officer should not comply with them. The result was the adoption of Judge Cohen's minority opinion in the *Rufeisen* case.²⁰⁹

The *Shalit* decision aroused public and political uproar. Demands by the religious parties to amend the Law were met shortly after the ruling. The *Law of Return (Amendment No. 2) 1970* added section 4B to the Law, which states: "For the

²⁰⁹ For more on the case see: Akzin [1970]. The Court affirmed the *Shalit* precedent a few days later in H.C. 4/69 *Ben Menashe v. the Minister of Interior*, 34 (1) PD 105.

purpose of this law a 'Jew' means a person born to a Jewish mother or converted to Judaism and who is not a member of another religion". The *Population Registry Law* was amended accordingly. These changes, however, were balanced by extending the rights granted by the *Law of Return* to "the child and grandchild of a Jew, to the spouse of a Jew and to the spouse of the child and grandchild of a Jew - with the exception of a person who was a Jew and willingly changed his religion" (section 4A).

The issue of 'who is a Jew' was not solved by the amendment of the *Law of Return*. Two questions remained open: the minor one was how to decide if a person was a member of another religion.²¹⁰ The major question, which was already in the air at the time of the amendment, is the question of conversion. In this particular issue the religious parties' demands - that following the word "converted" in section 4B, the words: "according to the Halacha" (i.e. according to the Orthodox rules of conversion) will be added - were not met,²¹¹ and it has remained a major political issue and a cause of several political crises. Conversions by Reform and Conservative Rabbies are not recognized by Orthodox Judaism and, hence, by the official religious institutions in Israel (which are controlled by Orthodox Jews). The religious parties in Israel want the *Law of Return* to reflect this as well. Until very recently the question did not arrive in the courts, mainly because in practice the important issue - the right to receive Israeli nationality - is usually covered by the broader definition of the beneficiaries of the Law, as section 4A stipulated. But in 1986 the Court was faced with the question in the case of *Susan Miller*.

The petitioner went through a Reform conversion into Judaism in New York. The Minister of Interior agreed to register her in the Population Registry as a Jew, but ordered the addition of the remark 'converted' to the registration. The High Court of Justice quashed the Minister's decision, holding that he was not authorized to add any details not prescribed by the Law to the Population Registry.²¹² Following the judgment the Minister resigned, and ordered the removal of his signature from newly issued identity cards. After an affirmation of the ruling by the Supreme Court in a later case,²¹³ the Government decided, following demands of the coalition's religious

²¹⁰ See: H.C. 563/77 *Dorflinger v. the Minister of Interior*, 33(2) PD 97 and H.C. 265/87 *Bersford v. the Ministry of Interior*, 43(4) PD 793.

²¹¹ On the Knesset discussion of the 1970 amendments see: Rubinstein [1991], pp. 185-186.

²¹² H.C. 230/86 *Miller v. the Minister of Interior*, 40(4) PD 436.

²¹³ H.C. 264/87 *Hitachdut Hasfaradim Shomrei Torah v. the Population Registrar*, 43(2) PD 727.

parties, to add a remark to all identity cards according to which the details in the cards are *prima facie* evidence to their accurateness except the items of 'Religion' and 'Leom'. But the High Court of Justice quashed this decision, holding that according to the *Population Registry Law* any changes made to the wording of identity cards require the approval of the Constitution, Law and Justice Committee of the Knesset.²¹⁴ Eventually this approval was granted by the Committee, and the remark is now being added to newly issued identity cards.

This is not the end of the 'who is a Jew' tale. In 1988, following the elections to the Twelfth Knesset, the religious parties demanded from the Likud, in exchange for joining the coalition, a commitment to amend the *Law of Return* within 42 days. This demand gave rise, once again, to a heated debate in Israel and among the Jewish communities abroad. It was one of the causes for the Likud's decision to form a national unity Government with the Labour Party rather than a narrow Government with the religious parties as chief partners. The question is bound to come up again.

The issue of 'who is a Jew' is interesting from the vantage point of the Court-Legislature-Government dynamics. On the one hand, the *Shalit* case is one of the distinctive examples in Israel's history of a quick response by the Knesset to overturn a decision of the Supreme Court. But, on the other hand, the fact that the issue was placed on the Government's agenda before the ruling, at the Court's initiative, and the Government refused to act, shows that it preferred that the Court itself settle the issue. Only when it turned out that the Court's ruling might cause the Government to fall did it intervene. The same trend was repeated in the recent exchange regarding identity cards. In principle, the Knesset could have regulated the whole issue, but it seems that it is more convenient for the Knesset (and the Government) to shift responsibilities in these issues to the Court. Only when the political stability of the Government is endangered there is no other option for it but to intervene.

5.3.2 Freedom From Religion in Israel: One Example

The main consequence of the four elements determining the relationships between religion and state in Israel, specified before, is that most controversies in this field were not about freedom of religion, but about freedom from religion, or, in Israeli jargon, freedom from 'religious coercion'. Among the issues litigated in the

²¹⁴ H.C 760/89 *Keshet v. the Minister of Interior*, 43(4) PD 781.

courts in this context were civil marriages, opening businesses on Saturday and the imposition of Jewish dietary laws (Kashrut). The example given below - breeding and sale of pork - is part of the last issue.

Soon after the establishment of the State the religious lobby began striving to change the state and religion 'status quo'. One of its prime targets was the banning of pig breeding and pork sale. It realized that working for this purpose through local authorities (also based on proportional representation and dependent upon coalitions with religious parties) might yield successful results. This brought to local pressure, successful at times, to impose Jewish law by using local authority licensing powers to bar the sale of pork. This was the issue of the 1954 case of *Axel*. The Municipality of Netanya, following religious pressure, conditioned a butcher shop's license on the demand that it would not sell pork meat. The butcher petitioned successfully to the High Court of Justice, which held that by this condition the municipality exceeded its powers, as religious considerations are a matter for the national legislature and beyond the scope of local authorities.²¹⁵

Following this and similar cases,²¹⁶ the Knesset passed the *Local Authorities (Special Enablement) Law 1956*,²¹⁷ which authorizes local authorities to enact bye-laws limiting or prohibiting the breeding and sale of pork. This Law, however, fell short of the aspirations of the religious parties, who want a total ban on the distribution and sale of pork products,²¹⁸ and who are constantly looking for the opportunity to achieve this. An unsuccessful attempt was made in 1985, when an amendment to the *Pig Raising Prohibition Law* failed to pass. In the midst of the 1990 national unity Government crisis both big parties promised Agudat Israel party to support such a law. The subsequent Likud Government managed to pass this Law on first reading, but not further. The Labour Government established following the 1992 elections does not depend in its existence on religious parties, and the law is unlikely, therefore, to pass during this Knesset term.

²¹⁵ H.C 122/54 *Axel v. Municipality of Netanya*, 8 PD 1524.

²¹⁶ For example: H.C 72/55 *Freeday v. Municipality of Tel-Aviv*, 10 PD 734.

²¹⁷ 11 *Laws* (1956) 16.

²¹⁸ An almost total ban (excluding several geographic areas) on pig breeding exists since the enactment of the *Pig Raising Prohibition Law 1962*, 16 *Laws* (1962) 93.

The pork example is representative of other issues of religious coercion which, due mainly to collective decision-making problems, the Knesset was unable to regulate in full, and thus delegated to the courts and to local authorities.²¹⁹ In this particular issue the initial delegation to the courts was a negative one. Following changes in the composition of the Knesset and the 'unsatisfactory' (from the religious lobby's point of view) arrangement made by the Court, the Knesset reached a new compromise by delegating the law-making powers again, this time a positive delegation to local authorities. The stability of the new status quo is yet to be tested.

6. Conclusion

The interaction between the Government, the Legislature and the Judiciary is a colossal subject whose ramifications transcend the scope of the present discussion, even when limited to a young and compact legal-political system such as Israel's. We have not treated, for example, the crucial role of judges as chairs and members of inquiry commissions.²²⁰ We also ignored the continuous dialogue between the courts and legislature in the fields of private law and criminal law.²²¹ Nor did we cover all realms of public law, such as the development by the Court of general administrative law principles (e.g. the duty of officials to provide reasoning, the review of discretionary powers, reasonableness and more).

Nonetheless, I would like to suggest that what has been covered in the chapter, viewed in the light of our earlier theoretical discussion, can support the 'revisionist' positive analysis of the doctrine of separation of powers surveyed in Chapter 4, and the delegation theory of the independence of the judiciary put forward in Chapter 6. Let me try to substantiate the main points of the theoretical argument on the basis of the story of the Israeli judiciary and its interrelations with the other branches of government:

²¹⁹ See further: Berenson [1973]; Gavison [1992], pp. 17-22; Rubinstein [1991], pp. 200-261; Klinghoffer [1983], 37-41.

²²⁰ Two of these commissions, headed by Presidents of the Supreme Court - the Agranat Commission investigating the responsibilities for the 1973 Arab-Israel War, and the Kahan Commission, which dealt with the 1982 massacre in Sabra and Shatilla - had significant and long-lasting effects on Israeli political life. In both cases Supreme Court judges were 'dragged' into the most controversial and charged issues. See on the role of judges in this context: Gavison [1991]; Shetreet [1980].

²²¹ See: Agranat [1984]; Klinghoffer [1983]; Sussman [1971].

1. The phenomenon of the independence of the judiciary.

The phenomenon of the independence of the judiciary was described as comprising two main elements: a lack of complete structural independence, and a gap between structural independence and (an unproportionally greater degree of) substantive independence. It seems that the Israeli example fits this description. The Israeli judiciary, as we have seen, enjoys a certain degree of structural independence from the Government, though not a complete one, while its independence from the legislature, the Knesset, is very limited. The independence whose object is the Government is the result of the non-political method of appointments and promotions of judges, guaranteed tenure and level of salaries, and some autonomy in the judges' work. These arrangements are also immune from the Government's emergency powers. The parallel independence whose object is the Knesset is very limited because, in the absence of a rigid constitution, all these arrangements are subject to the continuous good will of the Knesset. Furthermore, due to a lack of real separation of powers between the executive and legislature, and the control of the latter by the former, this structural independence as a whole is even more fragile.

The degree of structural independence of the Israeli judiciary can be debated,²²² but I think that it would be difficult to contradict the conclusion about the existence of a gap between it and the degree of substantive independence exercised by the judges, especially by the Supreme Court judges. Scholars do debate whether the path of the Supreme Court in the last 40 years was revolutionary or evolutionary.²²³ In either case it would be difficult to explain these developments - the shift from an English restrained and formal style to an American grand and active one; the jurisdiction which the Court took to itself in the course of the years; the narrowing to minimum of such threshold barriers as standing and justiciability; the Court's confrontations with the Government and the Knesset over highly controversial and charged issues, and more - by pointing out to parallel developments in the structural independence of Israeli judges. I think that it is not inaccurate to say that in the Israeli case not only is there a gap between structural and substantive independence, but this gap is in a constant dynamic of widening.²²⁴

²²² See: Shetreet [1990], pp. 371-406.

²²³ See: Kretzmer [1990], p. 347, versus Zamir [1990], pp. 356-365.

²²⁴ For a similar observation with the different wording of 'inverse correlation' see: Shetreet [1990], pp. 410-411.

2. Who is responsible for the independence of the judiciary?

I have argued (sharing, on this point, the view of Landes and Posner) that we have independent judiciaries because it is in the interest of governments and legislatures to maintain this independence. It seems that in the Israeli case this point is almost self-explanatory. We have seen how the structural independence of the Israeli judiciary (unlike many other political-legal systems) was virtually created by the Knesset and Government, and how it was maintained, and even expanded, with the years. In addition, we saw almost no resistance on the part of the Knesset and Government to the judiciary's overt expansionist path, which included intervention in issues traditionally under the sole authority of the Government (such as defence policy) and the Knesset (such as handling its internal affairs). Thus, not only was the structural independence of the Israeli judiciary created by the legislature and Government, but the widening gap between it and the substantive independence has been allowed by them as well. Under the assumptions of the economic approach this means that the independence of the judiciary has been in the interest of the Israeli government. This conclusion ought to result in rejection of the traditional model of separation of powers and the independence of the judiciary.

3. Why do legislatures and governments maintain an independent judiciary?

In Chapter 6 I attempted to argue in favour of the delegation explanation for the independence of the judiciary. According to this explanation it is in the interests of governments and legislatures to delegate some of their powers to an independent judiciary, because through such delegation they are able to maximize their self-interests. In the Israeli context this explanation does not sound alien. As early as 1971 Deputy President Sussman (who later became the President of the Court), made the following remark:

I have the impression that sometimes the Knesset avoids decisions in political matters and shifts the onus to the Court to discover hidden secrets in the law by way of interpretation (my translation - E.S).²²⁵

in 1983 Professor Klinghoffer, in his analysis of legislative reaction to judicial decisions in Israel, wrote:

²²⁵ Sussman [1971], p. 222.

Occasionally the Legislature, intentionally or not, invites the courts to act in a quasi-legislative fashion, whether by leaving a lacuna in a legislative arrangement though it may have believed the arrangement to be exhaustive, or by expressly or impliedly authorizing the courts to settle a legislative point that the Legislature itself has deliberately refrained from solving due to the lack of sufficient support within Parliament or for some other reason.²²⁶

And recently, Professor Shetreet observed that:

The executive has sometimes intentionally diverted the onus of making decisions from itself to the judiciary, thus bringing about judicial resolution of issues which are essentially political or economic...²²⁷

However, the main question to be asked is how, through delegation of powers, a maximization of self interest - the presumed goal of politicians - comes about. In our theoretical analysis the reasons for the delegation of legislative or executive powers were divided into two levels: the nucleus political decision-making unit and the collective decision-making. On the nucleus level powers are delegated primarily in order to shift responsibilities and due to conditions of uncertainty. On the collective level powers are delegated in order to avoid the fallacies of the majority decision-making rule, and especially the problem of cycling.

In the Israeli context, as a result of the Israeli electoral system, the nucleus political decision-making unit is the *party*, rather than the individual politician, and the equivalent to the collective level is mainly the *coalition parties*, rather than the various bodies which take part in the legislation process (different legislative houses or a separate executive branch). Unlike the American and, to a lesser degree, the British system, in Israel there is no accountability of the individual politician to his or her exclusive group of voters. Because of the national-proportional representation on the one hand, and the strict party discipline on the other hand, the party is the prime body which is accountable to the voters. In addition, due to the political reality of coalition governments, a major share of important public decision-making (in the form of primary and secondary legislation as well as governmental decisions) is the result of a collective decision-making process in which only the coalition parties take a significant part.²²⁸

²²⁶ Klinghoffer [1983], pp. 47-48.

²²⁷ Shetreet [1990], p. 406. For a conflicting view see: Zamir [1990], 366.

²²⁸ See also: Noll in McCubbins & Sullivan [1987], pp. 484-485.

The different explanations for the delegation of powers, modified in accordance with the Israeli system, can be applied to the main substantive fields examined in this chapter. In two of these fields - freedom of expression and security and defence - the legislature and Government gave the Court almost a blank cheque to regulate. In other words, the Knesset and Government have hardly ever reversed the rulings of the Court, and thus delegated to it the decision-making powers almost in full. The Court took full advantage of this opportunity in the field of freedom of expression, but to a lesser degree in matters of defense and security. In the field of state and religion the Knesset and Government conducted a dialogue with the Court, and overturned some of its decisions, but not before the Court was encouraged to decide. This can be seen as only a partial delegation of decision-making powers, or, rather, as an invitation to the Court to participate in the national decision-making process. In the disputes around Kahane the Knesset fought back the whole way until the retreat of the Court, and in fact denied it decision-making powers altogether.

It seems that in the Kahane case there was no delegation because there was a wide consensus among the coalition parties and the general public discrediting what Kahane stood for. Hence there were neither collective decision-making reasons to delegate the issue to the Court, nor uncertainty as to the political gains or losses from forming a policy towards Kahanism; nor was there a need to shift responsibilities. These can be seen as the main reasons why the Knesset did not want to delegate the matter to the Court.

The field of state and religion is more complicated. On the one hand, the religious parties, standing firmly on one side of the debate, are almost always essential partners for forming governments. On the other hand, the majority of the Israeli public, and this is probably true for the majority of supporters of both big parties, is on the secular side of the debate. In addition, the intensity of preferences in this field (on both sides) is fairly high: people are seldom indifferent towards it. This combination creates a need to shift responsibilities and to seek Court assistance in the collective decision-making process. Many issues within this field were, therefore, initially delegated negatively to the judiciary. Some of them were subsequently taken over by the Knesset and the Government, following rulings of the Court which shifted the status quo and threatened vital political partnerships.

The delegation of powers to the judiciary in the field of defence and security, mainly with relation to the Occupied Territories, is most significantly motivated by the responsibilities-shift consideration. It is convenient for the Government (or the coalition parties), primarily vis-à-vis its voters, to hold the Court responsible for the 'soft' approach taken with regard to security issues, and by the same token to use the Court as a legitimizing mechanism for its policies.²²⁹ The fact that the Court has traditionally applied a restricted review in matters of security and defence encouraged the Government to delegate to it more powers, especially following the Six-Day War and with regard to the Occupied Territories. This delegation has enabled the Government to shift responsibilities also with the international arena in mind.

The delegation in the area of freedom of expression is most significantly influenced by conditions of uncertainty. Among the four issues discussed here, freedom of expression is the most general and broad. Unlike the issues of state and religion, security and defence, and Kahanism, the attitudes of the voters towards freedom of expression are far less clear; it is not one of the prime topics which divide the political map or motivate the voters. Furthermore, its generality causes the voters and the politicians to take in particular cases different sides with regard to the principle questions of freedom of expression. All these factors render the field costly for regulation by the Government and Knesset, and hence the rentability of the delegation of the decision-making powers in this field to the judiciary.

The characteristics of the Israeli judiciary, and its degree of substantive independence, seem exceptional when compared to the equivalent British institutions and even, when differences of structural independence are taken into account, to the American ones. The collective decision-making factor can shed some light on these differences. In the American system potential cycling problems in public decision-making are solved by the multiplicity of bodies which participate in this process (bicameralism and President), each with a different structure of representation, and a power to veto decisions or restrict their domain. The judiciary is an additional body which can serve these purposes, but it is not an exclusive one. In Britain, with no coalition governments and a strong party discipline, the eventuality of cycling in public decision-making is not a major problem. Israel, with a political reality of coalition governments, on the one hand, and lacking bodies additional to the Knesset which could veto decisions or restrict their domain, on the other hand, is

²²⁹ See also: Gavison [1991], pp. 16-17.

in need of the courts to fulfil this task. Hence the broad delegation of powers to the judiciary, which virtually invites it to participate in the public decision-making process.

I will not profess to claim that the economic analysis of the independence of the judiciary can explain each and every component in the story of the Israeli judiciary and its interrelations with the Government and Knesset. But I do think that it can provide us with better understanding of these interrelations, which go beyond the mere description of the Court as reflecting "the nature of the society in Israel" and "the dynamic nature of a young state",²³⁰ and, more importantly, it can provide us with a general analytical framework to pursue the inquiry into the independence of the judiciary.

²³⁰ See: *supra* note 1.

Conclusion

This thesis offered a positive analysis of the independence of the judiciary based on the economic approach towards law. It was opened (Chapter 1) with a general survey of the economic approach, which attempted to draw the reader's attention to its expediency in dealing with legal issues. I suggested that there is more to the economic analysis of law than the Chicago doctrine, and that the economic approach is primarily a methodology, or a way of thinking about problems, rather than a crude conservative ideology. Thus, for example, when building a model to analyze a particular problem the underlying assumptions regarding the behaviour of the 'players' can vary from sheer pecuniary self-interest to altruism, and the relevant normative goals can vary from wealth-maximization to equal distribution. Indeed, while the pioneering positive model of the independence of the judiciary - the Landes-Posner model scrutinized in Chapter 5 of this thesis - is based on the philosophy of the 'strong' new law and economics, the alternative offered here (Chapter 6) is founded on a 'weak' version of the discipline.

The general introduction proceeded to propose two possible theoretical frameworks to deal with the positive analysis of the judiciary, or of adjudication: the jurisprudential paradigm (which originates from the questions: what is and what ought to be the law) and the theory of state paradigm (which originates from the questions: what is and what ought to be the state). This thesis was written using the latter framework; the independence of the judiciary was analyzed from the vantage point of the theory of state, and especially the doctrine of separation of powers. For this purpose, after a brief historical survey, we examined the doctrine of separation of powers, its rationales and various components, using the economic analysis language (Chapter 3).

Focusing on the positive level of analysis, we subsequently surveyed the current debate within the economic approach regarding the positive analysis of separation of powers, which also revealed conflicting views about the roles of the judiciary (Chapter 4). On one side we found the traditional 'demonopolization' view of separation of powers endorsed by Epstein, Mashaw, Macey and others, portraying the judiciary as one mechanism to balance and control the legislature, and hence as an obstacle to rent-seeking activity and interest-group legislation. The other camp, which includes Landes, Posner, Easterbrook, Tollison and Crain, holds a revisionist approach, arguing that the judiciary is serving exactly the opposite function by

helping to maximize the profits of the government and interest groups, and instead of separation of powers we in fact have collusion of powers.

My enquiry into the positive analysis of the judiciary began (Chapter 2) with a general observation according to which there is, apparently, no constitutional structure that guarantees a full structural judicial independence from the other branches of government (i.e. a structure which would enable courts to review the other branches' activity regardless of their explicit or implicit consent). Furthermore, a phenomenon common to many legal systems is the existence of a gap between structural independence and substantive independence of the judiciary. This observation, moulded with the underlying assumptions of the economic approach - rationality and self-maximizing behaviour - poses a serious problem to the 'obstacle' view of the judiciary, and the observed gap between substantive and structural independence has to rule it out altogether. Taking these assumptions into account, this gap means that the legislature and the government positively prefer to maintain an independent, rather than a dependent, judiciary. Should an independent judiciary work against the interests of the legislature and the government, this gap would remain inexplicable.

The empirical findings presented in the third part of the thesis lend further support to this initial observation. In the Israeli case (Chapter 8) we saw how the structural independence of the judiciary has been created by the legislature and Government, and how the gap between it and the substantive independence is in a constant process of widening with the consent of the other powers of government. The research into the English Court of Appeal (Chapter 7), which focused on the weakest component of the English judiciary's structural independence - the mechanism for appointment and promotion of judges - revealed that British Governments promote the independence of the judiciary by disregarding 'loyalty' to the Government as a consideration for judicial promotion, and in fact disadvantaging judges who express too much 'loyalty'.

After the rejection of the 'obstacle' approach we proceeded in the second part of the thesis to investigate the opposing approach, the Landes-Posner-Tollison-Crain model, and to show that the rejection of the former approach does not mean the endorsement of the latter one, quite the contrary. Although my empirical findings support the postulate that we have an independent judiciary because it is in the interest of the government to have it, I have argued that the Landes-Posner explanation as to why governments prefer to have independent judges is not

persuasive (Chapter 5). Landes and Posner argue that governments prefer to have an independent judiciary because such a judiciary is working to increase the profits of the government and interest-groups from (legislative) deals between them by enhancing the durability of these deals. The theory's main fault, beside the faults of the economic modelling, is its crucial dependency upon the assumption that an independent judiciary is loyal to the original, rather than the current, legislature; a view that was not supported by the writers' own empirical findings (Appendix 1) or theoretical proof. The comparison between the promotion policies of British Governments in their first term in office and in their second and third terms went against the Landes-Posner model as well.

The new route for explaining the independence of the judiciary, proposed in this thesis (Chapter 6), is more minimalistic in the sense that it is not based on problematic assumptions regarding the orientation of independent judges. According to this suggested description, the existence of an independent judiciary benefits the legislature regardless of the judiciary's subject of loyalty, be it the original or the current legislature. The benefits originate from the fact that it is at times worthwhile for politicians to delegate their legislative and executive roles to independent courts. By such delegation politicians can shift responsibilities, or solve problems of lack of information as to the preferences of their voters and their attitude toward risk, and thus maximize their political support and chances of re-election. The delegation, it is suggested, can also provide a solution to problems deriving from the fact that legislation is a collective and multi-body decision-making process, and primarily a solution to the problem of cycling.

The findings from the enquiry into the English Court of Appeal (Chapter 7) supported the new explanation for the independence of the judiciary in a negative way, by going against the grain of the traditional explanation (the Government was found to be endorsing the independence of judges) as well as the Landes-Posner model (the loyalty to the original legislature assumption was countered). The story of the Israeli Supreme Court and its interrelations with the Government and legislature (Chapter 8) lent a more direct support to my explanation. We have seen how the independence of judges was created, maintained and even widened by politicians, and how various issues were delegated in part or fully to the courts. I have tried to demonstrate why, for example, delegation in the field of defence and security fits the shifting responsibilities explanation and why state and religion issues are delegated primarily as a result of collective decision-making problems. I also showed that issues which raise neither collective decision-making or uncertainty problems nor a

need for shifting responsibilities, such as the Kahane issue, were not delegated to the courts at all.

Although the model offered here has several straightforward normative implications, the thesis focused on the positive side of the story of the independence of the judiciary, and should be further developed on the normative level. Thus, for example, the conclusion of the thesis shares, to some extent, the sceptical view on the practice of the doctrine of separation of powers and independent courts, in light of their proclaimed tasks of serving as an "excellent barrier to the encroachments and oppressions of the representative body";¹ but it does not go as far as Landes, Posner, Crain and Tollison who argue, in contrast to the traditional view, that an independent judiciary is working in favour of powerful interest-groups and against the unorganized majority or the general public. I have shown why an independent judiciary benefits the legislature, but this does not necessarily have to go along with benefiting interest-groups at the expense of the unorganized public. In this respect the conclusion of the thesis is not only on the positive level, but also in a more positive direction.

The preliminary comparative observations made in this thesis involving the American, British and Israeli constitutional, political and legal systems demonstrate, I believe, the predictive force of the proposed model. This line of enquiry ought to be developed further to provide a framework for a comparative analysis of the judiciary, separation of powers and the structural elements of states in general. There have been very few attempts so far to combine positive analysis of judicial decision-making with positive analysis of political and bureaucratic decision-making and with analysis of institutional choice. I hope that this thesis may contribute to this avenue of research and open new windows for further discussion.

¹ *The Federalist*, No. 78, p. 522.

Appendices

Appendix One

Empirical Testing of the Landes-Posner Model of the Independence of the Judiciary

In Chapter 5 we scrutinized the Landes-Posner theory of the independence of the judiciary. I have tried to show that their economic model, as well as its exogenous assumptions, are not fully convincing. This appendix will examine some empirical data intended to test the Landes-Posner model. I will try to assess the findings of these researches and the extent to which they support the predictions of the model. **Section 1** will present some testing made by Landes and Posner themselves. **Section 2** will give an account of empirical tests made by Crain and Tollison in the context of the Posner-Landes model. In **section 3** the recent empirical research of Anderson, Shughart and Tollison will be analyzed.

1. The Empirical Findings of Landes and Posner

Landes and Posner attached to the original article which introduced their model of the independence of the judiciary an appendix entitled: "Some Empirical Tests of Judicial Independence".¹ It focuses on nullifications of statutes by the American Supreme Court. These nullifications are perceived by the writers as one indication for the costs involved in an independent judiciary (costs incurred by both legislature and interest groups). In order for their model to work these costs ought to be lower than the benefits from independent courts gained by the increase in the durability of legislation that they provide. Indeed, they find that only 97 statutes out of more than 38,000 enacted between 1789-1972 were nullified, and many of them only after a long period in force, which means a limited durability even for some of the nullified statutes. This implies, according to Landes and Posner, that the independence of the judiciary imposes only minor costs and that the construction of the demand and supply curves in their model was accurate. It should nevertheless be born in mind that the costs involved in less dramatic behaviour of the courts, such as unfavourable interpretation, were not examined or taken into account in this conclusion, and it is difficult, therefore, to accept it as persuasive.

Next, Landes and Posner analyze the statute nullification data in the following multiple regression: $N^t = f\{\text{AGE}, \text{TEN}, \text{PAR}, \text{BILL}\}$

¹ Landes & Posner [1975], pp. 895-901.

whereas:

N^t = number of nullifications, per congressional term, of statutes enacted within the past t years (regressions were ran for $t=8$, $t=16$, and unlimited t).

AGE= average age of the Supreme Court judges at the end of each congressional term.

TEN= average tenure of the Supreme Court judges at the end of each congressional term.

PAR= a dummy variable that takes 1 if the party of the President is the ruling party in both houses of Congress, and 0 if the President's party is different from the Congress ruling party.

BILL= number of bills passed by Congress within the past t years.

Landes and Posner predict that AGE will be positively correlated to N^t because as older judges do not seek any more promotion or appointment to higher office, and hence are more independent of the current government, they will be less hesitant to nullify statutes. By a similar reasoning they expect TEN to be positively correlated to the number of nullifications, but to a lesser degree, especially with regard to nullification of acts passed in earlier years (N^{16} and N), because of an additional effect according to which recently appointed judges will be less indebted to more distant Congresses. PAR is predicted to be negatively correlated to the number of nullifications. It is assumed that the Court will show more independence, and thus nullify more acts, when there is more of a conflict between the President and Congress, i.e. when Congress is ruled by the party opposing that of the President. BILL serves as an independent control variable, and is predicted to be positively correlated to the number of nullifications. These predictions, and the results of the regression, are presented in table 1.

As can be seen, the only significant results are the positive signs of AGE and BILL; otherwise the regression results are inconclusive.² The most noticeable insignificance (in all six regressions) is that of PAR. Landes and Posner conclude that "the results of the regression analysis yield little support for a theory of legal decision-making that hypothesizes that the observed degree of judicial independence is a function of the costs and benefits to the judiciary of exercising

² The writers also conducted a set of three regressions limited to the 39-92nd Congresses, because there were only two nullifications during the first 38 Congresses. AGE was not significant in these regressions. Their only significant results were the positive correlation of TEN in the regressions of $t=16$ and unlimited t , results which do not support the prediction with regard to the behaviour of TEN for N^8 as opposed to N^{16} and N^t .

independence"³. It seems, however, that the writers should not be too disappointed, since even conclusive regression results would not have supported their theory of the independence of the judiciary.

Table 1
*Nullifications of statutes by the American Supreme Court (1789-1972)**

=====						
	Constant	AGE	TEN	PAR	BILL	R ²
Prediction:		+	+	-	+	
Results N ⁸	-5.483	0.094 (2.627)	-0.008 (0.16)	0.185 (0.621)	0.0002 (1.0005)	0.19
N ¹⁶	-6.208	0.90 (2.111)	0.063 (1.092)	0.065 (0.184)	0.0003 (2.724)	0.27
N ^t	-7.849	0.116 (2.56)	0.072 (1.174)	0.107 (0.287)	0.0003 (2.757)	0.31

* Based on Landes and Posner [1975] , p. 900.

It is difficult to see how the design of the empirical test can support the proposed theory. The core of the theory is the rentability of an independent judiciary for the legislature and interest groups. Its most questionable components are the cost-benefit analysis of the independent judiciary (whether the benefits from such a body outweigh the costs) and, primarily, the supposition as to the way of behaviour of an independent judiciary (deciding according to the original legislature's intent). The empirical study could not have answered these questions. Moreover, the tested variable did not even examine what is indicated in the writers' conclusion - whether the degree of independence exercised by the Court is a function of costs and benefits to the legislature. The only conclusion that can be drawn from these regressions is along the lines of what I proposed to call the phenomenon of the independence of the judiciary - that the substantial independence exercised by the American Supreme Court is greater than its structural dependency (as can be concluded from the insignificance of TEN and PAR).

2. The Empirical Findings of Crain and Tollison

Mark Crain and Robert Tollison take on the interest-group perspective of legislation and attempt to develop it further. They argue that the Presidential veto, on the level of the American Federal legislature, and the gubernatorial veto, on the

³ Landes & Posner [1975], pp. 899-901.

level of States' legislatures, play the same role as the judiciary; they are designed to increase the profits of the legislature and the interest groups.⁴ Moreover, they argue, the mere existence of a constitution, and the mechanism by which it works, are also part of this interest-group vision of the state.⁵ In empirical testing of these extensions they claim that they found support also for the Landes-Posner model itself. I will examine these findings only from the perspective of the Landes-Posner model.

2.1 The Roles of Constitutions and Constitutional Changes

Crain and Tollison construct their first regression to test "constitutional rights from an interest-group perspective within the context of state constitutional change in the United States".⁶ They view the constitution, and more specifically amendments to it, as an additional mechanism to increase the durability of legislation (next to legislative procedures and an independent judiciary). Only one of the methods of constitutional change - proposal by legislative assemblies, followed by general referenda - is examined, as this method is used in around 90% of all State constitutional changes. The regression that they present, across the various States, is the following:

$$P = f\{EM, L, JT, LT, T, S, AP\}$$

whereas:

P = the number of constitutional amendments passed by the legislature (reflects the level of mutually agreeable long-term contracts negotiated by legislators and interest groups).

EM = the effective majority that is required to make a proposal, defined as the voting rule times the size of the legislature (a proxy to the costs of making such proposals).

L = number of words in the existing State constitution (a proxy to the durability of past constitution amendments).

JT = the term of office of the State supreme court's chief justice (a proxy to the degree of judicial independence).

⁴ Crain & Tollison [1979b].

⁵ Crain & Tollison [1979a].

⁶ Ibid, p. 166.

LT= a dummy variable for the term length in the State's legislature, which equals (-1) if the term in both houses is two years, equal to 0 if the term in one of the houses is four years and in the second - two years, and equals 1 if the term in both houses is four years.

T= turnover of legislators, defined as a percentage of new members in a given legislature.

S= a dummy variable for the degree of voting procedure complications. It equals 0 if legislative approval of a constitutional amendment by only one session is required, and equals 1 if approval in two sessions is required.

A/P= the percentage of proposed amendments that were passed in the final referendum.

The writers predict a counter-intuitively positive correlation between EM and P. They argue that although larger majorities required to pass an amendment increase the costs of such amendment, "legislators will not adopt more costly procedures unless the net present value of such legislation is increased as a result. Thus, on the internal margin legislators will adjust until the increase in net present value from generating greater durability of contracts through constitutional amendments just offsets the increase in the costs of originating contracts".⁷ L is also predicted to be positively correlated to P, because it represents the durability of past contracts which will encourage additional ones.

JT, the proxy for judicial independence, is expected to have a negative sign, because constitutional amendments are perceived as a substitute to an independent judiciary. Both are meant to make contracts between the legislature and interest groups more durable. This means that if there is an independent judiciary there is no need for costly constitutional amendments. LT is predicted to be negatively correlated to the number of constitutional amendments. A short-term legislature increases the need for a durable constitutional provision. For the same reason T is predicted to have a positive sign - more legislative turnover requires more constitutional guarantees. A/P is predicted by Crain and Tollison to have a negative sign because it reflects higher costs of repealing legislation once enacted, and it is an indication for more opposition to special interest-group legislation. These predictions and the regression's results are presented in table 2.

⁷ Ibid, pp. 170-171.

Table 2
*Constitution amendments proposed by State legislatures (1970) - regression results**

	Constant	EM	L	JT	LT	T	S	A/P
predictions		+	+	-	-	+	+	-
results	92.17 (0.64)	1.80 (2.48)	0.0033 (4.87)	-11.86 (-1.19)	-62.92 (-1.31)	246.83 (1.06)	47.72 (0.83)	-317.62 (-1.03)
R ²	0.46							

* Based on Crain and Tollison [1979a], p. 173

As can be seen, all the variables have the predicted sign, but most of them are not significant (on a level of 0.1). The writers claim that the results of EM and JT verify the Landes-Posner model. The results prove, according to Crain and Tollison, that there is a trade off between the Landes-Posner two mechanisms for enhancing the durability of legislation and the suggested third mechanism - constitutional amendments. However, even if we accept the existence of such a trade off between judicial independence and constitutional amendments, despite its low significance, a decisive conclusion with regard to the important features of the Landes-Posner model cannot be drawn. A trade off between judicial independence and the degree of elaboration of a constitution can fit into other models of the independence of the judiciary, even to the contrasting model which views the independence of the judiciary, as well as the constitution, as tools to protect minorities or to represent the under-represented. At least from our perspective, therefore, the findings of Crain and Tollison do not help to explain the phenomenon of the independence of the judiciary.

2.2 The Role of the Executive Branch in the Interest-Group View of Legislation

After exploring the role of constitutional change in the context of the interest-group view of legislation Crain and Tollison proceed to expand the Landes-Posner model by presenting the executive veto, and more specifically the gubernatorial veto on the State legislature level, as an additional mechanism by which the durability of legislation is increased.⁸ In their words, similarly to an independent judiciary "the veto power increases the returns from legislative contracts with special interests, by

⁸ Crain & Tollison [1979b].

making these contracts harder to repeal, more than it increases the costs of passing legislation in the first place".⁹ The tested regression is as follows:

$$V = \{LM, LT, PC, JT, GS, LE\}$$

whereas:

V= number of gubernatorial vetoes.

LM= the percentage of legislators from the majority party.

LT= turnover of legislators, defined as the percentage of new legislators.

PC= dummy variable to measure the party correspondence. It equals (-1) if neither legislative houses is controlled by the governor's party, equals 0 if one of the houses is controlled by the governor's party, and equals 1 if in both houses the governor's party enjoys a majority.

JT= judicial tenure defined as the length of term of the State's chief justice.

GS= dummy variable to measure gubernatorial succession rights. It equals (-1) if the governor is limited to one term in office, it equals 0 if there is a two term limit, and it equals 1 if there are unlimited succession rights.

LE= number of bills enacted by the legislature (a control variable).

In contrast to conventional wisdom, the writers predict a positive correlation between LM and V. Larger majorities mean that passing legislation is less costly and therefore legislation is less durable. This will imply more reliance on legislative vetoes for enhancing the present value of legislation. For a similar reason LT is predicted to have a positive sign. More turnover implies less durability and a need for more legislative vetoes to increase the value of the legislation contract. The correspondence between the governor's party and the party controlling the legislature is not predicted by the writers to have a significant effect on the number of vetoes, again in contrast to the conventional view of separation of powers.

Surprisingly, Crain and Tollison predict JT to be positively correlated to the number of vetoes - V. Their explanation is that "the derived demand for vetoes will be influenced by the extent of judicial independence. For example, a more independent judiciary leads to increased reliance on normal legislation (as opposed to constitutional amendments), which in turn implies more reliance on the vetoes to

⁹ Ibid, p. 560.

protect existing legislative contracts".¹⁰ GS is predicted to have a negative sign, as a less independent governor is less likely to use his veto rights to enhance interest-group legislation. The number of bills enacted is the control variable which is predicted to be positively correlated to the number of vetoes. These predictions and the results of the regression are presented in table 3.

Table 3
*Regression results for gubernatorial vetoes (1973-1974)**

	LM	LT	PC	JT	GS	LE	
prediction	+	+	- / +	+	-	+	
results	8.11 (2.21)	-0.72 (-2.61)	0.12 (0.56)	1.31 (2.19)	-0.41 (-1.51)	1.02 (3.67)	R ² = 0.54 N=41

* Based on Crain and Tollison [1979b], p. 565.

The results correspond to the predictions (though not all of them are significant), with the exception of LT.¹¹ Crain and Tollison interpret these findings as a support for Landes' and Posner's durability-enhancing explanation for the institutional structure of the market for special interest legislation, as opposed to the minority protection theory of separation of powers.¹² It is difficult to agree with their conclusion. The most important finding according to the writers - the negative correlation between legislative majorities and gubernatorial vetoes - can also be accommodated with the protection of the minorities view of separation of powers. The same applies to the negative sign of GS.

Crain's and Tollison's prediction and finding with regard to judicial independence is especially striking: the main theme of their article is to present gubernatorial vetoes as fulfilling the same function as judicial independence, namely enhancing the durability of interest-group legislation. We would have expected, therefore, a prediction and result of a negative correlation between the two (as was predicted and found by the same writers with regard to constitutional amendments - see above). But, surprisingly, the writers predicted (and indeed found) a positive correlation. Their explanation for this positive correlation, quoted above, is far from

¹⁰ Ibid, p. 564.

¹¹ Crain and Tollison seem to have made a mistake when asserting that all their predictions were verified. They declare that they expected a negative sign for LT (p. 565), although earlier (p. 563) they explicitly predicted a positive correlation and reasoned this prediction. In either way the finding cannot shed light on the accuracy of the Landes-Posner model with regard to the independence of the judiciary.

¹² Ibid, p. 566.

convincing, as it is not clear why they expect judicial independence to affect only constitutional litigation and not statutory one. In conclusion, it seems that this empirical test, like the previous one, cannot operate in support of the Landes-Posner model of the independence of the judiciary.

3. The Empirical Findings of Anderson, Shughart and Tollison

The most recent attempt to certify the Landes-Posner model was made by Gary Anderson, William Shughart and Robert Tollison.¹³ The problem which they are attempting to tackle is, as they put it, "the one that has been least adequately treated in the existing literature". It is "the question of why the judiciary is motivated to remain independent".¹⁴ In other words, they are trying to deal with the most important question of the Landes-Posner model which was left unresolved in the original article: why would an independent judiciary be loyal to the enacting legislature. Their explanation is that "to the extent that legislatures benefit from the independence of the judiciary..., legislators will tend to increase the levels of judicial compensation, *ceteris paribus*". The hypothesis which they are set to test is, therefore: "the greater the degree of independence of the judiciary, the higher the legislature will set the judiciary's appropriations and the salaries of judges".¹⁵

We have already dealt with the theoretical faults of this explanation;¹⁶ but let us examine also its empirical angle. The data for the empirical test of this hypothesis was taken from the States supreme courts in the U.S.A (rather than from the Federal judiciary). This is the suggested regression, run across the various States:

$$\text{SALARY} = f\{\text{LAWSEL}, \text{ENACT}, \text{OVERTURNS}, \text{TERM}, \text{REMOVE}, \text{ELECT}\}$$

whereas:

SALARY= the annual salary of the chief justice of the State supreme court in 1977.

LAWSEL= average salary of lawyers in private practice in 1977.

ENACT= number of bills enacted in this State in 1976.

¹³ Anderson, Shughart & Tollison [1989].

¹⁴ Ibid, p. 219.

¹⁵ Ibid, pp. 219-220.

¹⁶ See: Chapter 5, section 2.

OVERTURNS1= number of overturns of legislation or regulations 1937-1977,
using substantive due process review.

OVERTURNS2= number of overturns of legislation or regulations 1957-1977,
using substantive due process review.

TERM= the length of term of the chief justice of the State's supreme court.

REMOVE= dummy variable, equals 1 if there is an easy removal of judges, i.e. if
judges can be removed from office by the governor, by a judicial review
board or by a majority vote of the supreme court, and equals 0
otherwise.

ELECT= dummy variable, equals 1 if judges are elected on partisan ballots, and
equals 0 otherwise.

The writers predict that LAWSEL and ENACT will be positively correlated to SALARY because the former represents the opportunity costs confronting justices (the higher the salaries in the private market, the higher judicial salaries are likely to be) and the latter represents the level of workload for the courts (greater workload - higher salaries). TERM is predicted to be negatively correlated to the level of the chief justice's salary because it is a substitute measure for job security. But the more important variables for our purpose are the remaining three. OVERTURNS represents the degree of independence exercised by the courts, and according to the main hypothesis of Anderson, Shughart and Tollison we should expect a positive correlation between it and the level of chief justices' salaries. REMOVE denotes the security of a justice in his or her office, and according to the writers it is likely to have two conflicting effects on their salary. On the one hand, less security in office implies a need for a higher salary to compensate for the lack of security; on the other hand, less security means less independence, as judges will be under pressure to decide in accordance with the wishes of the current government. This means, according to the main hypothesis, a smaller salary. ELECT is predicted to be negatively correlated to SALARY for two separate reasons: first, elected judges on partisan ballots receive part of their remuneration via party organization, campaign contributions etc. Second, elected judges are less independent and thus are expected to be granted lower salaries. The predictions and the regression results are presented in table 4.

All variables, with the exception of TERM, have the predicted sign and are significant. It is not surprising that TERM is an exception, because the writers' prediction with regard to it contradicts their prediction with regard to REMOVE. Both variables can be perceived as fulfilling a similar role of substitutes to SALARY, on the

one hand, and mechanisms for enhancing independence, on the other hand. Be it as it may, despite the conclusive results of the regression it is difficult to derive from it support for the Landes-Posner model of the independence of the judiciary. I still have difficulties in understanding what the writers wanted to prove with the above regression and some of their predictions. In the context of the Landes-Posner model their argument seems to be self-contradicting or, at least, cyclic.

Table 4
*Salary of chief justices of States' court of last resort (1977)**

	Constant	LAWSEL	ENACT	OVERTURNS	TERM	REMOVE	ELECT
Predictions		+	+	+	-	+/-	-
Results							
(OVERTURN1)	13471.6	546.60	5.48	492.93	32.69	5793.39	-3099.85
$R^2=0.54$		(4.40)	(2.95)	(2.36)	(0.14)	(2.0)	(-1.76)
(OVERTURN2)	14505.03	535.64	5.15	1117.78	3.98	5831.22	-3267.37
$R^2=0.53$		(4.17)	(2.68)	(2.04)	(0.01)	(1.98)	(-1.81)

* Based on Anderson, Shughart & Tollison [1989], p. 225.

The primary question of Anderson and his co-authors is: why do independent judges decide in accordance with the enacting legislature? Their reply, which is allegedly tested empirically, is that judges are paid for this activity, i.e. the greater the degree of decision-making in accordance with the enacting legislature, the higher the legislature will set the judiciary's appropriations and the salaries of judges. But do they really test this hypothesis? Apparently not. First, substantive due process is not an indication for decision-making according to the intents of the original legislature; on the contrary, invalidating legislation as unconstitutional is perceived by Landes and Posner to be on the costs side of an independent judiciary. The degree of loyalty to the enacting legislature is not measured at all by this regression, which is meant to explain it. Second, high salaries make one of the main components of structural judicial independence which the Landes-Posner model is set to explain. This essentially means that the object of the explanation is used by Anderson et al. also as its subject. One cannot use judicial independence as an explanatory factor for the behaviour of independent judges. It seems that the regression constructed by the writers is not designed to examine the behaviour of independent judges, but to explain their level of salary. Nor is it clear what is cause and what is consequence in the connection between the level of judges' salaries and their expression of substantive independence.

To summarize, I do not think that the empirical data that have been gathered so far can prove that the description in the Landes-Posner model is the 'true story' of

the independence of the judiciary. The problematic points of the theory remain unsolved.

Appendix 2

Delegation of Legislative Powers: the Perspective of the Nucleus Political Decision-Making Unit

1. The Shifting-Responsibilities Model: an Example

Definitions:

$b_i^l(X)$ - benefits in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by the legislature.

$c_i^l(X)$ - costs in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by the legislature.

$b_i^a(X)$ - benefits in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by an administrative agency.

$c_i^a(X)$ - costs in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by an administrative agency.

$b_i^c(X)$ - benefits in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by the courts.

$c_i^c(X)$ - costs in terms of political support to the nucleus political decision-making unit in constituency i , if X is to be regulated by the courts.

Assumptions:

$$(1) \quad b_i^a(X) = K_1 b_i^l(X)$$

$$(2) \quad c_i^a(X) = K_2 c_i^l(X)$$

$$(3) \quad b_i^c(X) = K_3 b_i^l(X)$$

$$(4) \quad c_i^c(X) = K_4 c_i^l(X)$$

$$(5) \quad 0 < K_1, K_2, K_3, K_4 < 1$$

$$(6) \quad K_1 > K_2$$

$$(7) \quad K_3 > K_4$$

$$(8) \quad K_1 > K_3$$

$$(9) \quad K_2 > K_4$$

Assumptions (1)-(5) imply that by delegation of legislative powers the nucleus political decision-making unit shifts responsibilities (credit as well as blame) to the delegatee, or, in other words, that the political benefits and costs for the unit from arrangement X adopted by a delegatee are lower than those which result from a direct legislation. A specific functional form representing the responsibility shift is

assumed for the sake of simplicity. Assumptions (6) and (7) indicate that the delegation creates asymmetric responsibility shifts whereas the blame shift is greater than the credit shift. Assumptions (8) and (9) imply that the responsibility shift by delegation to the courts is greater than the responsibility shift created by delegating to an agency.

Implications

The condition for preferring delegation, $c_i^l(X) - c_i^a(X) > b_i^l(X) - b_i^a(X)$ or $c_i^l(X) - c_i^c(X) > b_i^l(X) - b_i^c(X)$ can be re-phrased to:

$$(10) \quad c_i^l(X)(1-K_2) > b_i^l(X)(1-K_1) \quad \text{or}$$

$$\frac{c_i^l(X)}{b_i^l(X)} > \frac{1-K_1}{1-K_2}$$

$$(11) \quad c_i^l(X)(1-K_4) > b_i^l(X)(1-K_3) \quad \text{or}$$

$$\frac{c_i^l(X)}{b_i^l(X)} > \frac{1-K_3}{1-K_4}$$

Deriving from (6), (7), (10) and (11) is that if the constituency is a net loser from X, i.e. $b_i^l(X) < c_i^l(X)$, then the nucleus political decision-making unit will prefer delegation over legislation, because the left side of equations (10) and (11) is greater than 1, while the right side is smaller than 1. But this conclusion will be also true in some cases in which the constituency benefits from X.

We can demonstrate this by assigning the values $K_1=0.8$, $K_2=0.4$, $K_3=0.3$ and $K_4=0.1$. In this example delegation to an agency rather than direct legislation takes place if:

$$\frac{c_i^l(X)}{b_i^l(X)} > \frac{1}{3}$$

Delegation to the courts rather than direct legislation will take place if:

$$\frac{c_i^l(X)}{b_i^l(X)} > \frac{7}{9}$$

and delegation to the courts rather than delegation to an agency will take place if:

$$\frac{c_i^l(X)}{b_i^l(X)} > \frac{5}{3}$$

2. Delegation as a Result of Uncertainty

Definitions:

X^* - the arrangement chosen by the legislature (as a collective body).

$X^{d'}-X^{d''}$ - the range of possible arrangements to be adopted by a delegated agency or courts, under the delegation of X^* .

X^a - the expected arrangement by the individual legislator to be regulated by a delegated agency under the delegation of X^* . It equals $E(q(x))$.

X_i^* - the most preferred option of legislator i .

$U_i(X)$ - the utility function of legislator i over X .

Assumptions

- (1) The width of the probabilities distribution of the agency and the courts $[X^{d'}-X^{d''}]$ is equal.
- (2) The courts are unbiased delegates, which implies that their expected arrangement to be regulated under the delegation of X^* - $e(q(X))$ is X^* .
- (3) All legislators have the same prediction as to the expected arrangement to be adopted by an agency.
- (4) Legislators have concave utility functions.
- (5) The two institutional options for regulating X are delegation to the courts or delegation to an agency.

Implications

Case 1 - the agency is biased towards a higher level of regulation, i.e. $X^a > X^*$.

If $X_i^* < X^{d'} < X^* < X^{d''}$ the legislator i will prefer delegation to the courts (figure 1).

If $X^* < X^a < X^{d''} < X_i^*$ the legislator i will prefer delegation to the agency (figure 2).

If $X^{d'} < X_i^* < X^* < X^a$ or $X^* < X_i^* < X^a$ or $X^* < X^a < X_i^* < X^{d''}$ it is indeterminate whether the legislator i would prefer delegation to the agency or the courts.

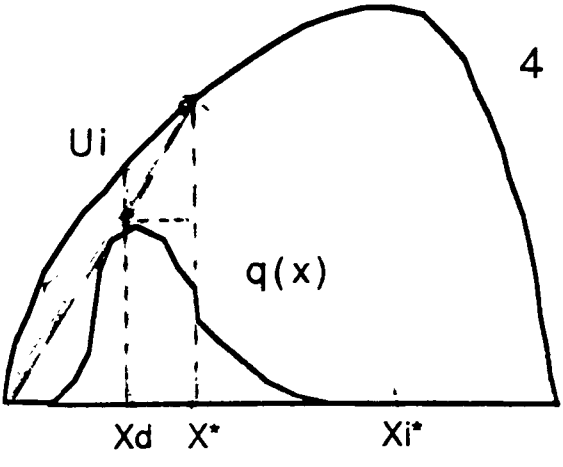
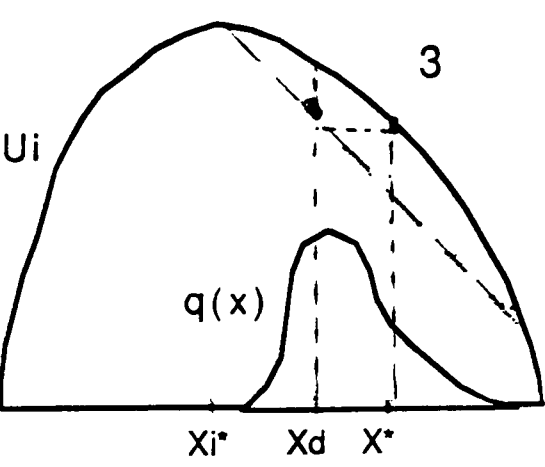
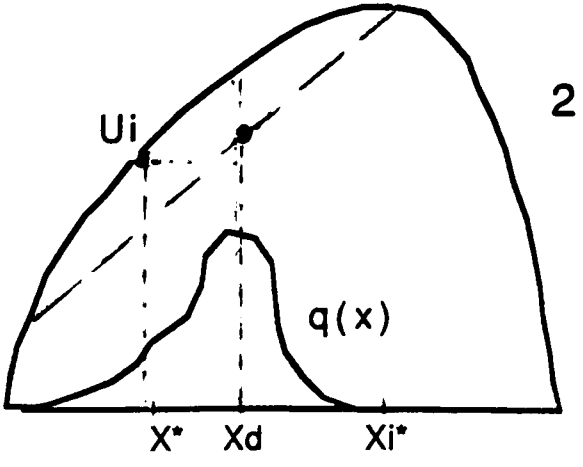
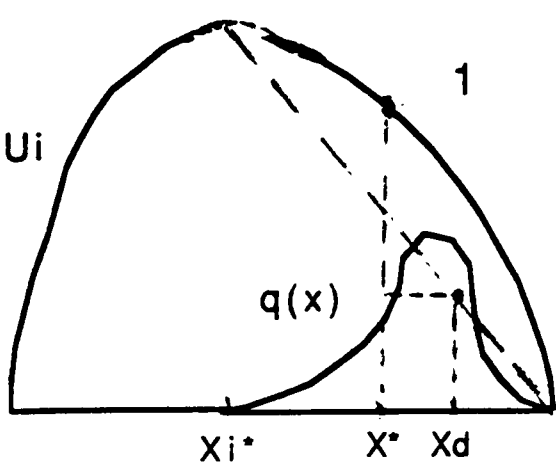
Case 2 - the delegatee is biased toward a lower level of regulation, i.e. $X^a < X^*$.

If $X_i^* < X^{d'} < X^a < X^*$ the legislator i will prefer delegation to the agency (figure 3).

If $X^a < X^* < X^{d''} < X_i^*$ the legislator i will prefer delegation to the courts (figure 4).

If $X^{d'} < X_i^* < X^a < X^*$ or $X^a < X_i^* < X^*$ or $X^a < X^* < X_i^* < X^{d''}$ it is indeterminate

whether the legislator would prefer delegation to the courts or to the agency.



Appendix 3
Court of Appeal - House of Lord Judges 1950-1992

The following list includes all judges who served in the Court of Appeal (those who were promoted to the House of Lords as well as those who were not promoted) from 1945 onwards. Judges who served in the House of Lords from 1950 but have not served before in the Court of Appeal will be mentioned in brackets. This category includes mainly judges from the Scottish Court of Session and the North Irish Court of Appeal but in some cases also judges who were promoted to the House of Lords directly from the High Court or from the Bar. If the judge served prior to his promotion to the House of Lords in different court from the Court of Appeal this court will be indicated in brackets. These judges were not included in the research.

<u>Name</u>	<u>Year appointed to C.A</u>	<u>Year appointed to H.L</u>	<u>Year retired</u>
(S.L. Porter [1]	1934 (K.B. Division)	1938	1954)
(W.A. Greene [2]	1935 (M.R from 1937)	1949	1950)
(W.G. Normand [3]	1935 (Scotland - L.P.)	1947	1953)
(G.T. Simonds [1]	1937 (Chancery Div)	1944 (L.C. 1951-1954)	1962)
(J.S.C. Reid [4]	(from the faculty of advocates in Scotland)	1948	1974)
(C.J. Radcliffe [5]	(from the BAR)	1949	1964)
(J. Keith [3]	1937 (Scotland)	1953	1961)
(J.C. MacDermont [6]	1944 (N.Ireland-L.C.J.)	1947	1951)
(G. Lawrence [7]	1944	1947	1957)
(F.D. Morton [8]	1944	1947	1959)
(R. Goddard [2]	1938	1944 (from 1946-L.C.J)	1958)
(F.J. Tucker [2]	1945	1950	1961)
A.T. Bucknil	1945		1951
D.B. Somervell [9]	1946	1954	1960
L.L. Cohen [6]	1946	1951	1960
C. Asquith [9]	1946	1951	1954
F.J. Wrottesley	1947		1948
F.R. Evershed [1]	1947 (M.R from 1949)	1962	1965
J.E. Singleton	1948		1957
A.T. Denning [7]	1948	1957 (M.R. from 1962)	1982
D.L. Jenkins [8]	1949	1959	1963
W.N. Birkett	1950		1957

F.L.C. Hodson [6]	1951	1960	1971
J.W. Morris [9]	1951	1960	1975
C.R.R. Romer	1951		1960
H.L. Parker	1954	(L.C.J. from 1958)	1971
F.A. Sellers	1957		1968
B. Ormerod	1957		1963
E.H. Pearce [7]	1957	1962	1969
(C.W.G. Guest [3]	1957 [Scotland)	1961	1971)
H.G. Willmer	1959		1969
C.E. Harman	1959		1970
(C.J.D. Shaw			
(Lord Kilbrandon)[3]	1959 (Scotland)	1971	1976)
P.A. Devlin [2]	1960	1961	1964
G.R. Upjohn [8]	1960	1963	1971
T.N. Donovan [2]	1960	1964	1971
H.A. Danckwerts	1961		1969
C.H. Pearson [1]	1961	1965	1974
W.A. Davies	1961		1974
W.J.K. Diplock [10]	1961	1968	1985
(R.O.B. Wilberforce [5]	1961 (Chancery Div.)	1964	1982)
C.R. Russell [8]	1962	1975	1982
(J.E.S. Simon [6]	1962 (president of	1971	1978)
	the Probate, Divorce and Admiralty Division)		
C.B. Salmon [2]	1964	1972	1980
(W.I.R. Fraser [4]	1964 (Scotland)	1975	1985)
C.R.N. Winn	1965		1971
E. Sachs	1966		1973
H. Edmund Davies [1]	1966	1974	1981
J.P. Widgery	1968	(from 1971 L.C.J)	1980
F. Atkinson	1968		1971
H.J. Phillimore	1968		1974
S.E. Karminski	1969		1973
J. Megaw	1969		1980
G. Cross [8]	1969	1971	1975
(R.E. Munningham-Buller			
(Viscount Dilhorne) [7]	(L.C. 1962-1964)	1969	1980)
D.B. Buckley	1970		1981
D.A.S. Cairns	1970		1977

(Q.M. Hogg (Lord Hailsham)		1970 (L.C)	1987)
E.B. Stamp	1971		1978
J.F.E. Stephenson	1971		1985
A.S. Orr	1971		1980
E.W. Roskill [2]	1971	1980	1986
(H.S. Keith [3]	1971 (Scotland)	1977	)
(Lowry [9]	1971 (N. Ireland-L.C.J.)	1988	)
F.H. Lawton	1972		1986
A. Evan James	1973		1976
L.G Scarman [6]	1973	1978	1986
R.F.G. Ormord	1974		1982
P.R. Evelyn Browne	1974		1980
G.D. Lane [9]	1974	1979 (from 1980 L.C.J)	1992
R.W. Goff	1975		1980
N.C. Bridge [7]	1975	1980	
S. Shaw	1975		1981
G.S. Walker	1976		1984
J.R. Hovell-Thurlow- Cumming-Bruce	1977		1985
E.W. Eveleigh	1977		1985
H.V. Brandon [1]	1978	1981	1991
S.W. Templeman [5]	1978	1982	
J.S. Brightman [8]	1979	1982	1987
J.F. Donaldson	1979	(from 1982 - M.R.)	1992
(Jauncey [8]	1979 (Scotland)	1988	)
W.H. Griffiths [4]	1980	1985	
D.J.C. Ackner [2]	1980	1986	1992
P.R. Oliver [10]	1980	1986	1992
R.H. Walford Dunn	1980		1984
T. Watkins VS	1980		
P.M. O'Connor	1980		1989
M.J. Fox	1981		1992
M.R.E. Kerr	1981		1989
R.L.A. Goff [6]	1982	1986	
J.D. May	1982		1989
C.J. Slade	1982		1991
F.B. Purchas	1982		
G.B.H. Dillon	1982		

S. Brown	1983	(from 1988 President of Family Division)	
R.J. Parker	1983		1992
N.C.H. Browne-			
Wilkinson [1]	1983	(from 1986 - Vice Chancellor)	1991
D.P. Croom-Johnson	1984		1989
A.J.L. Lloyd	1984		
B.T. Neill	1985		
M.J. Mustill [10]	1985		1992
M.C. Nourse	1985		
I.D.L. Glidewell	1985		
A.J. Balcome	1985		
R.B. Gibson	1985		
J.D. Stocker	1986		1992
H.K. Woolf [2]	1986		1992
D.J. Nichols	1986	(Vice Chancellor from 1991)	
T.H. Bingham	1986	[M.R. from 1992]	
(T.P. Russell	1987		)
(A.E. Oldfield			)
Batler Sloss	1988		)
(P.M. Taylor	1988	(L.C.J from 1992)	)
(M.S. Smith	1988		)
(C.S.T.J. Thayer			)
Staugnton	1988		)
(M. Mann	1988		)
(D.H. Faquharson	1989		)
(A.J.D. McCowan	1989		)
(A.R.A. Beldam	1989		)
(A.P. Leggatt	1990		)
(M.P. Nolan	1991		)
(R.R.F Scott	1991		)
(J. Steyn	1992		)
(G. Slynn [11]		[The EEC Court of Justice]	1992
(P.J.M. Kennedy	1992		)
(D.C.H. Hirst	1992		)
(S.D. Brown	1992		)
(A.H.M. Evans	1992		)
(C.D.R. Rose	1992		)
(L.H. Hoffman	1992		)

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