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Leipzig, February 2023

Report on my internship at the Supreme Court of Israel from 28 November to 11 December 2022

I. Organisational framework

As part of the exchange programme organised by the International Association of Supreme Administrative Jurisdictions (AIHJA/IASAJ), I completed a two-week internship at the Supreme Court of Israel in Jerusalem in the period from 28 November to 11 December 2022. This was, at the same time, my very first stay in Israel. The period of my visit fell into a very interesting phase of Israeli politics. On 1 November 2022, the elections to the 25th Knesset took place and ended with the election victory of the right-wing camp led by Benjamin Netanyahu. The formation of government was still ongoing and was not completed until after the end of my stay with the (re-)appointment of Benjamin Netanyahu as Prime Minister. However, a large part of the political debate about judicial reforms, which has been reported in the international media since then, has already started in this interim phase.

I would like to thank AIHJA/IASAJ very much for allowing me to spend such an - in every respect - exceptional time. My personal thanks go to the Secretary General of AIHJA/IASAJ, Ms Martine de Boisdeffre, as well as Ms Louise Fort, who took care of the organisational aspects of my stay.

My contact person at the Supreme Court was Ms Natalie Kimhi, the both friendly and competent Director of the Public Affairs Department. Ms Kimhi has compiled for me a busy schedule for the visit, which gave me an insight into all interesting aspects of Israeli administrative jurisdiction and far beyond. She also managed to design my programme in such a way that, at the same time, I was able to gain rich impressions of the history and current political situation of

Israel, the Israeli society and its religious influence, and of the diversity of cities and landscapes. Mr David Moatti, also from the Public Affairs Department, stood by my side for any practical advice; endowed with encyclopaedic knowledge and inexhaustible patience, he accompanied me on most appointments and on numerous and long paths through Jerusalem, Tel Aviv and on a day trip to the Judean Desert and the Dead Sea. Many thanks to you and all other helping hands!

II. Programme

The programme of my visit, of course, essentially related to my host institution, the Supreme Court of Israel. My contact at the Court and supervisor was Justice Ofer Grosskopf, who devoted a lot of time and attention to me regardless of his great workload. As further discussion partners from among the judges, the Deputy President of the Supreme Court, Justice Uzi Vogelman, as well as Justice Daphne Barak-Erez and retired Justice Izhak Englard were available for answering my questions without any reservation. I also had a very interesting conversation with Ms Keren Azulai, the registrar of the Court. According to her function, she is rather a CEO than a head of the registry in the German sense. In addition to the always very precise and fruitful discussions with the judges, I participated in several oral hearings of the Court, some of which addressed politically controversial questions. For example, one case concerned subsequent immigration of family members and naturalisation when one spouse is an Israeli citizen or resident and the other comes from the disputed territories or an enemy state such as Syria, Lebanon, Iraq or Iran. Another case dealt with access of female soldiers to special operational forces, comparable to the German Special Forces Command (*KSK, Kommando Spezialkräfte*).

A day trip led me to the District Court of Tel Aviv, where I also attended an oral hearing. The President of the Court, Justice Gershon Gontovnik, explained to me the tasks of his court, which is part of the intermediate level of the Israeli judicial system (between the magistrates' courts and the Supreme Court). Since I am a judge in one of the military affairs senates (*Wehrdienstsenate*) at the Federal Administrative Court (*Bundesverwaltungsgericht*), the visit to the newly built, architecturally and functionally impressive military court centre in

Beit Lid was a particular highlight. Major General Orly Markman (President of the Military Court of Appeals since the end of 2021 and third woman who has reached this rank in the Israeli Armed Forces), Brigadier-General Noa Zomer and her bright team briefed me about the basics, but also the latest developments of Israeli military justice.

A visit to Hebrew University led me to both the Givat Ram campus near the government district and Mount Scopus campus in East Jerusalem. Professor Alon Harel's partly unconventional view of Israel's political and judicial system was very stimulating. In the Knesset, the Israeli parliament, I received an individual guided tour through the building. On my own initiative, I attended a parliamentary session at the Visitors Gallery to convince myself of the lively culture of debate. In the Ministry of Justice, I had the opportunity to participate in an instructive meeting with Deputy Attorney General and Head of the Legal Counsel and Legislative Affairs Department, Mr Sharon Afek, and three of his staff members.

III. Literature

I had prepared for the internship based on a work, which is available both in the original English language version (Walter/Medina/Scholz/Wabnitz (eds.), The Israeli Legal System, 2019) and in a German translation (*Einführung in das israelische Recht*, 2019). In its first part, it contains informative sections on sources of law, the system of jurisdiction and constitutional law. However, administrative jurisdiction is only dealt with very briefly; the section on substantive administrative law depicts only areas of law, which in Germany do not fall within the jurisdiction of the administrative courts (antitrust law, tax law). Nevertheless, this work is helpful because of its topicality and systematic presentation, but also because it conveys a certain sense of the yet very different, common law-influenced legal thinking in Israel.

In the following, I would therefore like to focus on some aspects that I have particularly noticed – also in contrast to German administrative jurisdiction – or which are of particular current interest.

IV. The Supreme Court in Israel's judicial and political system

The Supreme Court holds a prominent position in Israel's judicial and political system.

1) In judicial terms, the Supreme Court, as is often formulated, "wears two hats".

It is, on the one hand, the highest Court of Appeal in Israel. In this function, it hears appeals as of right and applications for leave to appeal, mainly from judgments and decisions pronounced in the district courts. It is involved in all possible legal matters and thus fulfils a task that is in Germany distributed among five specialised supreme federal courts, including the Federal Administrative Court.

On the other hand, the Supreme Court sits, following the British example, as the High Court of Justice. In this role, the Court rules on the legality of decisions of state authorities including laws enacted by the Knesset. In that regard, it partly performs functions of a constitutional court, although not to the same extent and with the same scope as the German Federal Constitutional Court (*Bundesverfassungsgericht*). A recent example is the decision of 18 January 2023, by which the Supreme Court objected to the appointment of Arie Deri as Minister of the Interior and Health due to his criminal convictions.

2) But also at the political level, the Supreme Court of Israel has a position that goes far beyond that of comparable supreme courts in other states. In particular, the Supreme Court is to some extent an opposite pole to the government and the majority supporting it in the Knesset.

This is due, on the one hand, to the lack of state organs and instruments in Israel, apart from the Supreme Court, which could contribute to decentralisation and moderation of political power. There is no federal structure, no second chamber of the parliament (such as the German *Bundesrat* or the United States *Senate*) and there are no possibilities of control or intervention of the President. There is also a lack of involvement in international jurisprudence, such as that of the Court of Justice of the European Union or of the European Court of Human Rights.

On the other hand, Israel does not know an integral written constitution, but only a series of – currently 13 – Basic Laws adopted by the Knesset through legislation over the years. Since it is not a constitution in the proper sense, it is already disputed whether the Basic Laws take precedence over other laws at all; the Supreme Court has assumed such a precedence in two decisions in 1997 and 1999 in cases covered by the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty. Above all, in Israel, there is no provision comparable to article 79 of the Basic Law for the Federal Republic of Germany (*Grundgesetz*), which requires certain qualified majorities for an amendment of the constitution and which excludes the central principles from any legislation amending the constitution.

This overall unbalanced constitutional situation entails considerable political causes for conflict. Due to the deficits in the balance of state powers, the Supreme Court is facing unbridled political pressure that is being absorbed elsewhere by other institutions. Not infrequently, the Supreme Court is also moved close to the political opposition in political perception, which is in principle not appropriate to the status and function of a court. Nevertheless, the Supreme Court, whether it likes it or not, becomes, depending on the political camp, the bearer of hope for some and the bogeyman for others. All this forms the background to the government's current efforts to weaken the position of the Supreme Court.

V. Composition of the Supreme Court and election of the judges

1) The Supreme Court consists of 15 Justices. In relation to the abundance of the Court's duties, this number is very small. In addition, unlike in Germany, there is no internal division into fixed panels, such as senates. Each judge is therefore basically responsible for all functions and matters. There is no predetermined specialisation. This is a remarkable challenge!

During the period of my visit, 9 Justices were men and 6 Justices were women, including the President of the Supreme Court Esther Hayut. 14 judges were Jews, including three who are considered orthodox, and one judge was a Muslim Arab. There are no fixed quotas. As far as can be seen, the Supreme Court judges have a higher age both at their appointment and in the current

average than, for example, judges of the Federal Constitutional Court or the Federal Administrative Court. Regular retirement takes place at the age of 70.

2) The judges of the Supreme Court, as well as the judges of the district courts and magistrates' courts, are elected by the Committee for the Selection of Judges. According to no. 4 of the Basic Law: The Judiciary, it shall be made up of nine members: the President of the Supreme Court and two other justices of the Supreme Court chosen by their fellow justices; the Minister of Justice and another Minister assigned by the Government; two Members of the Knesset selected by the Knesset; and two representatives of the Bar Association, selected by the National Council of the Association. For the election of a judge, in principle, a simple majority of the votes is sufficient, but seven of the nine votes are required for the election of judges of the Supreme Court.

The composition of the Committee has generally proved to be very effective. The advantage is in particular the mixed composition – partly professional (3 judges, 2 lawyers), partly political (2 ministers, 2 parliamentarians) – which, in conjunction with the requirement of a qualified majority of votes (7 out of 9), has a moderating and balancing effect.

It is not surprising that, in the context of the new government's desire to gain a stronger political influence on the Supreme Court, there are various ideas to change this electoral procedure. The overall aim is to strengthen the political and to weaken the professional components. A comparatively small interference would be to abolish the requirement of a qualified majority (7 out of 9), with the result that the four politically shaped committee members could advertise for the missing fifth vote among the representatives of the Bar Association. Other proposals aim at changes in the composition of the Committee or the expansion of its number of members in such a way that the political government camp has the required majority of votes. The idea of a future direct election of Supreme Court judges by the Knesset goes the furthest. In this context, some suggest, following the example of the USA, the possibility of a previous hearing of the candidates by the Knesset.

3) A special question is the appointment of the President of the Supreme Court. This question is currently very easily and elegantly solved by the principle of seniority: If a president retires, the longest-serving judge at that time will be the

new president. As a result, current political influences as well as vacancies in the presidency are eliminated. According to the principle of seniority, unless this principle is changed, the five successors of the current President Esther Hayut can already be calculated until 2039. Imagine this at the five federal supreme courts in Germany! However, it goes without saying that the method of determining the president according to the principle of seniority has also entered the political debate.

VI. Some remarks on the proceedings before the Supreme Court

1) The Supreme Court, both as highest Court of Appeal and as the High Court of Justice, normally sits in panels of three justices. A panel of five or a larger uneven number of justices (up to eleven) sits on the direction of the President (or Deputy President) in matters that involve fundamental legal questions and constitutional issues of particular importance. A single justice may rule on less important matters.

Approximately 10,000 proceedings are initiated in the Supreme Court annually. About 40% of these are the main proceedings, generally heard before a panel of justices. The remainder of the proceedings (about 60%) are cases that are generally heard before a single justice.

2) In order to prepare the cases, each judge is assigned four assistants (similar to the judicial clerks at the Federal Constitutional Court). Two of them are law clerks, who still have to take their bar exam (similar to the persons receiving practical training in judicial or other legal work after having passed the first state examination in Germany (*Referendare*)); the other two are more experienced legal assistants, who are already lawyers and usually work for several years at the Supreme Court. From a career perspective, working as a law clerk at the Supreme Court is very attractive and in great demand. In a competitive selection procedure, approximately 30 law clerks are recruited each year for a period of one year to one year and a half.

3) The court proceedings follow the Common Law adversarial system. Nevertheless, it seems to me that the difference from the principle of investigation, which applies in Germany in administrative court proceedings, is

not great in practice. In any case, during the oral hearings I attended, the judges repeatedly asked the parties for factual as well as legal submissions or asked them if points remained unclear.

4) In any proceedings in which the Government is a party, it is represented by the Attorney General or his or her deputies. The Attorney General may also be invited if the party to the proceedings is a municipality or another public law corporation.

5) There is a significant difference from German law as regards the standing to bring proceedings (*locus standi*). Since the end of the 1970s, the Supreme Court has allowed actions not only if the petitioner is directly and specifically affected, but also if the petitioner has no particular connection to the matter, but his or her petition raises important rule of law matters. This extension towards an *actio popularis* regarding fundamental issues not only concerns rare individual cases, but is widespread. Numerous important proceedings have been pursued, for example, by non-governmental organisations (NGOs). The Supreme Court sees itself as "guardian of the rule of law".

6) A separate seating area for the press is provided in the courtroom, close to the judges' bench and the parties to the proceedings. Every year, 24 cases of particular public interest are broadcast live on public television.

VII. Decisions of the Supreme Court

1) The structure of judgments of the Supreme Court follows the common law practice and thus differs significantly from court decisions in Germany. The judgments do not have a uniform statement of reasons for the decision. On the contrary, the entire substantive part of the judgment is composed of a series of opinions of the individual judges involved in the decision, which, in free reasoning, constitute the respective view on the case and the legal considerations relevant to the respective judge. Each opinion is marked and signed. In general, there is a lead opinion for the majority, but there is no "opinion of the Court" as such. Each participating judge will either note that he or she concurs in the lead opinion (and possibly another opinion as well) or

write a separate concurrence. It is not unusual for most or all of the participating judges to write separately, even when they agree with the outcome.

A comparison with the dissenting opinions (*Sondervotum*), as they are known from decisions of the Federal Constitutional Court in Germany, would be misleading. Judges of the Federal Constitutional Court may set forth their differing view on the decision or its reasoning expressed during the deliberations in a separate opinion, which shall be annexed to the decision (section 30 (2) first sentence of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*)). This is therefore (only) an addition to the "decision of the Court".

Unlike in Germany, the operative part (the result) of the decision is found – almost somewhat hidden – at the end of the judgment.

2) Interesting is also the question of the binding nature of the Supreme Court's decisions for other courts and for the other supreme state organs (Government, Knesset).

No. 20 of the Basic Law: The Judiciary provides that (a) a rule established in a court shall guide a court of a lower instance, and (b) a rule established in the Supreme Court shall bind every court, save the Supreme Court. With regard to the binding effect of the Supreme Court decisions on other Israeli courts, the regulation of no. 20 (b) corresponds to the provision of section 31 (1) of the Act on the Federal Constitutional Court, according to which the decisions of the Federal Constitutional Court shall be binding, inter alia, on all courts.

However, the provision of no. 20 (b) applies to *all* decisions of the Supreme Court, i.e. not only judgments in constitutional disputes, but also judgments in proceedings in which the Supreme Court, as the Court of Appeal, decides on a dispute under administrative law. In the latter respect, the binding effect of the decisions of the Supreme Court goes beyond the binding effect of corresponding decisions of the Federal Administrative Court. The rules laid down by the Federal Administrative Court in its decisions are not formally binding on the administrative courts of the lower instances; they rather form guidelines within the meaning of no. 20 (a) of the Basic Law: The Judiciary.

The Supreme Court's position in relation to the Government and the majority supporting it in the Knesset is significantly weaker. The point of dispute here is whether the Knesset may, by way of legislation, overturn a decision of the Supreme Court (the law overrides the decision), and in particular whether the Knesset may re-enact a law that the Supreme Court has declared unconstitutional. An essential reason for the weaker position of the Supreme Court on this issue is the above-mentioned fact that the Basic Laws are not a constitution in the proper sense, but were enacted by the Knesset itself by statutory legislation.

This is the background for the current plans of the government and the Minister of Justice Jariv Levin, who want to establish by law that a majority in the Knesset will be able to pass a law in the future, even if, according to the Supreme Court, it breaches a Basic Law. In this context, some refer to the example of an "override clause" in Canadian constitutional law, which however has not yet been applied there at federal level.

VIII. Legal recourse in administrative matters

1) Disputes under administrative law were initially decided solely by the Supreme Court in its function as High Court of Justice. The review of decisions of state authorities were deliberately concentrated at the top. The situation was thus similar to that of the emergence of administrative jurisdiction in the German states in the 19th century, when at first only a central Higher Administrative Court (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*) for the respective state was established (e.g. Prussian Higher Administrative Court, Bavarian Higher Administrative Court).

The steadily growing number of cases on the one hand and, on the other hand, the fact that firm foundations of administrative law had gradually developed in practice led to the idea of transferring competences to a lower court of first instance. This idea was realised by the Administrative Courts Law of 2000. Article 1 provides its purpose, namely to gradually authorise the District Court sitting as an administrative court to hear administrative matters heard in the Supreme Court sitting as a High Court of Justice or other courts, by judges of the District Court who will be determined for this purpose, and according to

special procedures to be determined. Thus, no new courts were created, but the existing District Courts, of which there are six in Israel (besides the one I visited in Tel Aviv also those in Jerusalem, Haifa, Nazareth, Lod and Be'er Sheva), additionally assigned the functions of an administrative court. In other words, the Administrative Court forms a section of the District Court.

2) The judges of the Administrative Court are also designated among the number of judges of the District Court. This requires a special authorisation issued by the Minister of Justice in consultation with the Supreme Court. At the District Court of Tel Aviv, around one third of the approximately 60 judges have this authorisation. The Administrative Court basically decides by a single judge, but the President or the Vice President of the District Court may determine that a particular matter will be heard by three judges.

3) In matters under administrative law, the tasks are distributed between the Supreme Court and the District Court as follows:

The Administrative Courts Law enumeratively determines in its Appendix A the matters in which the District Court will hear a petition against a decision of an authority. This catalogue of matters, for which the District Court is thus responsible as first instance, is very extensive and is likely to constitute the vast majority of administrative areas of law. Appendix A currently comprises 63 thematically ordered numbers (e.g. no. 10 Planning and Construction; no. 11 Public Safety; no. 23 Environmental Protection). Each number then lists a more or less large number of thematically relevant laws or other provisions.

In all matters not assigned to the District Courts, especially claims against the Government, jurisdiction solely remains with the Supreme Court. The Supreme Court also regards itself as having the power to accept a petition directly submitted to it for a decision, even if the matter is referred to in Appendix A and is therefore, in principle, assigned to the District Court at first instance – a relic of its originally all-encompassing jurisdiction.

4) Against any judgment of the District Court as an administrative court, there is the possibility of lodging an appeal to the Supreme Court. This is an appeal by right, in other words an appeal that is unlimited and does not require approval (no leave). The relief effect for the Supreme Court, which should be achieved by

shifting competences to the District Courts, is therefore not as large as it initially appears.

A system such as in Germany, where any appeal requires an authorisation and is only allowed if there are legally determined grounds for granting leave, could not easily be introduced in Israel. No. 17 of the Basic Law: The Judiciary states that a verdict of a court in the first instance may be appealed by right, save a verdict of the Supreme Court. For the introduction of an appeal by leave, an amendment of no. 17 of the Basic Law: The Judiciary would therefore be required – a step that would perhaps have disadvantages as well.

Another possibility would be to shift the jurisdiction of first instance for certain disputes to an even lower level, i.e. to the magistrates' courts. Then in these cases, after an appeal by right to the District Court, the appeal to the Supreme Court could be shaped as an appeal by leave. There are political considerations for the creation of such a third level, but they are met – quite rightly – with scepticism. With a population of almost 10 million, Israel corresponds to a larger German federal state, where a two-tier system with a higher court and half a dozen subordinate administrative courts of first instance would be considered sufficient and adequate.

5) In addition to the jurisdiction of first instance described above, the District Court, in its function as an administrative court, still has a few less prominent tasks, two of which may be mentioned:

The District Court hears administrative appeals against the decisions of certain tribunals or committees, partly at the local level listed in Appendix B of the *Administrative Courts Law*. This list is also extensive, detailed and currently includes 28 numbers.

Shorter, namely consisting of only two numbers, is the list in Appendix C of the Administrative Courts Law, which describes the matters in which the District Court decides on compensations and damages. They concern public procurement law under Mandatory Tenders Law and certain proceedings under Class Actions Law.

IX. Military Courts

1) The military justice system is of great importance and public attention in Israel. On the one hand, this reflects the importance of the Israeli armed forces in the light of the security situation and the constant threat to Israel. On the other hand, military service in Israel is mandatory and affects a major part of the population, both in regular and reserve duty; the compulsory military service is currently two and a half years for men and two years for women.

The jurisdiction of the military courts covers soldiers, but also other employees of the army, as well as persons who are in possession of weapons belonging to the army. Sanctions are imposed on disciplinary and criminal offences, i.e. on both military offences (such as absence without official leave) and criminal offences according to the general Penal Law. In addition, the military courts in the West Bank exercise criminal jurisdiction over the Palestinian population, unless courts of the Palestinian National Authority have jurisdiction.

The Military Courts are authorised to impose on soldiers the following punishments: warning, reprimand, confinement to camp, fine, demotion of rank, detention, imprisonment and expulsion from the army. The measures are therefore similar to those in German military disciplinary law, but if I have understood it correctly, the strict separation that is drawn in Germany between criminal and disciplinary sanctions does not exist in Israel.

2) At first instance there are District Military Courts, whose jurisdiction is determined partly by territory (Northern, Southern, Central), partly by branches of the military service (ground forces, air force, navy) or by other functions. The superior Military Court of Appeals is competent to hear appeals against the judgments of the District Military Courts; this, again, is an appeal by right. Against the judgments of the Military Court of Appeals, a further appeal to the Supreme Court is possible which requires permission (appeal by leave); however, the President of the Supreme Court only grants this permission in special cases that raise important, difficult or innovative questions of law.

The military courts decide – such as the military service courts in Germany (*Bundeswehr* disciplinary and complaints courts (*Truppendienstgerichte*) and the military affairs senates of the Federal Administrative Court) – in a mixed composition of legally qualified professional judges and laymen judges with

military experience from the forces. However, a significant difference is that in Israel the professional judges also belong to the military and hold military ranks, whereas in Germany they are civilian judges.

3) The "Integrative Military Court" represents a specific procedure within the military court system, which was adopted only a few years ago. I got an interesting introduction to this new institution and had the opportunity to visit a respective oral hearing.

According to the total amount of offences being dealt with before the military courts, the absence without official leave (AWOL) accounts for the largest proportion (before drug offences) with more than two thirds. Quite often, the absence does not just amount to a few days, but many weeks and months. The most likely reason for the relatively and absolutely high number of this type of offence is the compulsory military service, which imposes burdens on a large number of still unstable young men and women that they cannot cope with for various reasons (socio-economic status, lack of support, family background, mental/physical/social difficulties, officers' attitude and lack of trust). Absence from military service without permission is threatened with long terms of imprisonment. Corresponding criminal records and – generally – improper performance and termination of military service are not accepted in much of the Israeli society and can lead to significant disadvantages in later professional life.

The concept of the "Integrative Military Court" aims, generally speaking, to enrich the military court proceedings in the AWOL cases with social, therapeutic and cooperative elements and measures designed to enable the soldiers concerned to return to the normality of military service, a proper termination of military service and, finally, entry into civil life with a clean record. Not only the soldier concerned, but also the army has an interest in successfully completing this procedure. Before the introduction of the "Integrative Military Court", only 20 to 30% of the AWOL offenders have completed their military service. Implementation statistics show that most soldiers successfully pass the reintegration programme. It therefore seems that the "*Integrative Military Court*" has embarked on a good course.

X. Conclusion

The Israeli judicial and legal system is characterised by the British common law. The course was set with the founding of the state, when the legal institutions of the British Mandate were taken over because they already existed and functioned properly. Continental European legal thinking faded into the background, although most of the legal professionals who fled or emigrated from Europe were trained in this tradition. Over time, Israeli law has emancipated itself from its British roots, but at the same time has opened up to new common law influence from the United States of America, also through its orientation to the American educational system. Today, it is therefore not easy to build legal bridges between Israel and continental Europe. I am all the more grateful that I could personally take some building blocks with me to Germany.

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