Playing the Game of Meritocracy

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*This Chapter examines several features of Israel’s Civil Service Appointments Law, tracing the gradual transition from the British influenced meritocratic model Israel originally sought to emulate to a less meritocratic model under which many appointments are made without tenders. These appointments, or ‘biased appointments’, are based not on merit, but on irrelevant considerations, whether political or personal favoritism. Exploring Israel’s trend towards making biased appointments, this chapter reveals the various regulatory mechanisms involved, and aims to determine whether the erosion of the classic meritocratic model constitutes a failure of the regulatory mechanisms or, rather, a conscious shift in the appointments model. This essay proposes ways to strengthen the civil service appointment system in Israel so as to limit the type and volume of appointments made without tenders. It also focuses on basic requirements for quality and skills even if non-meritocratic appointments are warranted on an individual and/or political basis.*

*Israeli State Comptroller reports from 2004[[1]](#footnote-1) have suggested that there have long been improprieties in political appointments and other appointments in the civil service. [[2]](#footnote-2) Along with these reports, a new legal standard has emerged in recent years regarding these ‘devious’ appointments, which has begun to result in new guidelines being set against such tenders in the civil service.[[3]](#footnote-3) The State Comptroller reports mentioned here portray civil service appointments as unprofessional and politically biased, in contrast to tenders or bids in which all candidates are treated equally, and their skills examined objectively.[[4]](#footnote-4) The Israeli Civil Service Commission (the ‘Commission’) often has to deal with issues such as unnecessary pressure or the imposition of personal appointments, attempts to obstruct tenders and extend temporary appointments, or, alternatively, approve tender requirements tailor-made for certain candidates. This essay explores the law with respect to biased appointments, focusing on such appointments in the civil service only, and not in the administrative authorities, governmental companies, or local municipalities.*

***Part I*** *demonstrates how the Israeli legal system originally adopted a meritocratic mode of appointment-making, accepting the underlying premises, history, and characteristics of this model. Having accepted this model, it can be argued that Israel should have rejected biased appointments. However, over time, Israel changed and even to some extent abandoned the meritocratic model.*  ***Part II*** *seeks to identify the main circumstances surrounding the trend of deviating from the meritocratic model and of moving towards biased appointments, and to examine the major causes for this change.* ***Part III*** *explains the regulatory situation perpetuating this trend of biased appointments and undermining the rule of mandatory appointments. In* ***Part IV,*** *the**argument is made that the historic American model of civil service appointments posed a challenge to the meritocratic model. The two main appointment models are reviewed in this context: the British meritocratic model favouring professional appointments based on quality and skills, and the American model that allows for ideological and politically based appointments.[[5]](#footnote-5)* ***Part V*** *discusses the issue of whether the appointment system should be changed, weighing whether the meritocratic model should be restored or, rather, an alternative model should be fully implemented or perhaps adapted for Israel, incorporating ideas from various models into a new Israeli one.[[6]](#footnote-6)* ***Part VI*** *concludes the Chapter.*

1. **Introduction: Choosing the meritocratic model – The Israeli case**

First, the historical factors that influenced Israel’s leaning towards the meritocratic model of civil service appointments should be reviewed. Reference to English law has been and still is a key element in Israel’s legal system and evolution in Israel, especially following the British Mandate, the laws of which were used as the basis for Israeli law.[[7]](#footnote-7) Also influential was Article 46 of the Order in Council, which states that ‘it’s easier to follow methods from which Israeli law already derived its legal arrangements or adopted similar fundamental principles’.[[8]](#footnote-8) Nonetheless, the hastily established temporary civil service in 1948 was highly partisan, and the genesis of Israel's biased appointment practice is evident in the ‘party index’ already applied in the institutions of the new country.[[9]](#footnote-9) However, this partisanship in appointment-making was finally addressed in the Appointments Act of 1959,[[10]](#footnote-10) which stated that civil service appointments are to be made by tender,[[11]](#footnote-11) emulating the English meritocratic model promoting a professional and apolitical civil service.[[12]](#footnote-12) This was followed by a later Supreme Court[[13]](#footnote-13) ruling that the civil service, as a trustee of the public, must be free of foreign interests, including partisan influence.[[14]](#footnote-14) Consequently, the appointments system was supposed to be objective, and any new appointment was meant to be based on professional factors only. In that respect, the Israeli governmental system tried to emulate the British system as much as possible,[[15]](#footnote-15) including its appointment procedures, which are supposed to evaluate professional skills only.[[16]](#footnote-16) This issue was considered of utmost importance, and the Supreme Court emphasized:

Section 19 of the Appointments Act, requiring that civil service appointments be made by tender, is the culmination of the law, embodying its main purpose. It is faithful to the idea that the civil service should be apolitical, setting the ground rules for civil service appointments. That is, selecting the most suitable person for each position, maintaining equal opportunity, and abolishing arbitrariness, bias, as well as extraneous and political interests from the selection process.[[17]](#footnote-17)

The implementation of the Appointments Act was undoubtedly the beginning of a new era in Israel’s civil service. Its main objective was to reduce biased appointments and ensure that employees were hired and promoted on the basis of objective skills and qualities (‘merit system’). In this it much resembled the English meritocratic system, which is not contingent on a change of government, in contrast to other models, such as the American one. Thus, the Appointments Act sought to foster a neutral, professional, and apolitical civil service.

The Appointments Act was introduced in June 1953 for its first Knesset reading by then Prime Minister David Ben-Gurion.[[18]](#footnote-18) Its aim was explained as follows:

Hiring state employees...shall not be subject to partisan bias or political affiliation, but rather personal qualification...The civil servant shall be hired based on an evaluation of the individual’s merits.[[19]](#footnote-19)

Section 24 of the Appointments Act read as follows:[[20]](#footnote-20)

A candidate for an open position, as stated in Section 19, must undergo evaluations and tests to prove his/her aptness and qualities. If several candidates are found qualified for a position, the most qualified shall be appointed.[[21]](#footnote-21)

The state authorities’ decision to choose the British model over the American one is evident in the Supreme Court ruling in the matter of *Halamish v. Tel Aviv Workers Council*.[[22]](#footnote-22) In that case, the court stressed that the underlying principle of the meritocratic model is to select employees based on their qualities and skills alone, while eliminating any other consideration that is not relevant to the position itself. This was a clear rejection of the ‘spoils system’ model employed in the United States. According to the court in the *Halamish* case, a public tender is meant to ‘reassure the public that the best are hired, not those with the most connections’.[[23]](#footnote-23) One of these irrelevant considerations referred to in *Halamish* is the political one: ‘Hiring state employees...shall not be subject to partisan bias or political affiliation, but rather personal training’.[[24]](#footnote-24)

Israel’s decision to adopt the British model is significant, at least in part, because it was not the only option available.[[25]](#footnote-25) On the other side of the spectrum is the alternative American model, under which people are appointed on the basis of trust and partisan favoritism, a model often known as the ‘spoils system’. It is arguable that once Israel chose to legally adopt the meritocratic model over the others, biased appointments should have been eliminated. However, as discussed in the second section, a number of conditions in the country contributed to the increase, even pervasiveness of biased appointments in Israel, despite such an approach having already been dismissed as an undesirable alternative to be avoided in the early years of the country’s history.

1. **Why do biased appointments happen?**

It is disconcerting for the public to hear about biased appointments and to discover that the civil service does not strictly abide by the Appointments Act. The frequency of biased appointments is suggested by numerous legal rulings, State Comptroller reports, and legal literature.[[26]](#footnote-26) Considering the problems caused by biased appointments, it is difficult to understand why the legislature (the Knesset) does not amend the provisions of the Appointments Act so that they better serve the purpose for which they were originally intended. In order to understand how these provisions have failed, the trend of biased appointments and the main circumstances supporting it must first be examined. In this regard, it is important to note that Israel did not fully enact the meritocratic model from the outset. Furthermore, over the years, even the attenuated model it did adopt eroded, allowing for the increase in biased appointments. In addition, there are specific regulatory issues in Israel that perpetuate this trend. All of these factors will be elaborated upon below.

1. Partial enactment of the meritocratic model in the Appointments Act

Not long after the establishment of the state, and notwithstanding the state’s initial partisanship in appointment-making, most of the principles of the British meritocratic model were adopted. However, it is wrong to assume that Israel fully implemented the British model. The Appointments Act was supposed to incorporate the meritocratic model, but it could not turn back the clock and undo the politicization of the civil service that existed in the early days of the country before the Act was passed. In fact, the Act actually eroded the classic British model from the outset by specifically defining the list of positions subject to tender, thereby making appointments by tender the exception to the rule of biased appointments. That the meritocratic model was not fully implemented is evident in the various sections of the Appointments Act that permit biased appointments as exceptions from the norm of meritocratic appointments. Thus, the Act both mandated public tenders and set forth criteria for exemptions from them. On the one hand, the Appointments Act was enacted to reduce improprieties and adopt the professional and apolitical British model (Section 19 of the Appointments Act):

No person shall be appointed a civil servant unless the Civil Service Commissioner publically announced the job opening, at the request of the executive manager or someone on his/her behalf, whether the position is open or only might be open.

On the other hand, Sections 21[[27]](#footnote-27) and 23[[28]](#footnote-28) of the Appointments Act state that the tender requirement shall not apply to senior positions, allowing the government to determine a list of positions that are exempt from the mandatory tender provisions. In particular, Section 23 of the Appointments Act allows appointments by search committees which are permitted according to provisions of the Civil Service Regulations and government decisions. The procedure is described as follows:

Like the tender process, the principles of equal opportunity and meritocratic selection are upheld. This procedure is intended for positions requiring specific professional and scientific qualifications, or regulatory positions that protect the public interest.[[29]](#footnote-29)

It appears that, at least in theory, that Section 23 was intended not as a gateway for biased appointments, but to provide a more effective or efficient way than tenders of searching for qualified candidates. Following the Supreme Court ruling[[30]](#footnote-30) which had the aim of improving the tender exemption mechanism, the government decided[[31]](#footnote-31) to establish the search committee mechanism and apply it to a limited number of specific positions that are exempt from tender.[[32]](#footnote-32) According to the State Comptroller:

The search committee is a worthy mechanism, but its flexibility can potentially violate the candidates’ equal opportunity rights in the initial selection stage before the committees summons them for a hearing. This is done solely based on the forms they submitted, without professional tools to support their decision, without setting criteria for the candidates, and without grading them. Therefore, there should have been hedges for the use of search committees, but this was not done.[[33]](#footnote-33)

Another substitute for the tender process is the Appointments Committee of the Civil Service Commission, operating under Section 7 of the Appointments Act. Paragraph 11.961 of the Civil Service Regulations provides details about the Appointments Committee, stating that it convenes to appoint government positions or positions that require government approval[[34]](#footnote-34) and are therefore subject to the review of the Committee, the proceedings of which are secret and confidential. Only the Civil Service Commission sees its report.[[35]](#footnote-35) The authority and designation of the Appointments Committees are defined as follows:[[36]](#footnote-36)

The appointments committee is intended to prevent improprieties and devious appointments based on factors such as: personal, business, or political ties with government figures.[[37]](#footnote-37)

Responding to the appeal of the *Ometz* foundation, devoted to ensuring proper governmental behavior, the Supreme Court addressed the role of the Appointments Committee, stating the following:

The primary function of the advisory committee is to examine the integrity of the appointment in the broadest sense of the term: the candidate, the appointing figure, and any other aspect that may pertain to the appointment’s integrity.[[38]](#footnote-38)

It therefore seems that the legislature intended to reduce exemptions from appointment tenders and to designate a specified number of positions, primarily senior or highly important positions, to be appointed by either a search or an appointment committee. However, these committees were not intended as a substitute for the tender process,[[39]](#footnote-39) which is supposed to be professional and unbiased. In fact, the search committee process is only a recommendation for the proposed appointment as the government may change or reverse the recommendation, or approve the recommendation even if the Appointments Committee opposes it, so that the committee’s function is thus only advisory.[[40]](#footnote-40)

Although at the time of the passage of the original Appointments Act, it appeared that the legislature originally intended to create two mechanisms, the meritocratic process and the search and appointments committees to protect the meritocratic process in the case of exemptions from tenders, it can now be seen that these committees are much more likely to hinder the meritocratic process than promote it. In order for the search committees to promote the meritocratic process and remain neutral, professional parameters must be set and the search committee should be given professional tools to evaluate candidates. As the State Comptroller report found, the search committee often does not set professional criteria in advance for evaluating candidates, nor does it rank or provide a detailed opinion on each candidate. Thus, in many cases, the search committee opens the door for the minister to influence candidate selection. If the committee recommends several candidates, the ultimate choice is that of the minister, who may have considerations that are not necessarily professional.[[41]](#footnote-41)

In order for the appointment committees to promote the meritocratic principle, they must be vested with authority and serve just an advisory function. In addition, the government should not be allowed to change or contravene the committee’s recommendations. Currently, all positions exempt from tender under Section 23 of the Appointments Act appear in the addendum to the Act. The language of the Act seems to suggest that Section 23 is not meant to undermine the meritocratic principle, but rather to add the requirement of government approval for the tender. Therefore, the exploitation of the Appointments Act to make more positions exempt from tender completely defeats the original purpose of the legislation. Note, also, that the list of positions exempted from mandatory tender under Section 23 is not exhaustive. If it were a closed list, it could be arguable that it did not represent an erosion of the meritocratic model, but, rather, expressed a fixed and predetermined exception, a ‘necessary evil’ decided upon at the time the law was enacted. However, that is not the case. The government has tried to expand the list over the years,[[42]](#footnote-42) with most of the new positions added to the list being ones that previously required an appointment tender.[[43]](#footnote-43) While the list of appointments exempt from the tender process gradually expanded, given the fact that the legislature[[44]](#footnote-44) did not limit it under Section 23 of the Appointments Act, the Supreme Court ruled that Section 23 is not a means to bypass a mandatory appointment tender under Section 19 of that law:

Section 23 discusses the addition of positions to the list by the government and determines those that require its approval. It does not discuss the exemption from tender. Adding a new position to the list does not exempt it from tender or substitute Section 21 and the procedure it outlines for issuing such an exemption.

The Court in this case made similar observations about Section 21 of the Appointments Act:

The mechanism in Section 21, under which the government’s exemption from tender shall be subject to the recommendation of the Service Commission, balances between the need to give the government a suitable tool to exercise its policy by making appointments without tender, and the need to avoid political or other inappropriate appointments. It ensures that a position will be added to the list due to relevant considerations only, rather than those of the candidate. It creates a worthy system of checks and balances that protect the rules of good governance. The broad interpretation of Section 23 largely obviates the need for Section 21, opening a 'window of opportunity' free of an objective filter.

The Court also argued that:

If the legislation was intended to rule that the positions listed in the addendum are exempt from tender and from the process for receiving said exemption (outlined in Section 21), one could expect that it be said explicitly, as was the case regarding certain positions in other sections. However, it is not stated, not by chance, but because the legislature did not intend to give Section 23 such power. It is inconceivable that Section 23 is designed to bypass important normative provisions, such as those set forth in Sections 19 and 21 of the Act.[[45]](#footnote-45)

In this case, Justice Strasberg-Cohen ruled that the important role of Section 23 is to concentrate all the positions that require government approval in one list, be it an appointment under Section 19 or under Section 21 of the Appointments Act. It is difficult to discern any coherent logic or rationale for the factors that render each position exempt from tender, let alone the existence of a common denominator between the various positions in the list when reviewing the list. For example, the position of comptroller at the Ministry of Public Security is on the list, while the same appointment in other government ministries is subject to an appointment tender. The State Comptroller addresses this issue:[[46]](#footnote-46)

No common denominator was found among positions the government had approved to staff through search committees: (1) Not all of them were senior positions – 16% of them were mid-level positions. (2) Equivalent positions in different ministries were not appointed the same way – some were staffed by tenders, others by search committees – and some were entirely exempt from tender.

The main conclusion that can be drawn, then, is that the Appointments Act includes provisions that poorly implement the meritocratic model. However, that some provisions of the Act lead to deviations from the classic meritocratic model, regardless of whether that was the original legislative intention, together with Israel choosing to adopt this model relatively early in its history, does not condemn the meritocratic model. Perhaps the changes that took place over time in Israel should be seen as a natural evolution of the local legal system seeking to adapt the provisions of the meritocratic Appointments Act to the local legal and political environment. Nevertheless, regardless of the reason, a review of the meritocratic model’s implementation in Israel suggests a breached and unstable system. The government’s application of Sections 19, 21, and 23 of the Appointments Act leads directly to the issue of whether the minimum requirements specified in these sections are being met. For example, the State Comptroller revealed that the search committees do not set any clear minimal requirements for the positions they are seeking to fill.[[47]](#footnote-47) The committee members determine the criteria for selecting the candidates they interview and examine, and decide which ones will be summoned. The State Comptroller’s report uncovered several search committees that interviewed candidates who failed to meet the minimal requirements for the position, but were nevertheless actually recommended for appointment.[[48]](#footnote-48)

1. Setting the policy for minimal requirements

The difficulties in setting minimum requirements for position range from setting such low minimum requirements that they do not serve the purpose of screening candidates to find the candidate with the best qualification, to demanding overly specific requirements, which sometimes leads to the setting of irrelevant minimum requirements. One possible solution is to have a professional and independent body set and administer a policy for minimal requirements. The provisions of the Civil Service Regulations that require setting minimal requirements for tenders appear in paragraphs 11.441 and 12.121. These paragraphs mention, among other things, the education and experience requirements for applying to tenders in the various professional ranks of the civil service.[[49]](#footnote-49) These requirements are specified in the tender documents, and any bid that fails to meet them will be eliminated. They are intended to set a limit on the tender committee’s discretion and to curb its actions. A vague description of the minimal requirements or, alternatively, one that is inconsistent with the actual requirements for the position can lead to disagreement over the interpretation.[[50]](#footnote-50) Moreover, if the language of the tender documents is sloppy or unclear, a court may disqualify it.[[51]](#footnote-51) When critically examining the mechanism for determining the minimal tender requirements, one must distinguish between two substantive needs: first, that the minimal requirements match the actual job requirements; and second, that the minimal requirements are described clearly for any reader or potential candidate. Only once these two requirements are met can any progress be made in moving towards a proper appointment procedure.[[52]](#footnote-52)

Naturally, a candidate cannot be disqualified from applying for public office without relying on minimal requirements that clearly distinguish between relevant and irrelevant needs. This fundamental principle is the foundation of the right of every Israeli citizen or resident to apply for any position, profession, or occupation, including in the civil service.[[53]](#footnote-53) The failure to determine a minimal requirements policy can be attributed to three factors that actually lead to biased appointments. The first is the lack of permanent standards for setting relevant minimal requirements or of definitions of too narrow or too broad requirements, be it in terms of education or professional experience. Second the Evaluation and Tender Center, cannot always objectively regulate the minimal requirements and ensure that they are reasonable and relevant to the position. As a result, the Center certainly cannot serve as a reliable gateway against biased appointments. Third, excessive leeway is given to the Evaluation Committee to set the criteria for the position in the tender process.

1. Setting relevant minimal requirements

Paragraph 11.441 of the Civil Service Regulations defines the term ‘professional experience’ as that outlined in the job description. However, the only positions for which professional experience is defined in this paragraph are those included in the categories of jurists, attorneys, and social workers. The remaining categories do not specify any required experience. It should be noted that there are some positions for which the required professional experience is obvious to all, particularly in occupations such as litigation, medicine, social work, etc., where the required professional experience simply involves licensing and experience in the field. But what are the qualifications for professions and civil service positions that are unregulated, such as tax inspectors, accountants, general managers, administrators, human resources managers, in-house auditors, and budget officers? On the one hand, a narrow requirement such as ‘professional experience in the field’ might block candidates who are employed in other similar professions, chiefly those with professional experience outside the civil service who intend to compete in public tenders. They, too, may be trained and qualified to perform the job in question. On the other hand, an overly broad requirement such as ‘experience in similar positions’ will attract a large pool of candidates who may not be qualified or suitable for the job. Any experience gained in a similar line of work, even if it does not require a license, can contribute to the proficiency and training of the potential candidate for the job. The Evaluation Committee is allowed to favor a particular candidate. Indeed, sometimes the Commission explicitly states this in the minimal requirements for the tender. But this advantage is conferred only if the candidate meets the minimal requirements that do not change even when the ‘similar experience’ criterion is added.[[54]](#footnote-54)

Not only is there a problem with setting relevant minimal requirements, but there is also a problem in defining a unified professional experience requirement that is relevant for all the potential candidates. That is, the minimal requirements may accommodate too many people, including those who are not suitable, or reduce the list too much and thus exclude people who are suitable. The problem is that the current Civil Service Regulations grant leeway both to those who frame the minimal requirements (usually the direct managers at the ministry where the position is open) and the tender committee that evaluates the professional experience. The task of setting minimal requirements with regard to higher education has been assigned to the ministries.[[55]](#footnote-55) It seems there is no way to set uniform educational requirements in advance for the wide range of civil service positions and professions,[[56]](#footnote-56) considering the abundance of programs and academic diplomas from various institutions in Israel and abroad.

Thus, the task of setting educational requirements might lead to biased appointments and even unwarranted benefits. This is because an academic degree entitles the candidate to a higher salary under the provisions of the Accountant General, even if there is no proven connection between the educational level and the requirements of the proposed position. Setting a particular educational level as a minimal requirement, even if it is not actually the case, might lead the committee to disqualify an otherwise good candidate. Furthermore, minimal requirements severely limit freedom of occupation, far more than do general standards.[[57]](#footnote-57) The writers of the tender must be careful not to set minimal requirements that unreasonably limit the possibility of applying for a position, which would render the tender illegitimate. Setting narrow minimal requirements will reduce the number of candidates, while a broader set of conditions will have the opposite effect.

First, setting minimal requirements in advance is problematic, as it is not possible to set uniform standards for a variety of positions. For example, the minimal requirements in a tender for the position of a ‘B2 grade legal advisor’ in the civil service would vary if the tender is for the Civil Service Commission or for the Finance Ministry. It is clear that, for the latter position, other than the minimal necessary requirement of an attorney’s license, the candidate should have some kind of experience in tax law or a similar field, which is not the case for the same job description in the Civil Service Commission. Thus, one could objectively point out the difficulty in setting uniform minimal requirements. Second, the Civil Service delegates its authority to run most of the tenders to the various ministries, thus perpetuating the subjective bias by which the minimal requirements are set. Once the authority to determine the requirements is delegated this way, the Commission’s Evaluation and Tender Center ceases to be a regulator of the minimal requirements and cannot set professional standards for positions.

It is clear that setting minimal requirements for any position is a difficult task. Finding the middle ground between too broad a set of requirements and one that is too narrow is an complicated task, and the balance point cannot be determined in advance. The reasonable choice is to set an objective test that meets the standards of a reasonable person. Thus, any form of minimal requirements on the spectrum should be acceptable, as long as they are neither too narrow or too broad. The standards for evaluating the minimal requirements should include relevance to the position (an essential requirement), and reasonableness. Setting relevant and reasonable minimal requirements will serve the meritocratic principle and its goal of promoting ‘skills’ rather than ‘connections’.

1. The evaluation committee’s discretion and composition

Even after overcoming the obstacle of minimal requirements and publishing the tender, the evaluation committee must face the candidates. Thus, the minimal requirements are only the initial filter in the hiring process. Section 45 of the Civil Service Rules (Appointments) (tenders, evaluations, and tests) 1961, states the following:

The Civil Service Commissioner may determine the method by which the evaluators and the evaluation committee shall determine the scores. As long as the Commissioner hasn’t set the said method, the evaluation committee shall determine the grading method.

Thus, in the absence of a the Civil Service Commissioner’s ruling, the evaluation committee must set the standards (the ‘method’) by which the scores are determined. However, the evaluation committee does not set a uniform method, as each evaluator sets their own method for grading the candidates.[[58]](#footnote-58) Thus, each committee and perhaps each evaluator in the committee sets their own subjective criteria for the position and grades the candidate accordingly (factoring in the documentation, reviews, and candidate’s test scores). Ostensibly, the composition of the committee itself does not necessarily have to result in a deviation from the meritocratic model to the extent of enabling biased appointments.[[59]](#footnote-59) Because committee members are selected in the presence of a representative of the Commission and another neutral representative (e.g., a representative of the State Employees Union, the relevant union, or elected official),[[60]](#footnote-60) any attempt by the ministry representative’s to make a biased appointment should be able to be thwarted. However, in most cases, the committee will recommend the candidate selected by the ministry representative. The ministry’s interests, which may have nothing to do with skills and training, will outweigh other, more professional interests. The official reason for this result is professional, taking into account gaps between the ministry representative and the other representatives in terms of experience and proficiency in the area. Consequently, the ministry representative might try to promote a particular candidate over others; in fact, the representatives usually succeed in doing so. The general attitude on the committee is that the representative speaks on behalf of the ministry personally and professionally, and therefore is best qualified to decide whether a certain candidate is fit for the proposed position. Therefore, the presence of the ministry representative on the committee may be essential for representing the ministry’s interests and needs. However, the same interests may make this tender essentially biased. One solution is to have the representative only give general feedback on the candidates’ suitability or inadequacy for the position, but not grade them. This feedback will be available to the other representatives, who can then decide how much it will affect the candidate’s score.[[61]](#footnote-61)

Section 2 of the Administration Procedures Amendment Act (Decisions and Reasoning)[[62]](#footnote-62) exempts the state, as a public authority, from voluntarily explaining its decisions. Moreover, Section 3(3) of the Act states that a civil servant is not obligated to explain why he or she rejected a candidate in a tender. However, in the matter of *Kendel v.* *Minister of the Interior*,[[63]](#footnote-63) Supreme Court Justice Heshin ruled that in order to enable the legal system to monitor tender processes, the reasoning must be provided, even in those cases where the legislature supposedly made a legal exemption. A later ruling in the matter of *Yossi Ilan v. Tel Aviv Municipality* [[64]](#footnote-64) stated that the principle of transparency is a supreme value given the basic view of the civil service as a public trustee. Given the fundamental importance of transparency, the legislature made adjustments, setting Provision 46 of the Civil Service Regulations of 1961, (Appointments) (tenders, evaluations, and tests) which obligates the members of the evaluation committees in tenders to provide their reasoning. The importance of this obligation was stressed in a Civil Service Commission announcement from 1998 elaborating why the committee members’ reasoning must be subject to a legal test if it is brought to court. The evaluation committee’s decision must be detailed in such a way that a layperson reading it can reasonably understand the grounds on which a candidate was selected or rejected following a tender, and the committee must lay out the objective reasons leading to its decision.

This protocol is the only tool by which the committee’s conduct can be evaluated in the event that someone files a complaint. If a protocol is insufficiently recorded, claims about inappropriate questions or statements, disregard for a certain candidate’s entitlement to affirmative action, and other issues that are not mentioned could potentially nullify the tender and mandate that a new one be issued. However, not all employees who seek to work as civil servants pass through the evaluation committees. Some positions are exempt from holding a tender and are instead solely subject to the approval of a search committee or evaluation committee. There are also temporary civil service appointments, human resources recruitment, and appointments to positions of trust, all of which are exempt from the mandatory tender requirements and are not subject to any minimal requirements, and do not go through a search committee, an appointments committee, or an evaluation committee.

1. ‘Temporary’ appointments

‘First we’ll appoint him, then we’ll hold a tender’.[[65]](#footnote-65)

The main terms governing temporary appointments in Israel are outlined in the Civil Service Commission provisions and the Appointments Act, which require that tenders be published.[[66]](#footnote-66) A temporary appointment may occur when a substitute is required due to the temporary absence of a worker, or if there is a need to temporarily staff a position before publishing a tender. In the case of the former, the substitution is limited to a period of one year. However, the Civil Service Commissioner or anyone on the Commissioner’s behalf may approve an extension to this period.[[67]](#footnote-67) Although the provisions of the Civil Service Regulations express a preference that the substitute meet the position’s requirements for education and experience, the Civil Service Commission can approve an exemption from said terms. In the case of a temporary position before a tender is issued, the newly opened position is first offered to workers within the civil service in the form of an internal tender.[[68]](#footnote-68) If a qualified candidate is not found for the job internally, a public tender is announced. All of this adds to the relatively long procedure for staffing positions in the civil service. Under paragraph 10.221 of the provisions of the Civil Service Regulations, until the position is filled by a permanent appointment, it is permitted to temporarily hire someone who is not a state employee as a substitute or a civil servant, subject to Section 18 of the Civil Service Regulations.[[69]](#footnote-69) It is also permitted to temporarily staff a position in the civil service until the tender is published and completed. Furthermore, if no suitable candidate is found through the tender, it is permitted to make an appointment without a tender.[[70]](#footnote-70) The substitution period for an open position for which the tender has not yet been announced is limited to three months, and can be extended by an additional three months.[[71]](#footnote-71) So it seems the meritocratic principles are not violated as long as the best possible substitute is found until the tender is completed, with a maximum time limit of six months.

However, this kind of temporary appointment may cause two potential problems: first, a delay in the announcement of the tender; and, second, the temporary worker can be hired without having to pass any test or prove that he or she meets the minimal requirements for the job. After holding the position for a few months, the tender is announced and then the temporary worker applies for the appointment. In this case, the temporary worker usually becomes the ministry’s favorite candidate due to the experience the worker has gained, and, in most cases, the temporary worker does indeed win the tender. This is what the Supreme Court had to say in the Crown case with respect to the hiring of temporary workers without a tender and the advantage it gives to them:[[72]](#footnote-72)

Apparently this option has become commonplace. It stems from several reasons, not necessarily the need to staff a newly opened position. There is no legal provision banning these employees from running in the tender, nor should there be. Naturally, they have the advantage of knowledge and experience, so their odds of getting hired are greater. As a result, these tenders do not provide equal opportunity. Furthermore, this leads to potential sidestepping of the underlying currents of the mandatory tender.[[73]](#footnote-73)

And thus, we see tenders announced after the temporary worker has held the position for a while, sometime even several years. To a certain extent, the courts[[74]](#footnote-74) endorse the periodic extension of temporary appointments until they become permanent without holding any tender, ruling that such temporary appointments should not be accepted, and a tender should be held, and that any such failure to do so is that of the Civil Service Commissioner, so the employee themselves should not have to face any penalty. In such cases, the temporary worker can be allowed to participate in an internal tender. If the court decides to punish the Civil Service Commissioner and the government ministries for their misconduct, the worker’s appointment should not be approved and the worker should not be allowed to participate in the internal tender. Nonetheless, the suggestion that the temporary worker’s employment shall resume only if that worker wins the appointment tender is an empty statement, since the ministry will most likely prefer the most experienced candidate. It is clear that the experienced candidate has successfully completed the required training and has proven to be competent in the position. This, of course, assumes that the worker meets the minimal requirements for the position, even though this parameter is rather flexible, as described earlier; it is certainly not difficult to adjust the minimal requirements to suit the candidate who was initially appointed temporarily.

Despite its principles to the contrary, the courts thereby validate biased appointments that bypass the regulatory oversight of a public tender. In addition, this endorsement might eventually lead to a legal exemption from the mandatory tender. The government, too, has recognised the problematic trend of temporary workers being employed for long periods on a wide scale. Therefore, it saw fit to grant a one-time exemption from tenders to workers employed as temporary workers for over five years, pending certain conditions.[[75]](#footnote-75) This move reflects the spirit of the court’s critique, suggesting that the temporary worker has an advantage when eventually competing in the appointment tender. A similar exemption was given for the hiring of contract workers with no tender after five years of working for the civil service. The government decided to grant a one-time exemption from tenders for the civil service positions of workers staffed as temporary workers for over five years in the following three categories: civil service positions under special contracts over five years; positions for contract workers who had been integrated into the service under special contracts and had been employed over five years; and positions for outsourced service providers who were later employed directly by the civil service in the same position for over five years.[[76]](#footnote-76) As a result, advisors and contract workers are now automatically integrated into the civil service without any mandatory tender, minimal requirements, or evaluation of qualities and skills.

1. Positions of trust

The core concept of the civil service in Israel, as anchored in the Appointments Act of 1959 and in legal rulings, states that the public service relies on neutral, professional, and apolitical staff appointed in a public, competitive, and equal selection process. The Israeli Civil Service is based on personnel that do not change with the replacement of the minister in charge. This situation reflects the essence of the professional service in the meritocratic model, in which workers are selected based on objective skills instead of political affiliation, and are therefore considered worthy for service any time or under any government. However, as an exception to this meritocratic rule, and under the Civil Service Act and the provisions of the Civil Service Regulations,[[77]](#footnote-77) the prime minister or any minister or government ministry director can appoint someone to a position of trust in their office as they please, without holding a tender. It seems that those in charge of appointing people to positions of trust are the ones who benefit from these workers.[[78]](#footnote-78) However, it is the government and the Civil Service Commission who are responsible for these improprieties. The latter has failed in its mission to exercise its executive powers and act as a guard dog over the issue of positions of trust in a minister’s office.

Many arguments could be made in favor or against appointments of positions of trust. The main argument in their favor is that they help streamline the civil service by ensuring that ministers are surrounded by workers who share the same ideological and political worldview, and thus represent the public as do elected officials. However, it can also be argued that the classic meritocratic model is intended to foster a professional, accountable, objective, and neutral civil service. The use of positions of trust means that the senior management of each ministry changes every time the government changes. As a result, when the elected minister is replaced, so are the director, deputy director, and all those around the minister who are usually employed in positions of trust. This instability in executive civil service positions makes the service shortsighted, prevents long-term planning and hinders the efficiency of the service, which has to adapt to new work methods and agendas every few years.

The public interest is to provide government ministers with the best managerial tools so they can fulfill their public responsibility, while allowing them to appoint people they believe will help them run the government. In addition, it is a matter of fundamental public interest that the position of trust appointments will not become a political prize given to associates who do not have the professional skills required for holding these senior positions. In order to balance between these factors, a limited mechanism for monitoring positions of trust must be established. And indeed, Section 21 of the Civil Service Act sets a special track that allows the government to grant an exemption from holding a tender by recommendation of the Civil Service Committee.[[79]](#footnote-79) Under the Appointments Act and the provisions of the Civil Service Regulations, the Civil Service Commissioner is authorised to approve positions of trust after first defining the requirements of every position of trust, including the job description and minimal requirements.[[80]](#footnote-80) Then, the specific government ministry will determine whether it already employs any state workers who are suitable for the position and whether the person who assumes this executive position should hold a position of trust rather than become a state worker selected by tender.[[81]](#footnote-81)

A State Comptroller inquiry in 2011[[82]](#footnote-82) revealed that no job description or minimal requirements were set for positions of trust before appointments.[[83]](#footnote-83) Rather, the job descriptions and requirements of existing positions were used, some of which had not even been approved by the Civil Service Commission. Another failure identified was that in cases where the list did not include a position suitable for the demands of the prime minister, individuals were appointed to vacant positions even though there was no match between the designated position of trust and the job actual description. Consequently, candidates’ fitness for the position and its minimal requirements were never examined.[[84]](#footnote-84) Indeed, there is a regulatory problem in Israel that is perpetuating these appointments. In almost every paragraph of the Civil Service Regulations and the Appointments Act, the Civil Service Commission is allowed to extend the special appointment, set criteria, or allow exemptions from tenders for special reasons. It has already been noted that despite Israel’s adoption of a form of the meritocratic model, there remain various types of biased appointments in the country, mostly attributable to an only partial enactment of the model and to implementation problems. This section has focused solely on problems arising from faulty mechanisms under the direct or regulatory responsibility of the Civil Service Commission. It is, however, also worth elaborating on the array of mechanisms created to regulate civil service appointments, and noting that there are implementation problems even in the regulatory mechanisms.

1. **Regulatory mechanisms**

As we have seen, several mechanisms were created to regulate civil service appointments:[[85]](#footnote-85) The legally authorised commission, various evaluation committees, the State Comptroller, and the courts. These can be divided into two main regulatory mechanisms: external mechanisms, consisting of the courts, the State Comptroller, and evaluation committees (launched by the government); and internal mechanisms operating under the Commission. In the case of the external mechanisms, the regulation is done retroactively. Thus, these external mechanisms should not be considered genuine regulatory mechanisms but only platforms for control involving some independent and pending appeals from the outside, which can only recommend policy changes. The courts have the tools to totally reverse an appointment or tender, or to disqualify someone from a position, as well as to harshly criticise the conduct of the Civil Service Commission and/or other government ministries. But since only a handful of appeals have been made to the courts to disqualify or reverse a tender, the courts’ function as a regulatory mechanism involves reprimanding and recommending policy changes only.

1. Internal regulatory mechanisms – Civil Service Commission

The Civil Service Commission is an internal regulatory mechanism. It is supposedly much more effective than other government bodies because it has the authority and power to impose change. However, this mechanism is imperfect. The commission is a support unit of a government ministry (currently the Prime Minister’s Office).[[86]](#footnote-86) It is not an independent body overseeing all the government ministries in the matter of all appointments. Its subordination to government ministries creates a dependency between the minister and the Civil Service Commissioner, which could affect the latter’s role as an internal regulatory mechanism in relation to civil service tenders.[[87]](#footnote-87) As the State Comptroller noted: ‘The central unit managing civil service workers should not be subordinate to the ministry where the core and decisive considerations are not administrative, but fiscal’.[[88]](#footnote-88) The Kuberski Committee Report of 1986 mentioned the problems with the Commission’s position within government ministries, in light of the inherent conflict between the interests the Civil Service Commissioner is supposed to represent and the ministry’s financial interests. The report further asserted that the Commission and its leader should be given autonomous professional status.[[89]](#footnote-89)

Due to multiple appeals against the Civil Service Commission and criticism of biased appointments, the Commission recognised its inability to regulate, especially since it is not an independent governmental body. This resulted in a delegation of authority over tenders to the various government ministries in the year 2006.[[90]](#footnote-90) This move essentially eliminated an effective regulatory mechanism and diminished deterrence, as the government ministries, from where the pressure to make certain appointments usually comes, are now in charge of the appointment process, thus potentially perpetuating the trend of biased appointments. As a result of the Commission’s delegation of authority over tenders to the ministries, its appointments unit became a central unit for setting the guidelines and instructions for civil service tenders. The delegation of authority to the ministries was also intended to minimise the pressure the minister can apply to the Commission’s support unit, currently the Prime Minister’s Office. However, it is likely that the minister would actually want to influence senior appointments, which remain in the hands of the Commission.

That the Civil Service Commission in Israel is not independent, unlike the situation in Britain, plays an important role in the criticism it faces regarding to biased appointments, and played an influential part in the decision to delegate part of its authority to ministries. I believe that it would have been more beneficial to establish the Commission’s independence and end its subordination to the Prime Minister’s Office. This would encourage more proper appointments, much in the way the independent mechanism in Britain operates. However, the Commission in Israel is not alone in its lack of independence. The practice of delegating authority to the ministries is also the norm in New Zealand and Australia, which both decided to delegate the civil service administration’s authority. Thus, government ministries are given latitude to make personnel appointments and promotions.[[91]](#footnote-91) Moreover, this delegation of authority even created a new problem, in that there are no clear instructions on how the various ministries should set uniform minimal requirements for similar positions.

1. External regulatory mechanisms

A review of court rulings in Israel from recent years reveals a clear expansion of jurisdiction and intervention in appointments.[[92]](#footnote-92) In some appeals, it can be seen that the court is trying to delegitimise the trend towards biased appointments. Nonetheless, to date, neither the law nor the policies have been changed in order to advance any such shift. I believe the court is actually a secondary regulatory mechanism, lacking any mechanisms of real deterrence and possessing only the ability to make recommendations. The courts’ statements might have an effect on certain conduct and reduce the trend of biased appointments, but they are not sufficient to eliminate the trend completely. The real struggle is against the provisions of the law that enable biased appointments and the kind of court interventions that have been made do not necessarily have an impact on the reality on the ground. For example, in the case of Tzachi Hanegbi,[[93]](#footnote-93) the state prosecuted him for fraud and breach of trust in making an appointment, holding the figure who made the appointment personally responsible. This case represents the first time the Israeli court expanded the grounds and remedies for the lawsuit, setting compensation for those affected by the dubious tender process under review. Since the Hanegbi case, in which I believe the court took a new and brave judicial stance regarding the appointments issue,[[94]](#footnote-94) the court has continued to find legal means to deal with biased appointments in an attempt to eliminate them from the legal system entirely.

In conclusion, one could argue that the courts are not a powerful deterrent against biased appointments. While it appears that the imposition of personal or criminal responsibility is indeed important,[[95]](#footnote-95) this is not the only solution. Rather, imposing a ‘punishment’ is a retroactive measure that could affect people’s conduct *ex ante*, although it does not lead to real policy change that would eliminate biased appointments entirely. That would require changing the law, which the court cannot do.

State Comptroller reports[[96]](#footnote-96) have elaborated on the issue of biased appointments, often expressing the Comptroller’s firm stance against them. Different State Comptroller focus on the intervention of senior ministry officials in the decisions of the evaluation and search committees, as well as in the management of the tender. The first State Comptroller report on biased appointments from 1989 states that: ‘The inquiry revealed that the foul trend of political appointments is common in the full range of positions in the civil service.’[[97]](#footnote-97) Various State Comptroller reports also tend to make recommendations, such as: ‘Appointment processes must be held properly, and the integrity of the considerations must be upheld’. But this criticism by the State Comptroller, on its own, does not represent a regulatory position.

Over the years, the government has launched several public committees to examine civil service appointments.[[98]](#footnote-98) All of them, despite their various operational recommendations, stressed that the main intention of the Appointments Act is to ensure the political independence of the government mechanism by ensuring that appointments are made based on skills and qualities. Most of these committees recommended reducing the number of positions in the addendum to the Appointments Act allowing for exceptions to tenders, and establishing a professional and independent Appointments Committee whose job would be to approve biased appointments under the law, after examining candidates’ skills and qualities. However, the government chose not to implement the various recommendations of the committees – not even those of the State Comptroller. The first committees on public appointments appeared following the change in government in the 1970s, after which the ministers exploited the exemption from mandatory tenders for executive positions in order to appoint their own associates to positions. In response, in 1981, the government instructed its legal advisor to appoint a joint committee of the Justice Ministry and the Commission. This committee, the Gabai Committee, was tasked with examining the government’s authority under Section 23 of the Appointments Act. Shortly after, in 1986, the Civil Service Commission appointed the Dror Committee to examine the existing provisions for classifying the political and partisan activity of civil servants. This committee looked for ways to ensure the administrator’s professionalism and autonomy while allowing the minister to promote his or her policies. The committee stressed the need for a professional and apolitical civil service. Also in 1986, Prime Minister Shimon Peres appointed Chaim Kuberski to lead a committee for civil service reform: the Kuberski Committee. Despite doing the most comprehensive work on this issue in the country’s history, this committee, like its predecessors, had none of its many recommendations implemented. As if there had not been enough committees and recommendations, in 1994, the government appointed yet another one, the Ben Dror Committee, whose job was to set new standards and procedures for those civil service appointments exempt from tenders. It recommended limiting the number of exemptions and the authority to make such exemptions.[[99]](#footnote-99) Then, in 2006 the government appointed the Shamgar Committee to formulate rules of ethics for members of the government.[[100]](#footnote-100) Anyone who examines the civil service’s self-criticism might mistakenly be impressed by the large number and frequency of the appointment committees. However, those who examine what actually happened after the publication of the committees’ recommendations will find that they were not adopted. It is not clear whether there has been a deliberate effort not to examine the committees’ recommendations or if, somehow, the Civil Service Commission actually did examine the recommendations thoroughly but determined that they should not be implemented.

The general approach adopted by the reports of the various committees is that of ensuring the political independence of the government mechanism by making appointments based on skills and qualities. The conclusion is that there is a real need to change the current Appointments Act. Is the meritocratic model Israel sought to implement in its early days the one most suited for the country’s current political, social and security situation? Should the country insist on reform and eliminate any non-meritocratic trend? Should the meritocratic model be modified, or should a different one be adopted? Regardless of the answers to these question, it does not suffice to declare the meritocratic model the best for the country simply because Israel’s early leaders thought it to be so.

1. **A comparison of the meritocratic models**

A review of the appointments in the Israeli civil service suggests that even though the state wanted to abolish the trend of political appointments in its early days and adopt the apolitical meritocratic model, pressure groups[[101]](#footnote-101) thwarted its full implementation and kept pulling away from the model. Furthermore, the country’s regulatory mechanisms failed to slow or stop the trend. Given the gap between the meritocratic ideal and the reality, it is worth questioning the desire of the country’s elected officials in its early days to emulate the utopian meritocratic model and prevent any kind of unprofessional biased appointment. One could argue that only a new Appointments Act that fully adheres to the meritocratic model can bring about the desired change of eliminating unprofessional biased appointments. However, without addressing the issue of pressure groups and trying to marginalise them, even a new act fully in alignment with the meritocratic model will not be able to really change the situation. Therefore, another option is to recognise that the principles of the meritocratic model are not suitable for the type of government in Israel, and therefore consider a new one. The British model Israel chose to adopt is not the only option available in the world. The American model, which accepts political appointments, while rejecting other kinds of biased appointments, is one alternative. In fact, while the United Kingdom and the United States appear to be on opposite sides of the spectrum in terms of appointment-making considerations, each country underwent different processes in addressing similar democratic values to arrive at their different systems. Therefore, it is instructive to compare the two models.

1. The British model

The British model puts a greater emphasis than those of other countries on separating politics from governance, with the aim of protecting and insulating the civil service.[[102]](#footnote-102) All positions in the service are professional, staffed by certified officials who are selected based on their skills. But the British model did not always take this approach. The professional meritocratic service based on skills and qualities is the outcome of a long process. Until 1850, the British model was characterised by staffing positions based on personal connections, as the wealthy lords exercised control over members of parliament and other officials.[[103]](#footnote-103) This state of affairs changed following the Northcote Trevelyan Report of 1854,[[104]](#footnote-104) which called for a ban on political and partisan appointments and for meritocratic appointments and promotions.[[105]](#footnote-105) While the suggested reform was eventually adopted, only in 1870 was it ruled by Order of the Crown that political appointments were an exception to the rule of civil service appointments.[[106]](#footnote-106) By World War I, the scope of appointments subject to aptitude tests and achievement had gradually increased. Thus emerged an evaluation system based on objective criteria for making appointments, rather than referring to what were considered irrelevant considerations, such as politics. To monitor and ensure the implementation of this method, Britain established two bodies to supervise the meritocratic system and to facilitate appeals against tender processes.[[107]](#footnote-107) These bodies are also in charge of regulating appointments to positions legally exempt from the meritocratic model: temporary appointments, renewed appointments of former civil servants (in the same position), and appointments of people with disabilities. These exceptions are not political by nature, and any infringement of the model and its values is thus minimal and measured. Examples of such exceptions include: a temporary worker, even one lacking the objective skills required for the position, who is appointed for a short and limited period; a worker who served in the public service in the past and wants to return is automatically considered suitable; and a worker with a disability is hired because of the social tendency to assist this heretofore excluded population by applying affirmative action. Therefore, these exceptions are measurable and do not harm the overall meritocratic system of the service.

In conclusion, according to the meritocratic model, ideally, the appointments system should be free of extraneous considerations. Any changes in personnel should be based on professional attributes only. All positions are manned by employees who were evaluated and found suitable for the job, since the minimum requirements are set by a professional body in addition to the Civil Service Commission. Moreover, in the British model, this commission is an independent body. The British model thus struck a balance between exemptions from tenders and allowing political appointments for positions of trust, all the while strictly insisting on minimal requirements. Thus, the British model ensures that politically and personally appointed candidates are suitable for the position, even if they did not compete in a tender that treated all candidates equally but were selected due to other considerations. The British model therefore ensures that the service will not compromise its professionalism, even if appointments are made based on extraneous considerations.

1. The American model

The American model combines meritocratic values and political considerations. Also known as the ‘spoils system’, the American model is on the opposite side of the spectrum with respect to the classic British model. In xxxxx, responding to an increase in the number of political appointments as well as the civil service reform, President Garfield asked for an evaluation of qualities and skills of candidates for government appointments based on the model already applied in the United Kingdom. The purpose of the reform was to remove the political pressure of the patronage system and to promote merit-based appointments. The first change within the federal system mitigating the American spoils system model took place in the original Civil Service Act, known as the Pendleton Act of 1883.[[108]](#footnote-108) This act encouraged the setting of rules for making appointments to positions, encouraging adherence to the meritocratic principle and objective measurements of the British model. Although it did not obligate evaluations based on skills and qualities, it did call for the abolition of political appointments. The Pendleton Act established a federal Civil Service Commission responsible for introducing the new system and ensuring the end of political patronage.

The establishment of civil service merit systems in the states followed the changes in the federal system. First, in 1883, the merit system was established in New York and Massachusetts, and over the next 60 years, approximately 20 other states adopted the merit system. By 1940, the merit system was mandated under the Social Security Act of 1940. Due to that act, all civil employees of states were required to be hired under merit principles, similar to employees in the federal service.[[109]](#footnote-109)

Furthermore, the Civil Service Reform Act of 1978 mandated the establishment of two bodies with the responsibility of enforcing the provisions of the anti-corruption law and regulating the ban on political activity.[[110]](#footnote-110) The merit system’s Protection Board serves as a system for appeals against tender processes, based on the Civil Service Reform Act and the Office of Personal Management.[[111]](#footnote-111) The objective of the Board is to ensure that the values of the meritocratic model are reflected in the procedures and practices of human resources departments.[[112]](#footnote-112) The U.S. courts also joined the effort to reduce the incidence of political appointments while still upholding the right of the American government to promote its policies through appointments based on party affiliation. Consequently, while U.S. court rulings limited the number of political appointments,[[113]](#footnote-113) they certainly did not abolish the trend. In fact, the acknowledgement of American legislatures and courts of the importance of adopting the main points of the meritocratic model, which is free of political intrigue, resulted primarily in recommendations as opposed to actual legal mandates to evaluate candidates on the basis of qualities and skills.[[114]](#footnote-114)

Nonetheless, in the U.S. the adoption and improvement of the use of merit-based principles was fairly rapid, resulting in the appointment of well-qualified individuals to all levels of positions, from lower grades to higher positions. However, some of the state and federal positions, which required confirmation by the legislature, were still exempt from merit requirements. Under the new system, appointments of lower grades could only be made through competition, while the higher grades, where individuals in these key positions wield considerable power,[[115]](#footnote-115) were left open to patronage. Today, the U.S. President is entitled to staff nearly 4,000 positions without any tender or Senate approval,and often the president’s team includes only own personal associates throughout the president’s term in office.That said, this kind of appointment is non-competitive but not necessarily solely politically or ideologically based. The Senate is considered the body that regulates such appointments, but it also approves non-competitive appointments. Thus, along with the exemption enabled by the federal system to make political and ideological appointments, the U.S. Constitution fortifies the values of the meritocratic system – equal opportunity for all and a refusal on personal appointments.[[116]](#footnote-116) This section in the constitution recognises two appointment methods: presidential appointments that require the Senate’s approval, such as those for federal courts and directors of government bureaus;[[117]](#footnote-117) and those that don’t require Senate approval, or ‘inferior officers’.[[118]](#footnote-118) The non-competitive appointments system is considered justified and responsible toward voters, maintaining high motivation in the executive branch as well as ensuring a fresh inflow of ideas and initiatives in every term.[[119]](#footnote-119) The basic purpose of the American model is not to prevent an efficient and reliable civil service, but rather to ensure a limited number of effective and talented appointments for the new political administration (much like the positions of trust in the Israeli system) and to arrange positions in the public service designated to support political parties. However, two requirements in the United States are noteworthy. The first is the ‘reduction demand’ and the second is the ‘demand for efficiency and talent’. The Israeli system does not limit the number of positions of trust that are permitted, and the list continues to grow with time.Furthermore, regarding ‘efficiency and talent’, it appears that the American system requires a certain level of both from those appointed to positions of trust, unlike the Israeli system, in which individuals can be appointed to positions of trust without any official minimal requirements, thus opening the door for unfit appointments.[[120]](#footnote-120)

In conclusion, the difference between the U.S. appointments model and the Israeli one is primarily the volume of biased appointments and the level of minimal requirements. The number of appointments based on ideology and politics under the U.S. system is still relatively high,[[121]](#footnote-121) notwithstanding the dramatic increase in merit-based appointments. As a result, the civil service in the U.S. remains professional while still allowing for the appointment of candidates based on their political-ideological affiliation. The question to be asked is whether, even if professionalism is maintained, the appointment of a particular candidate based on ideological or political criteria is therefore biased. The answer is yes. There is no difference between appointing a candidate because of personal or family ties, even if that candidate does not meet the minimal requirements for the job. The U.S. model combines both the demand for qualifications and an allowance for political considerations. Similarly, Israel has not fully adopted a merit system, as it does not insist on a basic set of necessary skills for positions that do not require a tender, such as positions of trust.

1. Integrating meritocratic principles in the American model

The meritocratic principles the United States chose to include in its national model differ from those of the conventional classic meritocratic model and also from those of the Israeli model.[[122]](#footnote-122) One of the examples of a major difference is the minimal requirements, which, in the United States, are usually determined by the director of the department or bureau, and not by an impartial professional body. Even the existence of regulatory bodies, such as the United States Office of Personnel Management and the United States Merit Systems Protection Board, differs from the situation in Israel. These mechanisms have no ongoing contact with the government departments and do not take part in tenders, as does the Israeli Civil Service Commission by virtue of its sending a representative to an evaluation committee. In the United States, these regulatory bodies are independent, unlike the Commission, which is a support unit that is not independent. In the American civil service, both at the federal and state levels, hiring temporary staff is commonplace. These workers do not go through any meritocratic process. In the United States, there are no minimal requirements for such positions or provisions for hiring after a certain period of time, as there are in Israel. Thus, many positions in the United States are filled by external bodies, such as personnel agencies. These workers are not considered state workers and cannot be integrated into the system, and the civil service cannot really regulate the recruitment or the quality of the candidates.

Another major difference between the meritocratic practices adopted in the United States and the classic meritocratic model enacted in Israel is the tender process. There are no mandatory procedures for tenders in the United States. Sometimes there are written tests and/or interviews with a superior, but there are no evaluation committees. That is, unlike written tests, which can objectively evaluate a candidate’s professional aptness, personal interviews (which are not generally conducted in Israel) result in the interviewers’ subjective view of the candidate’s suitability.

Looking to the United States as a source for a civil service selection model for Israel is problematic, mainly because the methods of government in the two countries are different. While ministers in Israel are elected officials, in the United States, the president appoints the leaders of all the departments. In the U.S. federal government, the senior executive staff shares the political agenda of every elected president. Therefore, biased appointments based on politics or ideology are part of the system. Note that, while the search committees in Israel are comprised of several members whose job is to balance the decision so that the best candidate is chosen for the position, in the United States, it is the president alone who makes the recommendation. Furthermore, there are nearly 200 positions the president can staff without Senate approval or the oversight of any outside body. These kinds of positions are currently staffed by nearly 4,000 people. As for the Senate’s oversight over presidential appointments, it should be noted that the Senate rarely disqualifies candidates and, even if it does, the decision is not final. So is there any point in considering Israeli adopting the American model, being that their political systems are so different? Indeed, it does not appear that the American model is suitable for Israel, which has a multi-party political system and which lacks the checks and balances of the American Constitution.[[123]](#footnote-123)

1. Have the British ‘succeeded’ where Israel ‘failed’?

Having determined that the American model is not suitable for Israel, another look should be given to the British model. As discussed, all appointments in the British civil service have strict minimal requirements and are subject to a tender. The Senior Appointments Selection Committee in the United Kingdom was established to oversee appointments of senior executives. This committee is similar to the search committees under Israel’s Appointments Act, but the British have a three-phase process, after which the committee passes its recommendations on to the Head of the Home Civil Service. He or she then passes on their recommendations to the prime minister, who makes the final decision. This is almost identical to the process for appointing senior positions in Israel, where there is also a committee that passes on its recommendation to the government for final approval. However, the fact that in Britain there are two evaluating figures making recommendations to the government ensures a better counterbalance to any extraneous interests.

Another difference between the way the meritocratic model is implemented in the United Kingdom and Israel is the fact that all stages of the appointment process in Britain must be fully documented.[[124]](#footnote-124) This information must be publicly available to all, unlike the situation in Israel vis-a-vis the committee protocols. Under Israeli law, these protocols are required only to include the main points, resulting in very thin records, which are the exact opposite of the fully documented British protocols. The protocols in Britain are also easily accessible to the public, unlike those in Israel, which are available only by demand. If the information on the appointment process were to be published in Israel, like it is in Britain, it seems likely that Israel would witness fewer biased tenders. The more transparent the public system is, the less likely it is to deviate from the legal norms.

The system in Britain established a commission led by an impartial commissioner, unlike the Commission in Israel, which always serves as a support unit dependent on the ministry to which it is attached. The British appointments code lays several ironclad principles for civil service appointments,[[125]](#footnote-125) and those particularly relevant to this discussion will be examined. First, in the British system, candidates are to be selected based on their skills, experience, and qualities (a similar provision appears in the Israel Civil Service Act [Appointments]); After selection, before the appointment takes effect, the chosen candidate in the United Kingdom must be thoroughly vetted by an impartial team appointed by the Commissioner (another regulatory mechanism). All stages of the appointment must be documented and the information about them must be accessible to all. The committees of the British Parliament’s lower house hold hearings to approve senior appointments, which means that it is possible to appeal against the tender without having to go to court. The senior positions are staffed by people only from within the service itself, in contrast to Israel’s search committees that look for candidates from outside the service.[[126]](#footnote-126) And, finally, promotions are based on seniority and skill in the United Kingdom, unlike the system in Israel, where there is a maximum rank civil servants can reach through seniority. Once that cap is reached, they must compete in a tender for ae more senior position.

When considering the American model or the classic British meritocratic model as alternatives to the Israeli model for civil service appointments, whether through complete replication or the adoption of certain principles, one should recognise that the composition of the coalition in Israel is a major cause for the partial implementation of the classic meritocratic model. Calls to restore a classic meritocratic model must take cognizance of the pressure applied by parties in the government to appoint their own cronies. It seems that regardless of what steps Israel decides to take, it must make certain that the model chosen has the right tools to deal effectually with the factors that have caused the meritocratic model in Israel to fail so far. Even prior to choosing the tools, it is imperative to better understand how to address the factors that have undermined the meritocratic system in Israel, and whether the effect they have is actually undesirable. Will Israel choose to marginalise their influence? Or, rather, will Israel recognise and preserve their influence, as the American model does? This analysis is important because, even if Israel chooses the meritocratic model, without addressing the issue of pressure groups and trying to minimise their impact, there is little chance of changing the situation.

1. Pressure groups and position holders in the wake of the coalition composition and method of government

When examining the alternative models, one must take into account the political and legal differences between the countries. It is assumed that it is the law and the organizational structure that lead to biased appointments and regulatory problems in Israel, but they are not actually the cause. The actual cause is the political maneuvering of actors trying to promote their own interests, exploiting legal loopholes, and influencing regulatory figures. Most non-professional appointees are associates of the strong political parties,[[127]](#footnote-127) and thus pressure groups grow even stronger as their interests increase and expand.

The basic question is who are these pressure groups. As implied by this discussion, these pressure groups often consist of position holders, such as government ministers and other executive officials within the civil service.[[128]](#footnote-128) Since the fate of ministers relies largely on party members, these members, too, constitute pressure groups guiding ministers’ interests. Then there are the Knesset members, who significantly influence the implementation of decisions and policy changes that ministers propose to the government. Therefore, they, too, are influential. In addition, the influence of private capital is also a factor due to the increasing number of officials, mostly high-level ones, moving into or expanding their ventures in the private sector. Even without these encroachments into the private sector, many government ministries make decisions that have an immense impact on the private sector, especially at its highest levels. It is clear that the influence of all these so-called ‘pressure groups’ is not unique to the Israeli method of government, but is characteristic of the Western world and democratic regimes in general.[[129]](#footnote-129)

These pressure groups act to expand the list in the addendum to the Appointments Act regarding positions of trust, gradually making the exception to the rule, the positions of trust, the rule itself.[[130]](#footnote-130) Every new position of trust appointment means more power for pressure groups, essentially allowing more biased appointments due to the increasing pressure.[[131]](#footnote-131) In addition, pressure groups have influence both on the minimal requirements for tenders and on the regulators. For example, pressure groups apply pressure to add more positions before the tenders are published and staff these positions using temporary appointments regardless of the appointees’ merits. Or they urge the Commission, as the regulator of civil service appointments, to accept their proposed appointments or publish tenders under their specific minimal requirements.

The Commission is thus pressured both by external groups and by those within the government and the various ministries, including the Ministry of Finance. This ministry in particular urges the Commission to save on the costs of tenders and encourages temporary employment, which opens the gate for legitimizing biased appointments. The democratization of political parties in Israel, at least in part, gave a lot of power to the electoral bodies that choose the party candidates for the Knesset and government (party conventions, registered members, etc.). These bodies’ votes can largely determine the political fate of a candidate for office. Candidates’ dependence on an electoral body that is not anonymous, and that has many members who are employed or would like to be employed in the civil service, poses the danger of the political leadership viewing public offices as a prize to give in return for political support and as a means of strengthening their own position in the party. The political leadership might view such civil service positions a convenient and worthwhile platform for wide-scale politically and ideologically biased appointments.[[132]](#footnote-132)

Here, I would like to examine which model can better cope with these groups by facilitating more effective balancing mechanisms to abolish biased appointments. It is possible that none of the alternative models can actually cope effectively with pressure groups. If this is indeed the case, the best alternative might be to change the existing conditions and modify the model to match the socio-political reality in Israel. And, yet, when choosing an existing alternative model, it seems that the American model, which itself entails a great risk of politically and ideologically based appointments, manages to cope better with pressure groups. On the other hand, the classic meritocratic model sets very strict rules for civil service appointments. It usually succeeds in preventing biased appointments and resisting pressure from various groups, since the law does not allow for loopholes. It sets a careful tender procedure, which mandates minimal requirements even for the equivalent of Israel’s ‘positions of trust’. And all this is regulated and guided by a professional independent body similar to the Civil Service Commission. So what conclusions can be reached?

1. **Crossroads**

We now know that although Israel adopted the British model mandating meritocratic appointments, its civil service is still afflicted by biased appointments. Evidently, the meritocratic model implemented in Israel does not provide any legal arrangement that can entirely prevent biased appointments. Rather, the model as adopted in Israel facilitates deviations from meritocratic appointments. Israel now stands at a crossroad facing two alternatives. Should the country adopt the classic meritocratic model, as the country’s leaders proposed early in its history, and try to totally prevent non-professional appointments? Or should Israel recognise that the principles of the meritocratic model do not suit the Israeli method of government, and consider an alternative?

The Israeli model strictly forbids considering party affiliation as a factor in appointments.[[133]](#footnote-133) However, the legislature differentiates between political favoritism for civil service positions and favoritism for positions in the minister’s circle of trust, where it may be justifiable to place someone who shares the minister’s views. Consequently, the Israeli legislature made an exemption from purely meritocratic appointment-making in the form of positions of trust.[[134]](#footnote-134) While these positions have already been discussed, it should be emphasised that the list of positions exempt from tender is not a closed one. It has changed and increased over the years. Thus, this aspect of biased appointments in the Israeli model could be seen as an open floodgate, edging Israel closer to the American model. However, it is also arguable the Knesset tried to mitigate biased appointments by limiting them to a specific time period. Indeed, positions of trust are limited to the minister’s term. Still, the candidate chosen for the position of trust is not blocked from being appointed to another such position, be it for the same minister or another one. This practice can also be seen in the British model. However, unlike the Israeli model, the British one sets a very low cap on positions of trust, with no possibility of changing it. In comparison to the British, and even the Israeli one, the politicization in the American model is striking, as is the weight it gives to political influence, which far exceeds that seen in the British meritocratic model or the Israeli model. While the trend favoring political appointments has diminished in the United States, following substantial criticism of the politicization of the American civil service, there are still many positions based on party affiliation.[[135]](#footnote-135) When a candidate is evaluated, party affiliation is an acceptable factor. Therefore, the U.S. civil service model is not free of political appointments; some designated appointments are made as positions of trust, while for some appointments, political affiliation is part of the criteria when evaluating a candidate for the position.

The Israeli model sets minimal requirements for tenders, determined by the Civil Service Commission, the ministry or the relevant support unit.[[136]](#footnote-136) The problem here is twofold. First, the ministry or support unit may lack the professional qualifications to set minimal requirements for the position. Second, the ministry may be subject to substantial pressure from the outside to set particular requirements for the position. As a result, there is the challenge of setting relevant minimal standards that are neither too narrow or too broad, and that include reasonable education requirements. Essentially, biased appointments for general positions and positions of trust where a tender is not held are made possible because no minimal requirements are set. The British model, on which the Israeli model’s minimal requirements were based, strongly favors skill and professionalism for all positions in the civil service. Unlike the Israeli model, every position in the British civil service has minimal requirements that are strictly vetted, including positions of trust and other positions exempt from tender. In the American model, the minimal requirements are set by the equivalent of the Civil Service Commission, which is completely independent. This process is totally different from the Israeli model. The American model is partially similar to the British model in that it mandates minimal requirements for some of the positions of trust. For example, the president may appoint associates with either shared political views or who are connected personally as long as they are qualified to perform the job and meet the minimal requirements. But these requirements are set by the president, not by a commission.

It appears that the decision as to how much Israel wants to strengthen the bond between administration and government ranges from practical to ideological. Although the Israeli model is gradually becoming more like the American one. I do not believe that it is the most suitable for coping with Israel’s local reality over time, especially due to the different political systems. Rather, sharing the views of Israel’s early leaders, I suggest that the classic meritocratic model of the United Kingdom is the most suitable for Israel. Given that the current legal and political systems are based on the British meritocratic method, any deviation from the meritocratic appointment method must be done carefully, while considering complementary changes in the method of government. In lieu of such changes, it is necessary to block any legal permission to make biased appointments by reforming the existing law.

1. **Conclusion**

Considering the problems that biased appointments create, it is hard to understand why the legislature has not acted to change the provisions of the Appointments Act. The meritocratic model has not been fully implemented, as evidenced in the various sections of the Appointments Act permitting biased appointments as an exemption from meritocratic appointments. I believe we should uphold the pledge of the country’s founders to preserve the classic meritocratic model, and thus eradicate the influence of pressure groups. In order to emulate the classic meritocratic model, the existing model must improve in the following three areas: First, the minimal requirements must be changed, with minimal requirements mandated for every position (including temporary appointments, exemptions from tenders, and search committees), as is the case in both the United States and Britain. Second, the Civil Service Commission should be transformed into a professional and independent body by removing ministries’ authority over it, as is the case in the United States and the United Kingdom. This move will help set reasonable minimal requirements and will also promote the regulation of tenders and compliance with minimal requirements. Finally, the number of appointments exempt from tender should be limited by reviewing the list of positions exempt from tender in the addendum to the Appointments Act, shortening it, and placing a general cap on the number of positions that can be exempt.

1. *Report on Political Appointments and Irregular Appointments: Ministry of the Environment*, State Comptroller's Office, State Comptroller's Office, (2004) (in Hebrew). [↑](#footnote-ref-1)
2. See also: *Annual Reports* 56b*,* State Comptroller's Office, 1995; 249-269. [↑](#footnote-ref-2)
3. HCJ 3094/93 The Movement for Quality Government in Israel v. State of Israel*,* IsrSC 47(5), 404 (year); HCJ 2533/97The Movement for Quality Government in Israel v. The Government of Israel*,* IsrSC 51(3), 46 (year); HCJ 1993/03 The Movement for Quality Government in Israel v. The Prime Minister*,* IsrSC 57(6), 217 (year);HCJ 154/98 Histadrut Haovdim Haclalit v. State of Israel*,* IsrSC 52(5), 111 (year) [hereinafter: *Einstein Case*]; HCJ 703/87 Kraon v. Civil Service Commission, IsrSC 45(2), 512 (year); HCJ 4284/08 Samuel Klepner v. Israel Postal Company*,* IsrSC 63(3), 766 (year).  [↑](#footnote-ref-3)
4. Navot Doron *Improper Political Appointments in Israel,* Tel Aviv: Harold Hartog School of Government & Policy, Tel Aviv University (2007) [in Hebrew]. [↑](#footnote-ref-4)
5. Daphne Barak-Erez, *Comparative Law as a Practice – Institutional Aspects, Cultural and Practical*, 81(4) Din Udvarim (Haifa Law Review) (2008) [in Hebrew]; Alfredo M. Rabello and Pablo Lerner, *The Role of Comparative Law in Israel*, 21Mechkarei Mishpat (Bar-Ilan University Law Review) 89 (2004) [in Hebrew]. On the differences between Israel, Britain and the United States, and what may help refine the answer to the question of which model of civil service staff appointments is more appropriate to Israel, see also: Daphne Barak-Erez, *The Institutional Aspects of Comparative Law* 15 Columbia Journal of European Law 477, 488-489 (year); O. Kahn-Freund, *On Uses and Misuses of Comparative Law* 37(1) Modern Law Review 1 (1974). [↑](#footnote-ref-5)
6. For a discussion of how the Israeli state service description resembles the British Civil Service See: Itzhak Zamir, *Ethics in Politics*, 17 Is. L. Rev 250, 277 (1986). [↑](#footnote-ref-6)
7. Law and Administration Ordinance, 5708-1948. [↑](#footnote-ref-7)
8. Daphne Barak-Erez, *supra,* note 5. [↑](#footnote-ref-8)
9. *A Report: General Inspection of the Civil Service and Other Bodies Supported by State Budget,* Public Enquiry Committee (1989) (The Koberski Committee), Vol. 1.Jerusalem: Government Printing Office [in Hebrew]. [↑](#footnote-ref-9)
10. Civil Service Law (Appointments) 5719-1959 (hereinafter: *Appointments Act*(. [↑](#footnote-ref-10)
11. Section 19 of the Appointments Act and the remarks of honor Strasberg-Cohen in the *Einstein* case, *supra* note 3. [↑](#footnote-ref-11)
12. I. Zamir, *supra,* note 6; and *Einstein* case, *supra,* note 3, pp. 120-122. [↑](#footnote-ref-12)
13. HCJ 4566/90 *David Dekel v. Minister of Finance,* IsrSC 45(1) 028 (year). [↑](#footnote-ref-13)
14. HCJ 313/97 *Avraham Exclrod v. Deputy Mayor of Jerusalem,* IsrSC 22(1) 80. [↑](#footnote-ref-14)
15. At the date of the establishment of Israel in 1948. [↑](#footnote-ref-15)
16. D. Dery *Political Appointments in Israel: Between Statehood and Partisanship.* The Israel Democracy Institute, Hakibbutz Hameuchad, Israel (1993) [in Hebrew]. [↑](#footnote-ref-16)
17. *Einstein* case, supra, note 5, p.120. [↑](#footnote-ref-17)
18. Knesset, 1424-1953. [↑](#footnote-ref-18)
19. *Ibid.* [↑](#footnote-ref-19)
20. Civil Service Appointment Act Bill, 365-1958. [↑](#footnote-ref-20)
21. In the early 1960s, the Service Committee and the Finance Committee of the Knesset determined rules regarding management aspects of the tender process. The rules appear in: State Service (Appointments) (Tenders, examinations and tests) Act, 1588-1961. In addition to Section 19 of the Appointment Act, section 18a of the Government Companies Law, 1975 determines tender duties. Regarding statutory authorities, see Section 17 (b) of the Ports and Railways Authority, 1961 [see HCJ 6673/01 *Movement for Quality Government v. Minister of Transportation,* IsrSC 51(1) 799 (year)].With regard to the local authorities, see HCJ 1086/94 *Zuker v. Tel Aviv Municipality,* IsrSC 49(1) 139 (year). [↑](#footnote-ref-21)
22. N.L.C 44/ 4-20 *Halamish v. Tel Aviv Workers Council*, IsrLC 15, 320 (year). [↑](#footnote-ref-22)
23. *Ibid*. p. 327. [↑](#footnote-ref-23)
24. N.L.C 53/ 3-171 *Yihiya v. State of Israel*, IsrLC 25, 479, 485 (year).In the matter of state companies,see State Comptroller's Office, *Report No. 39*, 1989 (in Hebrew) and State Comptroller's Office, *Report on* *Appointment of Directors of Government Companies*, Jerusalem: State Comptroller's Office, 1989 (in Hebrew). [↑](#footnote-ref-24)
25. See ‘*Monitoring the appointment of senior civil service’*, Knesset Research and Information Center Report, September 2004; and ‘*Political Appointments in the Public Service in Western Europe*’, Knesset Research and Information Center Report, November 2004. [↑](#footnote-ref-25)
26. Regarding biased appointments, see HCJ 703/87, *supra,* note 3. Regarding the existence of political appointees see: HCJ 5657/09 *The Movement for Quality Government v. The State of Israel,* IsrSC (unpublished, November 24th 2009). Regarding the arguments against justifying political appointees, see I. Zamir *Political Appointments*, 20 Is. L. Rev 19, 26 (1990). [↑](#footnote-ref-26)
27. ‘21. The Government may, on the basis of a proposal from the Service Committee and subject to a published notice in the “Reshumot”, determine jobs and types of jobs to which the tender obligation referred to in section 19 shall not apply, and section 11 shall not apply to the Service Committee proposal; The Service Committee may, whether normally or in a particular case, permit, under conditions to be determined, or unconditionally, an appointment to a position without being declared as aforesaid, if the candidate passes to the civil service under this Act….’ [↑](#footnote-ref-27)
28. ‘23. A person from one of the positions specified in the Second Schedule to this Law shall not be appointed except with the approval of the Government and under the conditions to be determined; The government may add to and subtract from the list of jobs in the second appendix.’ [↑](#footnote-ref-28)
29. Paragraph 11.968 of the Civil Service Regulations. See also Israeli Government Resolution No. 345 dated 09.14.1999. [↑](#footnote-ref-29)
30. HCJ 154/98, *supra,* note 3. [↑](#footnote-ref-30)
31. Israeli Government Resolution No. 345, September 1999. [↑](#footnote-ref-31)
32. Paragraph 11.968 in the Civil Service Regulations. For a review regarding the search committees; see State Comptroller's Office, Annual Report 61b, 2010. [↑](#footnote-ref-32)
33. Annual Report, *ibid*, p. 37. [↑](#footnote-ref-33)
34. Thus, Section 6 of the Appointments Act states that the appointment of the Civil Service Commissioner will be in the hands of the government and Section 19 does not apply. Section 12 provides a similar procedure regarding the appointment of CEOs of government offices. [↑](#footnote-ref-34)
35. This course of action appears extensively in paragraphs 11.963 to 11.967 and sections 10 and 11 of the Appointments Act. [↑](#footnote-ref-35)
36. Government Decision No. 91, 05.10.2009, Section II. [↑](#footnote-ref-36)
37. Government Companies Law, 1975. This sets minimum qualifying conditions and instructions for the Appointments Committee, which is responsible for supervising compliance with these conditions. For further details, see Daphne Barak-Erez, *Judicial Politic*, Crime Report 8, 370 (1999). [↑](#footnote-ref-37)
38. HCJ 1570/07 *Ometz NGO v. Minister of Public Security* (unpublished, February 25th 2007). [↑](#footnote-ref-38)
39. State Comptroller's Office Reports, *supra,* note 35. [↑](#footnote-ref-39)
40. Section 11 of the Appointments Act. [↑](#footnote-ref-40)
41. *Ibid.* [↑](#footnote-ref-41)
42. The Civil Service Act was published on April 15th 1959 and at that time there were nine positions under Article 23. Today there are 75 position types listed, which represents an increase of over 800%. [↑](#footnote-ref-42)
43. State Comptroller's Office Reports no. 61b, *supra,* note 35, p. 38. [↑](#footnote-ref-43)
44. HCJ 154/98, *supra,* note 3. [↑](#footnote-ref-44)
45. *Ibid*. p. 129. [↑](#footnote-ref-45)
46. State Comptroller's Office Reports no.61b at p.38, *supra,* note 35. [↑](#footnote-ref-46)
47. *Ibid.* p. 60. [↑](#footnote-ref-47)
48. *Ibid.*  [↑](#footnote-ref-48)
49. The Government Companies Law further provides in Section 17(c) that the Minister of Finance may, in consultation with the Government Companies Authority and with the approval of the Knesset Finance Committee, proscribe regulations regarding the qualifications of directors [↑](#footnote-ref-49)
50. L.C. (Jer. 1184/07 Revital Yogev v. The State of Israel(unpublished, March 7th 2007). [↑](#footnote-ref-50)
51. See D.C.C (T.A.) 1295/94 Epshtein v. Ministry of Religious Affairs*,* IsrSC 26(6) 895 andM.C.M 6352/01 Israeli News v. Minister of Communications*,* IsrSC 46(2) 94, 144. [↑](#footnote-ref-51)
52. On the problems in determining the threshold conditions, see State Comptroller's Office Report no. 39, p. 642, *supra,* note 35. [↑](#footnote-ref-52)
53. An example in this regard: N.L.C 400024/98 New Unionizing of Workers v. Zim - Israel Navigation IsrSC 33 (11). [↑](#footnote-ref-53)
54. For the claim that minimum requirements are not always determined in a relevant manner for the position and may even discriminate between candidates, see see L.C. (Jer.) Center for Women's Justice v. Rabbinical Courts Administration (unpublished, November 26th 2008). [↑](#footnote-ref-54)
55. See Articles 13 and 14 of the Appointments Law. [↑](#footnote-ref-55)
56. The Court also held that there may be changes to the minimum requirements of a particular job after some time. This decision is reasonable, fair, practical and proportionate, and indeed necessary for the purpose of improving the public service. See L.C. (T.A.) 2001/07 Achmed Zuabi v. The State of Israel (unpublished, August 17th 2008). [↑](#footnote-ref-56)
57. The condition can be classified only as a benchmark and thus gives the Commission discretion in choosing the best offer. [↑](#footnote-ref-57)
58. The Annual Report 2010, published by the Civil Service Commission, pointed out that 539 inquiries and complaints had been filed that year. Of those, 75% involved reservations concerning a tender procedure, while 46% were about the commission of examiners. [↑](#footnote-ref-58)
59. Petition regarding the composition of the Commission N.L.C. 621/07 Shmuel Gonen v. Ruth Zuaretz (unpublished, September 21st 2008). [↑](#footnote-ref-59)
60. §§11.454 to 11.457 of the Civil Service Regulations. [↑](#footnote-ref-60)
61. Regarding political lobbying of members of a tender committee and the effect on one or more representative members of the Commission, which establishes grounds for disqualification of the tender conduct, see HCJ 606/86 Abdel Hay v. Director of the Ministry of Education and Culture, IsrSC 41(1) 795. [↑](#footnote-ref-61)
62. Administrative Procedure Amendment Act (Decisions and Reasons) 1959. [↑](#footnote-ref-62)
63. HCJ 758/88 Kendel v. Minister of the Interior*,* IsrSC 41(4) 505, 528. [↑](#footnote-ref-63)
64. HCJ 3751/03 Yossi Ilan v. Tel Aviv Municipality*,* IsrSC 59(3) 817. [↑](#footnote-ref-64)
65. State Comptroller's OfficeReportno. 52a, 291 (2001) (in Hebrew). [↑](#footnote-ref-65)
66. Article 19 of the Appointments Act. [↑](#footnote-ref-66)
67. Or for the absence of the employee, whichever is shorter, see paragraph 18.141 of the Civil Service Regulations. [↑](#footnote-ref-67)
68. See Paragraph 12.111a of the Civil Service Regulations. [↑](#footnote-ref-68)
69. See Paragraph 18.131 of the Civil Service Regulations: ‘It is vital that the role of the job will be carried out continuously and without delay’. [↑](#footnote-ref-69)
70. Paragraphs 11.958 and 18.131(e) of the Civil Service Regulations. [↑](#footnote-ref-70)
71. See Paragraph 18.135 of the Civil Service Regulations. [↑](#footnote-ref-71)
72. HCJ 703/87, *supra,* note 3. [↑](#footnote-ref-72)
73. *Ibid.* p. 523. [↑](#footnote-ref-73)
74. N.L.C 5134/01 Nadav Shefer v. The State of Israel and the Ministry of Health (unpublished, August 1st 2002) and N.L.C 388/99 Jacob Hason v. State of Israel Ministry of Construction and Housing, IsrSC 39(1) 358. [↑](#footnote-ref-74)
75. Government decision CL/ 9 dated July 5th 2001 under Section 21 of the Appointments Act clarified that civil service regulations do not limit the extension of the temporary appointment, so the temporary appointment can be extended without limit. [↑](#footnote-ref-75)
76. *Ibid.* [↑](#footnote-ref-76)
77. Article 21 of the Appointments Act. [↑](#footnote-ref-77)
78. The Prime Minister, minister, or CEO. [↑](#footnote-ref-78)
79. A committee which has 11 members headed by the Civil Service Commissioner, with five participants who are government agency executives and five public officials who are not civil servants. [↑](#footnote-ref-79)
80. Resolution no. BK/97 of the Ministerial Committee for State Control dated October 11th 2005, which was given the status of a Government decision on the same date (no. 4360). [↑](#footnote-ref-80)
81. See also the rules of the Civil Service (Appointments) (Tenders, Examinations and Tests) Act, 1961 and the Notice of Civil Service Commissioner NV/41 dated June 18th 1996. [↑](#footnote-ref-81)
82. *Employment of workers in positions of personal trust in the Prime Minister’s Office Report,* State Comptroller's Office*,* (2011) (in Hebrew). [↑](#footnote-ref-82)
83. In the Prime Minister’s Office. [↑](#footnote-ref-83)
84. The State Comptroller's report found that although six positions were defined as positions of trust, these definitions actually referred to types of positions, and, in practice, the Prime Minister's Office had 56 positions that were positions of trust. [↑](#footnote-ref-84)
85. For further elaboration, see A. Shapiro, *Appointments to Senior Positions in the Civil Service and Supervision*, Parliament Sheet (69), the Israel Democracy Institute website. (2011) [in Hebrew]. [↑](#footnote-ref-85)
86. The Civil Service Commission was established in 1950 under the name ‘Commission Mechanism’ and was under the auspices of the Prime Minister's Office. In 1961, the Commission moved to a unit under the auspices of the Ministry of Finance. Since then, it has moved back and forth between the Prime Minister's Office and the Ministry of Finance. Today, the Civil Service is a unit of the Office of the Prime Minister. [↑](#footnote-ref-86)
87. See the remarks of Y. Rafael and S. Rosenberg, both Israeli Knesset members, at the Knesset Cabinet, no.25, 1959, pp. 366, 552. Similarly, Israeli Knesset member Yakov Riftin raised the question of whether the general Civil Service Commission should be a government function and why it is not subject directly to the Knesset (p. 371). On the other hand, see the response of Prime Minister David Ben-Gurion at the same cabinet meeting, in which he argued that it is impossible to revoke the mechanism of the Cabinet from the minister; it alone is responsible for all officials (p. 630). [↑](#footnote-ref-87)
88. State Comptroller's Office*, Report*, no.11[1960] 19 (in Hebrew). [↑](#footnote-ref-88)
89. Public Enquiry Committee, *supra,* note 11, pp. 103-104. At that time, the Civil Service Commission was under the Ministry of Finance. [↑](#footnote-ref-89)
90. ‘Staffing through tenders in the Civil Service’ Provisions and implementation from September 2006. Also see the Civil Service Commission Circular dated January 3rd 2007. Delegation of authority to carry out all tenders, including internal office and public tenders. Senior positions’ tenders remain the responsibility of the Civil Service Commission. [↑](#footnote-ref-90)
91. B.G.[Peters, & J. Pierre, (eds) (2004) Politicization of the civil service in comparative perspective.](http://onlinelibrary.wiley.com/doi/10.1111/j.1475-6765.2007.00717.x/full" \l "b44)  [↑](#footnote-ref-91)
92. Daphne Barak-Erez, *supra,* note 31. [↑](#footnote-ref-92)
93. *Supra,* note 5. [↑](#footnote-ref-93)
94. Another case held that a violation of the Public Authority tenders is an act of lack of good faith: N.L.C 1027/00 Hadaya Ali v. The Local Council of Beit Jann, IsrSC 37, 491, 505-506. There, the court imposed personal liability. This option was hinted as a possibility earlier in HCJ 4284/08, *supra,* note 3. [↑](#footnote-ref-94)
95. Regarding the disciplinary tribunal, see: Daphne Barak-Erez, *Administrative Law and the Fight against Government Corruption,* Mishael Cheshin Book (Tel Aviv: Israel Bar Publishing, 2009) (in Hebrew) 213, 238. See also: I. Zamir *supra,* note 29, which held that it is possible that in certain circumstances, the appointment for political reasons will also constitute a criminal offense. [↑](#footnote-ref-95)
96. *Report* no. 39, State Comptroller's Office, *supra,* note 26; *Report* no. 41, State Comptroller's Office, May 22nd 1991; *Report* no. 43,State Comptroller's Office, April 1st 1993; *Report* no. 44, State Comptroller's Office, April 21st 1994; *Report* no. 46, State Comptroller's Office, April 15th 1996; *Report* no. 47, State Comptroller's Office, April 16th 1997; *Report* no. 48, State Comptroller's Office, April 9th 1998; *EPA Report*, State Comptroller's Office, *supra,* note 3; *Report* no. 61b, State Comptroller's Office, *supra* note 35. [↑](#footnote-ref-96)
97. *Report* no. 39, State Comptroller's Office, *supra,* note 26. [↑](#footnote-ref-97)
98. *A Report: Review Committee Questions Involving the Appointment of People without Tender (The Meir Gabai Report), Vol. 1.* Public Enquiry Committee, Jerusalem: Government Printing Office (1982) [in Hebrew]; Koberski Committee*, supra,* note 11; *The Commission to Examine the Existing Provisions Regarding the AQualification of Political Party Activity and State Employees (The Dror Committee), Vol. 1.,* Public Enquiry Committee Government printing office, Jerusalem (1989) [in Hebrew]; *A Report: The Committee to Formulate Criteria and New Procedures for Senior Positions in the Civil Service Exemption from a Tender (Headed by Retired Judge Mordechai Ben-Dror), Vol. 1.* Public Enquiry Committee (1995) Jerusalem: Government Printing Office, Jerusalem [in Hebrew]. [↑](#footnote-ref-98)
99. The committee did not discuss directly the essence of Article 23 of the Appointments Act or the interaction between sections 19 and 21 of the Appointments Act. [↑](#footnote-ref-99)
100. Resolution No. 194 dated June 25th 2006. [↑](#footnote-ref-100)
101. Below, at part E. [↑](#footnote-ref-101)
102. [↑](#footnote-ref-102)
103. D. Dery *supra,* note 16, pp. 28-29. Peter G. Richards *Patronage in British Government*. Toronto: University of Toronto Press (1963). [↑](#footnote-ref-103)
104. *Ibid*, pp. 41-48. [↑](#footnote-ref-104)
105. *Ibid*. [↑](#footnote-ref-105)
106. Richards, *supra,* note 106, pp. 49-54. [↑](#footnote-ref-106)
107. See: Office of The Civil Service Commissioners (OCSC) and Commissioner for Public Appointments (OCPA). See also Civil Service Commissioners Recruitment Code, Sect. 2.2. [↑](#footnote-ref-107)
108. Civil Service Reform Act, U.S.C. (1883), after a proposal by Senator Charles Sumner 1864: ‘Appointment by Competitive Examinations’. See: Robert Maranto *Politics and Bureaucracy in the Modern Presidency,*  Westport, CT: Praeger Press (1993), p. 12; Richard Rose,with Klaus Dieter Schmidt *Public Employment in Western Nations* Cambridge: Cambridge University Press (1985).. [↑](#footnote-ref-108)
109. Richard C. Kearney, *Labor Relations in the Public Sector,* New York: Marcel Dekker, , (1984), p. 167. [↑](#footnote-ref-109)
110. Civil Service Reform Act. U.S.C. (1978). [↑](#footnote-ref-110)
111. See: <http://www.opm.gov/BiographyofAnIdeal/PU_CSreform.htm> [↑](#footnote-ref-111)
112. George A. Krause, David E. Levis, James W. Douglas *Political Appointments, Civil Service System, and Bureaucratic Competence; Organizional Balancing and Executive Branch Revenue Forecasts in the American States,*. American Journal Of Political Science, 50: 770–787 (2006). [↑](#footnote-ref-112)
113. *Elrod v. Burns* 427 US 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). [↑](#footnote-ref-113)
114. George A. Krause, David E. Levis, James W. Douglas, *supra,* note 117. However, they still believed there was room for appointments based on party affiliation. [↑](#footnote-ref-114)
115. Such as collector, chief of bureau, and postmaster. [↑](#footnote-ref-115)
116. 5 U.S.C. § 2301 b (1) and b(2) and § 2302. [↑](#footnote-ref-116)
117. The U.S. terminology is ‘Department Head’. [↑](#footnote-ref-117)
118. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1241-1245 (1994). [↑](#footnote-ref-118)
119. I. Zamir *Political Appointments as an Expression of Government Corruption*, National Security Studies, Vol. 9, 37, 47. See also State Comptroller's Office Reports no.39, *supra,* note 35, p. 627. [↑](#footnote-ref-119)
120. There is no determination of the threshold in advance, but the Commission has discretion in determining the criteria for selection. See Lior Ben David *Political Appointments in the Public Service in Western Europe*, Knesset Research and Information Center Report, 2004. [↑](#footnote-ref-120)
121. Even the Pendleton Civil Service Reform Act of 1883 limited the number of political appointments but did not reject them. We thus see that in the American system, there is a limit, while in Israel,there is no limit. [↑](#footnote-ref-121)
122. Source: Personal interview conducted with Professor Jack Biermann at Boston University, US, October 3rd 2011 as part of my stay as a Visiting Scholar at Boston University. [↑](#footnote-ref-122)
123. Anirudh V.S. Ruhil and Pedro J. Camoes, *What Lies Beneath: The Political Roots of State Merit Systems,* JoUrnal of Public Administration Research and Theory, Vol 13 No. 1 (2003) pp.27-42. [↑](#footnote-ref-123)
124. Details can be found at: http://publicappointmentscommissioner.independent.gov.uk/publications/annual-reports/ [↑](#footnote-ref-124)
125. On the requirement to regulate the appointment procedure in the civil service, See: [www.ocpa.gov.uk/index2.htm](http://www.ocpa.gov.uk/index2.htm) [↑](#footnote-ref-125)
126. See: [www.parliament.uk/commons/lib/research/notes/snpc-03161.pdf](http://www.parliament.uk/commons/lib/research/notes/snpc-03161.pdf) [↑](#footnote-ref-126)
127. The appointment of an unprofessional party is always in the absence of appropriate skills, and can therefore be considered a biased appointment. [↑](#footnote-ref-127)
128. For examples of these positions: the Civil Service Commissioner, CEOs and VPs, various commissioners, the Supervisor of Banks and more. [↑](#footnote-ref-128)
129. I. Galnoor, *The Public Sector: Development, Structure, Function and Reforms*, *ACADEMON*, Jerusalem (2007). [↑](#footnote-ref-129)
130. Dafna Schayek, *Supervision of Appointing Senior Civil Service*, Knesset Research and Information Center Report, 2004. [↑](#footnote-ref-130)
131. *Annual Report* 56b, State Comptroller's Office, , *supra,* note 4, pp. 21-24, 28; *Reports*, State Comptroller's Office, *supra,* note 86. [↑](#footnote-ref-131)
132. D. Dery, *supra,* note 16. Regarding the size of the problem, see HCJ 2533/97 and HCJ 1993/03, *supra,* note 3. [↑](#footnote-ref-132)
133. This issue appears in the Civil Service rules, is emphasised in rulings and in the Attorney General instructions, and regulated in the Civil Service Law (Classification of Party Activity and Collection of Funds), 1959. [↑](#footnote-ref-133)
134. Employees of positions of trust will be employed under Article 1(16) to the Civil Service Law (Appointments) (Special Contract), 1960. [↑](#footnote-ref-134)
135. This is in relation to the size of the public service. These are 200 types of positions, representing about 4,000 employees. [↑](#footnote-ref-135)
136. Following the devolution of powers from the Civil Service Commission to the offices, the Civil Service Commission remains responsible only for tenders for the highest ranking positions. [↑](#footnote-ref-136)