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THE QUIET REVOLUTION OF ISRAEL'S PUBLIC PROCUREMENT LAW

Hadas Peled

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ABSTRACT

This article gives a legal-historical outlook on the development of the Israeli procurement law, the main achievements and challenges, and the "quiet revolution" it is going through. This article analyses the respective roles of the three branches: the legislature, the executive, and the judiciary from an institutional vantage point, in designing the public procurement legal framework. This, while considering the greater socio-political and economic context. Israel's public procurement regime is undergoing significant changes. The most recent changes involve a greater degree of professionalism by different governmental units; e-procurement; e-tendering; and a pilot of e-guarantees. Furthermore, the government is promoting public-private partnerships (PPPs) by engaging in more sophisticated long-term procurement models. Moreover, the decision of the Supreme Court of Israel in *Bibi Roads Earthmoving & Development Ltd v Israel Railways Ltd* is an important milestone representing a formalistic approach in contract law interpretation of government procurement contracts. This decision had a profound impact on the procurement cycle as a whole. A proposal for a revision of the Mandatory Tenders Regulations, aimed at increasing competition and diversity of suppliers by giving the government/executive more discretion in the procurement process, is now on the table. Within this context, the judicial overhaul promoted by the 37th government and its ramifications on public procurement law is briefly discussed.

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THE QUIET REVOLUTION OF ISRAEL'S PUBLIC PROCUREMENT LAW

Hadas Peled*

LLB, LLM, PHD

Lecturer at Bar Ilan University, Israel

1 Introduction

The size of Israeli public procurement is estimated to be 14% of its GDP.[1] Roughly 3% is managed by the centralized Government Procurement Administration.[2] While the Israeli economy is consistently shifting toward a greater degree of privatization, large parts of the economy remain dominated by public procurement. For example, the health and education systems are primarily publicly funded and subject to public procurement law. Infrastructure and utilities, including electricity, energy, and transport, are dominated by public financing and state-owned companies which manage the development and operations of these sectors. The state also owns the majority of land. Therefore, development of real estate projects often involves public procurement procedures. Security, emergency, and safety related spending are publicly funded and therefore falls within the scope of public procurement. Social services are also subject to public procurement law.[3] Thus, public procurement continues to influence substantial parts of the economy and daily life.

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[1] Open Contracting Partnership 2020. See OCP2020-Global-Public-Procurement-Spend.pdf (open-contracting.org).

[2] See the Government Procurement Administration website Welcome to the Government Procurement Administration website (mr.gov.il).

[3] The 35'th Government, Government Decision No. 489, November 1, 2020 מדיניות ממשלתית למדידה והערכה בשירותים חברתיים במיקור חוץ | מספר החלטה 489 | משרד ראש הממשלה (www.gov.il).

The paper offers an historical perspective on the evolution of Israeli procurement law, assessing it from the institutional lens of the respective roles of the three branches: the legislature (the Knesset), the executive/government, and the judicial branch. Israel is a common law mixed jurisdiction. The Israeli parliamentary democracy is based on the separation of powers doctrine. The government/executive plays a dual role in setting regulations not enacted by the Knesset, creating policies and budgets, and executing and implementing such policies through its ministries, state owned companies, and other organs. In the absence of a written constitution, there is an ongoing debate regarding the roles, powers, and functions of each of these branches. This debate has been at the center of wide-spread demonstrations in view of proposed overhaul reforms proposed by the 37th government. This article analyses the legal milestones marking the re-orientation of the different functions of the executive/government, the legislature, and the judiciary in developing public procurement law in their greater socio-political and economic context.

I first discuss the role played by the legislature in creating the legal framework applicable to public procurement. Then, secondly, I analyse the role of the judiciary and its approach which shifts throughout the years on an axis between realism, purposive and neo-formalism interpretation. Thirdly, the article debates the challenges faced by the executive/government in building a competent framework for public procurement. The article concludes by analysing the interplay between the legislature, the judiciary, and the executive/administration, explaining the quiet revolution of Israel's public procurement law, the impact of the Covid-19 pandemic as a catalyst, and discussing the potential outcomes of the quiet revolution. Within this context, I discuss the public confrontation for and against the judicial reforms proposed by the 37th government and consider their potential ramifications.

2 The Legislature: Sewing, Stitching and Patching a Normative Framework

Israel inherited the legal tradition of public procurement from the British Mandate (1917-1948).[4] This included, however, only a short regulation applicable to municipalities with a general duty to procure through public tenders.[5] During the early years of statehood, many areas that required legislation, including within the administrative and public law, were left unregulated. Moreover, at the time of Israel's establishment, it was very small and underdeveloped. In addition, influenced by Communist ideology regarding ownership, many parts of the economy were state/government owned/affiliated. In the absence of legislation, legal lacunas were typically filled by the Supreme Court,[6] as discussed in part three.

It was only in 1992, that the Mandatory Tenders Law 5752-1992 was finally promulgated, asserting the duty of the government to conduct procurement through tenders. The Mandatory Tenders Law is a concise law and has only nine original provisions, supplemented to-date by only four sub-articles. The basic requirement of the Mandatory Tenders Law favours public tenders:

> "The State and any government corporation … may not enter into a contract for the execution of a transaction in goods or in land, or for the execution of work, or for the purchase of services, except pursuant to a public tender that allows every person an equal opportunity to participate in it." (Hebrew)[7]

The law sets a recommendation for the level of required threshold conditions, which may be adjusted subject to clear justification in the solicitation documents.[8] Beyond this, many substantial issues were left unregulated by the Act, and were supplemented, by dedicated regulations.

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[4] Kedar 2002:117-133.
[5] A municipality "may not enter into a contract to transfer land or goods, to order goods or to perform work except for through a public tender." (Hebrew). See art 94(1) of the Municipalities Ordinance of 1934.
[6] Shalev 1999:149-150.
[7] See art 2(a) of the Mandatory Tenders Law 5752-1992.
[8] See Annex I of the Mandatory Tenders Law.

The different ministries, organs of state and organisations directly affiliated to the state "national" level, including state owned and/or controlled companies, are all subject to the Mandatory Tenders Regulations 5753-1993. Municipalities, towns, and townships located within Israel are subject to the Municipalities Regulations (Tenders) 5748-1987. They are also subject to the different circulars published by the Ministry of Interior.[9] Municipalities and townships located in the Judea and Samaria Area[10] are subject to the Mandatory Tenders Ordinance (Judea and Samaria) 5780-2020 and Mandatory Tenders Rules (Goods, Services and Works), (Judea and Samaria) 5780-2020. An effort, nonetheless, remains to complete the legislative process to clarify which regulations are applicable to the various public utility corporations formed by the municipalities and localities.[11] In addition, the Ministry of Defence is subject to the Mandatory Tenders Regulations (Ministry of Defence Procurement) 5753-1993. Higher education institutions (the majority of higher education institutions, including most of the leading universities, are all public) are subject to the Mandatory Tenders Regulations (procurement by high education institutions) 5770-2010. Although most of these different regulations reiterate similar language, following, more or less, the Mandatory Tenders Regulations, there are some clear differences. For example, the threshold and exemptions allowed for municipalities and townships to be exempt from open public tender procedures is lower than that of universities, state-owned corporations, or the Ministry of Defence. In addition, despite the advantages linked to electronic tenders, these are still not available to all bodies and organizations, including at the municipal level.[12] Thus, there is an urgent need to amend and clarify the regulatory framework.

As stated in the explanatory notes to a new revision of the Mandatory Tenders Regulations (Draft for comments) 5782-2022 proposed in June 2022, for public comments:

> "The regulations in their current form are characterized by disorganized processes, unclear terms, and significant difficulty in orientation. This difficulty intensifies in light of the fact that

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[9] See the Government Procurement Administration website https://mr.gov.il/ilgstorefront/en.
[10] This is an Israeli government-designated administrative territory that encompasses the Israeli-occupied West Bank, excluding East Jerusalem.
[11] Mandatory Tenders Regulations (Local Corporations) 5781-2021 [draft].
[12] HCJ 1777/14 *Chen Hamakom Ltd v Kiryat Ono Municipality* (published June 16, 2016).

> each public body implements the regulations on its own, and therefore, any ambiguity leads to multiple interpretations and contradictions in the way the regulations are implemented. This situation leads to an increase in legal disputes, delays in procurement procedures and damage to the work of public bodies that are subject to regulations. In addition, the lack of clarity and the difference in the interpretation and application of the regulations makes it difficult for suppliers who wish to compete in tenders of public bodies and creates an advantage for existing suppliers, which, as a result, leads to a reduction in the availability of suppliers." (Hebrew) [13]

In summation, there is a large body of different regulations applicable to different bodies that were introduced in a gradual fashion. Ultimately, this effort led to the overall inclusion of most of the public sector within the oversight of the Tender law and regulations.

With regards to international sources, Israel is a member of the World Trade Organisation's (WTO) Agreement on Government Procurement (GPA).[14] Israel complies with the GPA,[15] however, it has not adopted the UNCITRAL Model Law on Public Procurement.[16] Thus far, such proposal has not been raised.

In addition, there is a general duty that applies to hybrid bodies to procure by means of tenders. Hybrid bodies, also commonly known as dual hat corporations, are private bodies which fulfil public functions. The jurisprudence has applied various public law duties on such private bodies.[17] The Supreme Court, nonetheless, confirmed that this general duty does not mean that the law and regulations shall be applicable to such procurement procedures.[18]

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[13] See art 1 of the Mandatory Tenders Regulations 5782-2022 (draft for public comments).
[14] World Trade Organisation 2022.
[15] Reich 2017:221-267.
[16] UNCITRAL Model Law on Public Procurement (2011).
[17] Harel 2019:38-50.
[18] HCJ 7002/19 *China Motors Ltd et al v Ministry of Transportation et al* (July 7, 2020). In this highly publicized case, there was a debate about whether public transportation operators which receive subsidies from the government are subject to the Mandatory Tenders Regulations, and consequently, to the duty of local industrial cooperation. Here, the High Court of Justice (HCJ) affirmed the approach of the inter-ministerial committee and the Ministry of Justice, deciding that although the procurement was conducted through public tender procedures, they were not subject to the authority of the regulations.

After nearly eight decades of sewing, stitching, and patching, there are multiple regulatory sources of law for public procurement prescribed by the legislator rather than a unified practice. These multiple sources of law are reviewed by either the administrative court, the civil court, or in rare circumstances, by the High Court of Justice as the hearing tribunal. The practice of central questions such as the timeframe for the submission of an appeal, administrative delay, and standstill, are still not regulated in a unified manner, and remains a source of confusion and disputes.[19] The importance of these issues goes beyond the application of justice and principles of law, and has a huge impact on procurement procedures.

3 The Court on the Axis of Realism, Purposive and Neo-Formalism Interpretation

3.1 The Centralized and Realist Judiciary

Israel inherited its legal system from the British Mandate. During the British Mandate, British citizens were nominated to the Supreme Court which had exclusive jurisdiction on any government-related matter. The government's procurement activities were identified as an integral part of the administrative-governmental functions. Accordingly, the Supreme Court construed and applied to government or government entities' procurement activities, general principles and doctrines borrowed from administrative law.[20] Since the British Mandate regulations were not repealed at the establishment of the state of Israel, municipalities were under the obligation to procure through tenders, and related disputes were referred to the Supreme Court.[21]

The Supreme Court, however, extended such duties to other governmental entities. One of the first leading judgments noted in the literature was issued by the Supreme

[19] Shabbat 2017:381-523.
[20] Shalev 1999:130-135.
[21] See art 11 of the Law and Administration Ordinance 5708-1948.

Court in 1961. In *Bet-Ariza Rehovot Ltd and others v Minister of Agriculture and all*, Justice Berenson affirmed the jurisdiction of the Supreme Court on petitions regarding the procurement and award phase. Importantly, the court determined the duty of the government and government-affiliated units and agencies to conduct their procurement activities fairly and equally, including the duty to conduct public tenders as a general rule. These far-reaching obligations were imposed by the Supreme Court despite the absence of a specific regulatory provision that applied such a duty to the specified unit under the Ministry of Agriculture. The Supreme Court construed such procurement-related duties and obligations as stemming from administrative law doctrines, requiring the government to uphold the principles of reasonableness, equality, and fairness in the entirety of its operations.[22]

Based on these broad conceptual legal principles, the Supreme Court further developed a detailed body of public procurement law. For example, in *Gazit veShaham Construction Ltd v the Port Authority* a prohibition on conducting negotiations with only one bidder was based on equity and equality principles.[23] In 1963, in *Herut Ltd v The Minister of Health et. al.*, a rule against conflict of interest of any of the members of the tendering committee of a procurement authority was determined based on administrative and equitable law rationales.[24] The right of participants to information contained in procurement documents, and procurement authority debriefing duties, were all deducted from administrative law principles.[25] Since these judgements were made by the Supreme Court as the High Court of Justice, they were binding legal precedents, transmitted to all levels of the administration and government agencies, including state owned enterprises and municipalities. Thus, in the absence of detailed primary legislation, the realist judiciary imposed public procurement principles and norms.[26]

An important milestone in the development of the legal narrative of public procurement law was provided in 1973, with the enactment of the Contract Law (General Part) 5733-

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[22] HCJ 292/61 *Bet-Ariza Rehovot Ltd and others v Minister of Agriculture and all* 16 PD 20.
[23] HCJ 316/63 *Gazit ve Shaham Construction Ltd v the Port Authority and all* 18 PD 11.
[24] HCJ 794/78 *Herut Ltd et al v The Minister of Health* 33(2) PD 716; HCJ 35/82 *Yishpar Ltd v Minister of Defence et al* 37(2) PD 505.
[25] HCJ 187/71 *Ramet Ltd v The Company for Renovation of Jerusalem Old City*, 26(1) PD 118.
[26] Dekel 2001:359-415.

1973. The Contract Law, which followed German civil law methodology, applied the duty to act in a customary manner and in good faith during the pre-contractual stage.[27] This duty was construed by the judiciary to also apply to public procurement. The Supreme Court applied contract law principles while interpreting tender documents. Therefore, in the event that the tender documents were misleading or ambiguous, the Supreme Court opted for an interpretation that would favour the petitioner, who did not control the preparation of the tender documents.[28] Importantly, the introduction of contract law principles allowed the importation of contract law remedies. This enabled claims for damages, including restitution, although the court generally refrained from the award of damages.[29] The approach of the Supreme Court, therefore, involves importing principles and doctrines from both contract law and administrative law. Under such duality, the judiciary construed duties that apply to both the procurement authority and the private economic operators and stakeholders.[30]

The pillars of public procurement law were created in the absence of detailed legislation by the realist judiciary. Despite this common law style of development, coherency was generally maintained until the 1980s, since disputes regarding public procurement were directly referred to the Supreme Court. While this is an important feature in the development of the legal narrative of public procurement law in Israel, it has led to an influx of public procurement related petitions and disputes.[31]

3.2 The Purposive Judiciary

The early 1990's ushered in a series of important changes to the legal narrative of the Israeli legal system generally, and public procurement law specifically. The consequences of these changes remain under constant debate. The Knesset promulgated the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, which were a milestone in Israel's constitutional revolution. Israel does not have a written Constitution, but rather a series of basic laws. The Human Dignity

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[27] Cohen 2001:13.
[28] HCJ 649/89 *United Steel Industries Ltd v Ministry of Economy and Planning* 45(1) PD 485.
[29] Reich & Shabbat 2014:50-77.
[30] HCJ 991/91 *Pasternak v Ministry of Ministry of Construction and Housing* 45(5) PD 50.
[31] Dekel 2006:403-429.

and Liberty and the Freedom of Occupation laws secured basic constitutional rights. On the basis of these basic laws, the principle of equality was construed by the judiciary as a constitutional principle.[32] The basic laws further included a proportionality test.[33] Thus, the legal narrative of public procurement law was now composed of constitutional law doctrines, providing the principles of equality and proportionality with an authoritative underlying narrative power, as well as administrative law and contract law doctrines.

In conjunction with the above-mentioned changes, and as explained above,[34] the Mandatory Tenders Law and Regulations were promulgated. The most compelling effect of the promulgation of the Mandatory Tenders Law on the narrative of judicial review over public procurement, was the organisational and institutional transition it brought about in the review of public procurement. It was clarified that all challenges and appeals over decisions of procurement authorities should be referred to the civil courts instead of the Supreme Court.[35] This meant the referral of a substantial case load to the civil courts. Motivated by new powers delegated from the Supreme Court, the civil courts broadly implemented the general principles of public procurement as outlined by the Supreme Court. In 2000, another milestone was achieved with the promulgation of the Administrative Matters Courts Law 5752-2000. The administrative court law assigned to the newly established administrative courts (district courts, second instance court level), jurisdiction over administrative petitions resolved at the Supreme Court. This includes jurisdiction over petitions regarding public procurement.[36] However, the Supreme Court has maintained residual jurisdiction.[37]

Thus, from a technical standpoint, it became possible to resolve disputes and petitions regarding procurement in the civil courts, administrative courts, and the Supreme court. The result was a complete decentralization of jurisdiction over judicial review of public procurement. Moreover, since the powers of the judiciary to grant relief or

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[32] Shany 2020:11-13.
[33] Barak 2010:295-649.
[34] See part two.
[35] HCJ 991/91 *Pasternak v Ministry of Ministry of Construction and Housing* 45(5) PD 50. This decision effectively started the process of referring petitions regarding public procurement to civil courts, with a residual jurisdiction of the Supreme Court.
[36] See art 5 of Administrative Matter Courts Law 5752-2000.
[37] See art 6.

interim relief were based on the unlimited powers that initially belonged to the Supreme Court and which were derived from the principles of equity, the courts at all levels inherited unlimited reviewing powers over public procurement proceedings. To further complicate matters, different procedures apply in the different courts.[38] These include different interim measures, and different interpretations regarding the required evidence and burden of proof. The conflicting approaches of the different jurisdictional sources, therefore, created confusion and led to conflicting decisions regarding essential procedural matters which are central to judicial review and the streamlining of the procurement and award phase.

Locus standi serves as a good example to demonstrate the confusion. The locus standi of a participant in a public tender whose proposal was not selected is a clear and established principle.[39] Nonetheless, diverse opinions have emerged regarding adjunct questions, and in particular, with regards to the "clean hands" of the petitioner. Since the procurement law in Israel developed and stemmed also from equity common law, some tribunals insisted on denying *locus standi* when questions were raised with regards to the "clean hands" of the petitioners.[40] Another pertinent example of the confusion regarding the procedures of judicial review of public procurement was the time limit for submission of petitions. The procurement law is silent regarding the time frame for the submission of an appeal. Under administrative law, some general principles are applicable to the submission of an administrative petition, which should be submitted within 45 days.[41] However, such statutory time frame is subject to the doctrine of laches under the equity common law. In some cases, the courts have found that petitions submitted within the general administrative statutory timeline constitutes late petitions and should be refused. Such uncertainty obscured the practice of judicial review over public procurement.[42]

Following the common law tradition, judgements typically include detailed normative guidelines and references. The two declared narratives for public procurement are

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[38] Civil courts, administrative courts, and the Supreme Court.
[39] HCJ 19/79 *Rosman v Ashkelon Municipality* 33(3) PD 794.
[40] Shabat 2017:381-493.
[41] See art 3 of the Administrative Courts Regulations (Procedures) 5761-2000.
[42] Shabbat 2017:268-285.

integrity and maximization of economy and efficiency in procurement.[43] In the face of growing concerns over public confidence in the overall integrity of the administration, the judiciary tried to offer simplicity while adapting a one-dimensional narrative, focusing only on integrity as the main litmus test to guide the development of public procurement law in Israel. However, this approach did not achieve the expected result. The procurement and award phase has been prolonged, and became more costly and complicated, causing delays in the execution and implementation of public projects.[44]

An example which best demonstrates this perplexing approach is the approach of the judiciary in the face of inconsistencies which often exist between the bid-guarantees which bidders submit and the tender documents themselves. Theoretically, a bid guarantee should be a straight-forward and simple requirement that is requested in order to demonstrate the earnest intention of the bidders to conclude the agreement on the basis of its proposal. In practice, however, bidders often present inconsistent bid guarantees. Some bid-guarantees were deemed non-compliant as they provided "better" terms. For example, if the solicitation tender documents required a bid guarantee valid until x/y/year, and the bank provides the bidder with a guarantee valid until x/y/year+n days, this would be classified as discrepancy. There are many more examples that can be gleaned from the Israeli experience.[45] Based on these inconsistencies, conflicting decisions regarding the question of disqualification of proposals with a defective bid guarantee flooded the procurement system. If the lowest proposal is supposed to be disqualified only due to a technical issue in the bid guarantee, this may be regarded as a waste of public funds. Conversely, the acceptance of non-complying offers may be deemed to be against the principle of equality and integrity of the procurement procedures. Settling the debate in *Gili and Yoel Azaria Ltd. et. al. v Ben Ari Tal Ram Projects*, the Supreme Court, in search for order, directed that any inconsistency between the bid guarantee and the tender documents should lead to the disqualification of the bid guarantee and, consequently, of the proposal.[46] Justice Meltzer, who supported this decision, explain in an

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[43] See art 1 of the Mandatory Tenders Regulations.
[44] Zvi Hauzer, Former General Director of the Office of Prime Minister, Israel Bar Association Practice Course, 24/10/12. (On file with the author).
[45] Vexler & Tamir 2012:62.
[46] HCJ 7230/19 *Gili and Yoel Azaria Ltd et al v Ben Ari Tal Ram Projects Ltd* (May 26, 2020).

open/informal lecture, that the underlying narrative that led to such an approach was his concern about the declining integrity of the public administration in Israel.[47] Therefore, any inconsistency is treated with the highest degree of scrutiny and may lead to disqualification. Despite this clear approach, inconsistencies in bid guarantees did not vanish from the practice of public procurement. Various scholars, practitioners, and judges have presented alternatives to the rigid narrative directed by the Supreme Court.[48]

The rigid narrative did not suit the real-time challenges of public procurement. Consequently, procurement authorities have tried, as much as is feasible, to avoid open public tenders which are prone to judicial review and, thus delays.[49] A recently sought revision of the Mandatory Tenders Regulations seeks to solve this problem by providing the procuring authority more leeway regarding threshold conditions, including flexibility about submissions of bid guarantee as a threshold condition.[50]

Conversely, where labour rights were at stake, the Supreme Court adhered to a purposive approach.[51] In *Sheleg Halavan v Ashkelon Municipality et al* (*Sheleg Halavan*),[52] the respondent, Ashkelon municipality, issued a tender for the provision of cleaning services. The tender documents provided a minimum bid price in accordance with the exact amount for wages of cleaning staff as determined in a government circular establishing a national standard for said wages. Respondent 2, which was a participant in the tender, submitted the lowest bid. It explained that the proposal was not abnormally low and covers its expenses and the earning of a profit. Such calculations assumed that a percentage of its workers at any given time would not have acquired enough seniority to entitle them to pension and other benefits. The lower court upheld the award of the tender to the respondent, noting that the tender itself had included no requirement regarding the seniority of workers and that the bid was therefore entirely acceptable. The narrative chosen by the lowest court confirmed the single dimension litmus test focusing merely on integrity of the procedure. The

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[47] Justice Hannan Meltzer, Israel Bar Association Practice Course, 26/12/12. (On file with the author).
[48] Dekel 2012:157.
[49] Ministry of Economy, General Accountant, *Annual Report of Government Procurement – 2018* (published July 15, 2019)
[50] See art 21.b of the Mandatory Tenders Regulations (draft for comments) 5782-2022.
[51] Barak 2005:55-80.
[52] HCJ 9241/09 *Sheleg Halavan 1986 Ltd v Ashkelon Municipality et al* (July 8, 2010).

appellant, which had tendered unsuccessfully on the basis of a higher salary cost, appealed. The appeal against the lower court's decision was allowed in full. The Supreme Court ruled that upholding workers' rights is of paramount importance and will be a relevant consideration in government tender decisions. A government authority issuing a tender to contract for services with an external party must, nevertheless, provide as much forward-looking protection for the contractors' workers as is possible. Thus, when a bidder has expressly stated that it plans to dismiss workers after particularly short periods of time in order to minimize the burden of social benefit payments, the bid cannot be accepted. Furthermore, the tender itself was also declared void:

> "However, it was not only the winning bid that was seriously defective, but also the tender itself. The minimum price set did not take into consideration the additional cost elements and the profit, and in this way, respondent 1 essentially invited the bidders to submit unacceptable bids. Presumably, if the municipality had included, as required, an estimate based on all the cost components of the tender, the tenders committee would have easily noted the defect. This did not happen, and in any event the defect cannot be corrected, even if a different bid had been chosen instead of the winning bid."[53]

Consequently, the practice of evaluation of proposals in labour-intensive services such as cleaning services was reformed. Tender documents were revised to include a clear requirement for participants to include in their proposal a detailed calculation that proves that workers' rights are being safeguarded throughout the procurement cycle, as well as an appropriate percentage of profits. Procurement authorities have the duty to make detailed examinations and verify such submissions by scrutinising the data and calculations of bidders.[54]

In recent years, however, a serious political debate regarding constitutionalism and separation of powers has threatened the legitimacy of the Israeli judiciary.[55] This includes repeated direct attacks by leading political figures such as the Prime

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[53] Para 13 (Justice Levy).
[54] AdminC (Tel Aviv) 2287-06-17 *Organization of Nursing Companies v Ministry of Defence* (July 1, 2019) (Nevo); AdminC (Jerusalem) 2588-06-10 *Hevzekin Management Services Ltd v Municipality of Jerusalem* (June 1, 2016) (Nevo).
[55] Chief Justice Hayut. See *Supreme Court chief accuses politicians of seeking to 'destroy' justice system Times of Israel* (May 23, 2022) https://www.timesofisrael.com/topic/israel-supreme-court/.

Minister,[56] Minister of Justice,[57] and scholars,[58] complaining about an excessively activist judiciary. The Israeli judiciary, which historically enjoyed a high degree of public confidence, is concerned about the loss of legitimacy. The growing debate about the constitutional role of the Israeli judiciary is intensified by social disunity between major parties-alliances within the Israeli society. Judicial review of public procurement is situated at the crossroad of these debates.

3.3 The Rise of Neo-Formalist Judiciary: Bibi Roads Dirt and Development Ltd. v Israel Railways Ltd

Covid-19 presented several challenges for the Israeli government, in particular, severe financial constraints amid a growing demand for governmental services. The challenges were met with a restrained court, allowing greater leeway for administrative discretion. It is within this context, that *Bibi Roads Dirt and Development Ltd v Israel Railways Ltd* ("*Bibi Roads*") should be read.

Bibi Roads is a typical transport infrastructure dispute-related case. Israel Railways Ltd. is a state-owned corporation responsible for the development and operations of Israel's railway network. The tender, published by Israel Railways, was awarded to the qualified bidder according to the bill of quantities. The initial estimation of the tender was about 67 million NIS. During the execution, Israel Railways agreed to pay Bibi Roads a sum of approximately 104 million NIS. *Bibi Roads* claimed an additional sum of 47 million NIS due to additional work, delays, and damage caused by a third subcontractor. The district court in Jerusalem approved *Bibi Roads*' claim and required ISR to pay Bibi Roads an additional 47 million. Israel Railways appealed to the

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[56] Prime Minister Binyamin Netanyahu (2009-2021). See: *Israel's Netanyahu attacks justice system as trial begins, PBS News Weekend* (May 24, 2020), Israel's Netanyahu attacks justice system as trial begins | PBS News Weekend.
[57] Ayelet Shaked, Minister of Justice (2015-2018). See *Shaked vows Supreme Court shake-up, Globes* (March 18, 2019) Shaked vows Supreme Court shake-up - Globes.
[58] Sapir 2009:355-378.

Supreme Court. On appeal, the Supreme Court approved claims in the amount of only roughly 8 million NIS.[59]

The legal reasoning, however, bears important significance for contract interpretation and signifies a shift toward neo-formalism, with significant implications for the entire procurement cycle. The contractor argued that this was an open-relational contract, meaning, a contract which is intended to remain open for completion of details pursuant to the duty of good faith and based on standards of fairness and reasonableness. This was used to support its requests for additional payments, such as for changes to the work it had to do, extra work that had to be done, financial damages caused by delays, and so on. Israel Railways argued that this was a closed contract which binds the parties to act in accordance with its expressed provisions. Therefore, there is no basis for the additional payment request of the contractor.[60]

According to Justice Stein, different legal construction methodologies and theories should apply to different contracts. In the case of *Bibi Roads*, the contract is a "closed" contract, with little room for interpretation by the court. "Closed contracts" are contracts entered into between "sophisticated" business entities that follow a tender procedure and have a high level of specification. Stein distinguishes between relational contracts (open contracts), which are phrased in general terms only and are usually relevant when dealing with long-term contracts, and closed contracts, which include all the terms agreed upon between the parties to the contract in a clear manner and do not require creative interpretation.[61] According to Stein, when dealing with a closed contract, the duty of the court is to interpret and to apply its terms as they are written, without having to inquire what the parties had deliberated when signing the contract. Stein adds that there is a wide range of cases between these two types of contracts, which will be interpreted by the court using the rules which apply to the two foregoing types of contracts. In these types of contracts, the judiciary should interpret the dispute

[59] CivA 7649/18 *Bibi Roads Dirt and Development Ltd v Israel Railways Ltd* (November 20, 2019) paras 1-3 (Justice Stein).
[60] Para 4 (Justice Stein).
[61] Paras 12-15 (Justice Stein).

in accordance with the strict letter of the contract, with little discretionary intervention by the judiciary.[62]

From a legal theory point of view, the *Bibi Roads* decision undermines the purposive approach of the judiciary led by former Chief Justice Prof. Aharon Barak and a leading scholar. Barak's purposive interpretation in law theory was adopted as the guiding principle in contract law interpretation and included both private and administrative and quasi-administrative contracts. Purposive interpretation tries to determine what the parties to a contract meant by it. This can be done by looking at both the language of the contract and the external circumstances which led to the contract. The language of the contract will not always be given more weight or importance than the purpose of the contract or the duties of fairness and good faith that apply to the parties.[63]

Barak's legal legacy was highly criticized, mostly by those who disagreed with his active constitutional approach. In 2011, the Contracts Law (General Part) 5733-1973, was amended by stating that the language of the contract should firstly be examined to determine the correct interpretation of the contract. However, the legal reasoning of the purposive theory remained a standard and guideline for many rulings.[64] The *Bibi Roads* decision aimed to change this approach.

The *Bibi Roads* decision was highly criticized by private companies and prominent jurists. However, it generated a "chilling" effect on disputes and claims between contractors and state-owned companies, and had a great impact on the procurement cycle as a whole.[65]

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[62] Para 18 (Justice Stein).
[63] CA 4628/93 *State of Israel v Apropim Real Estate Development Ltd* (1991) 49 PD 295.
[64] Zamir 2021:81-95.
[65] The observation is made on the basis of closed discussion with legal counsels of state-owned companies, who estimated that the number of disputes submitted to court was significantly reduced. Published statistics are not yet available (October 2022).

4 The Administration of the Public Procurement Sector: Privatisation, Decentralisation, Capacity Building and Professionalisation

The state of Israel came into being in mid-May 1948, in the midst of a war threatening its existence. The immediate economic challenges were formidable. The state had to finance and wage a war; take in as many immigrants as possible; provide basic commodities to the existing and new population; and establish a government bureaucracy able of coping with these challenges. The Immediate needs of the population were met by a strict austerity program and inflationary government finance, repressed by price controls, and rationing of basic commodities. The Israeli economy was initially subject to extensive government control and direct intervention, often, as an economic operator. For example, the ports were developed, managed, and operated as a special unit under the Ministry of Transportation. The legislature and the executive did not adopt an overall legal regime for public procurement. It should be clarified that such a premature/underdeveloped legal framework for public procurement was common not only in Israel, but also featured other economies up until the 1990s.[66] In response to this gap in the law, the Israeli Supreme Court effectively established a detailed source for public procurement policy, as discussed above.[67]

The shift from a controlled economy to a free economy gradually began in the 1960s. In response to a realisation by policymakers that government intervention in the economy was excessive, Israel embarked upon a gradual process of economic liberalization. These measures primarily addressed trade (changes in customs procedures) and capital measures, moderately lifting restrictions and allowing capital flow. However, it did not distinguish between the economic and administrative functions of the state. A disastrous inflationary spiral accelerated the moderate liberalization process in the late seventies and early 1980s.[68]

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[66] Arrowsmith *et al* 2000:15-18.
[67] See part three.
[68] Razin 2019:45-68.

Throughout the mid 1980s and the 1990s, the role of the government in the economy, as a direct economic operator, was considerably reduced with overall privatization.[69] At the same time, finally, the Mandatory Tenders Law and the Mandatory Tenders Regulations were promulgated in the early 1990s. They prescribed for a centralized management of procurement under the authority of a centralized exemption committee. Various procurement authorities complained about an excessively bureaucratic procedure, which hindered their performance, and consequently, accountability. The centralized exemption committee, whether motivated by the need to control budgetary expenses or by an overload of requests for exemptions from public tenders, intended or unintended, created a bottleneck. [70]

Consequently, in 2009 a major revision of the of the Mandatory Tender Regulations was achieved, allowing for greater decentralization.[71] The revision expanded methods of procurement and provided additional details concerning the application of each method.[72] The revision of the Tenders Regulations introduced a long list of different types and thresholds for exemption from public tender. Following the revision, the application for an exemption from public tender in accordance with the list of exemptions was completely decentralized. The revision required each procurement authority to nominate an internal exemption committee within the procurement authority itself to review and decide exemptions from open public tenders.[73] This was balanced by a requirement to enhance greater transparency regarding exemption. Therefore, following the revision, any decision about exemption must be published. Where the most restrictive method of procurement is pursued, for example, contracting with a sole supplier, prior to the decision of the exemption committee, a notice should

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[69] Eckstein *et al* 1998:123-188.
[70] Government Procurement Administration, Mandatory Tenders Regulations reform 2009, Tender laws (mr.gov.il).
[71] Reich 2017:236-252.
[72] See Mandatory Tenders Regulations: For example, adding preliminary request for information (art 14A of the Mandatory Tenders Regulations), additional sub-types of competitive process such as a tender with pre-qualification stage, as a tender with two-stage evaluation, as a public tender with additional competitive process, as a framework tender or as a combination of such tendering methods. (Art 17A, 17B of the Mandatory Tenders Regulations), Framework Tender (art 17F of the Mandatory Tenders Regulations) and Automated Tenders (art 19 of the Mandatory Tenders Regulations).
[73] See Mandatory Tender Regulations: The exemption committee is composed of senior management such as the Director General of the procurement authority, the legal advisor of the procurement authority, and the general accountant of the procurement authority. See arts 11, 32 and 40 of the Mandatory Tenders Regulations.

be published online, with an expert opinion, allowing affected interest parties to submit their opinion or objection to the sought exemption. The exemption committee is required to consider all such relevant opinions or objections.[74]

Noting the transparency requirement, the revision of the Mandatory Tenders Regulations led to a complete decentralization of the exemption regime for public procurement in Israel. The decentralization also generated positive outcomes since the various procuring authorities gradually achieved more competence. This was enhanced by compulsory training in public procurement law and regulations.[75]

At the same time, the result of the decentralization of exemption from open public tender is continuously criticized by reviews conducted by the State Comptroller and Ombudsman of Israel, as the majority of procurement is not achieved through open public tenders.[76] Moreover, the public sector was also criticized for not fulfilling its potential in implementing innovating solutions in the administration.[77] Multiple initiatives were left only as contingency plans. This is contrary to expectations given Israel's innovative culture as the "start-up nation". These challenges are exacerbated in recent years, in particular since 2019, by prevailing political instability due to repeated general elections (the fifth general election in four years).

With limited support from the courts and/or the legislature, the executive/government has to rely on itself in driving further the development of public procurement law and enhancing the competency of the system. These concerns are raised in the draft proposal of the Mandatory Tenders Regulations (2022).

An important trend is with regards to the effort to shift to a Public Private Partnership (PPP) model. Large scale projects are gradually transferred to the oversight of the inter-ministerial task force, that gradually opted for long-term PPP projects.[78] These efforts are still focused at national state projects and have not lingered to the local

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[74] See art 3A.a.
[75] See art 42.
[76] The State Comptroller and Ombudsman, Annual Report, (2010-2018). See https://www.mevaker.gov.il/En/publication/Pages/LinkstoReports.aspx.
[77] Observatory of Public Sector Innovation 2020. See Initial Scan of the Israeli public sector innovation system (oecd-opsi.org).
[78] PPP Projects in Israel 2021. See PPP Projects in Israel (www.gov.il).

municipal levels, despite the desirability to allow for such projects, for example, establishment and operations of educational facilities and/or local utilities on a long-term PPP basis.[79] Such long term projects typically requires more sophisticated procurement and award procedures.

The Covid-19 pandemic generated more public pressure on the executive. The administration has, therefore, taken the initiative to introduce and implement new and more efficient procedures by requiring e-procurement; e-tendering; a pilot of e-guarantees, and e-debriefing (with zoom meetings that allow potential participants to engage more in the bidding process). Consequently, many of the innovative contingency plans were now being dusted off. Notable, is the Government Procurement Administration.

The Government Procurement Administration is a staff body in the Division of Economic Offices at the Accountant General's Division. Its main functions are to outline government procurement policy, create key engagements for government ministries and auxiliary units, establish digital infrastructure to carry out procurement and pre-procurement processes, and assist government bodies in executing and implementing procurement policy in their ministries. The Government Procurement Administration is acting to implement procurement policy as determined by the government and the Knesset through publication of the Administration's directives that guide the ministries (provisions of the Finance and Economy Regulations), and also assists in policy formulation procedures. The Procurement Administration has the advantage of being able to incorporate various goals and values that shape procurement policy and to recommend policies that balance the various goals while constantly learning the practices of the world and recommendations of non-government bodies, such as the Organisation for Economic Co-operation and Development (OECD). To this end, the Procurement Administration is taking an active part in the meetings of the Working Party of the Leading Practitioners on Public Procurement (LPP) at the OECD. The Government Procurement Administration deals

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[79] Razin *et al* PPP in Israel: maturation or decline? (May 24, 2021) שותפויות מוניציפליות-פרטיות (PPP) בישראל: שקיעה או התבגרות? | פורטל רשויות מקומיות | רשויות - הפורטל הישראלי לרשויות המקומיות (rashuiot.co.il).

with the promotion of innovative procurement processes to simplify and refine said processes and enable innovative procurement to be carried out in the government.

The Government Procurement Administration also promotes digital systems for managing procurement processes, from initiating procurement, pre-procurement, and procurement itself, including: a system for managing shortened procurement procedures (up to 50,000 NIS), a system for managing tender committees, a digital tender box, a digital tender management system, a dynamic tender centre and more. For example, to address the problem of inconsistencies in the wording of bid guarantees, the Government Procurement Administration initiated a reform of e-guarantees. This decision also substantially reduces the costs for participating in public tenders.[80] Most recently (June 2022), last but not least, there is an intention to revise the Mandatory Tenders Regulations 2022-5852 with a new draft for comments on the table.[81] This version intends to revise the existing regulations and to provide more discretion to the various procuring units. For example, the mandatory requirement to include bid guarantees as a condition threshold is now left to the discretion of the procuring authority. This may solve the problem of bid-guarantees and the rigidity of the interpretation in the case of discrepancies.[82] It also seeks to reduce the burden of submissions and to allow bidders to submit the necessary approvals for review only as a condition for the award, and to satisfy them at the bidding stage with only a declaration.[83] Such an approach tries to reduce the burden and cost of participating in tenders. The draft also proposes to delete some of the regulations, and in particular, exemptions available according to the current regulation, however, not in use.[84]

The proposed revision of the Mandatory Tenders Regulations was subject to criticism and discussion among the leading experts. Particularly criticised was the lack of attention to the procurement of social services, which require specialized adaptation

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[80] Government Decision No. 260 dated June 26, 2020. See ערבויות דיגיטליות (govextra.gov.il).
[81] Mandatory Tenders Regulations 5782-2022 (draft for comments), אתר החקיקה הממשלתי - טיוטת "תקנות חובת המכרזים, התשפ"ב-2022" (tazkirim.gov.il).
[82] See art 21B of the Mandatory Tenders Regulations 5782-2022.
[83] See the explanatory note to art 21.
[84] See the explanatory note to art 3, deleting seven sub articles which are available under the current regulations, however, are not in common use.

according to various non-governmental organizations.[85] The proposed draft also lack clarity and does not incorporate clear transparency standards that are currently enhanced by practice (and not necessarily by the regulations).[86] While the Mandatory Tenders Regulations grants bidders the right to review the winning bid, the court have extended the right to review to additional bidders, on the basis of the general freedom of information doctrine. The draft refrains from handling the procedural yet important questions related to the review procedures and is silent about defining a clear standstill period and other procedural issues. Prof. Dekel noted a too broad discretion for exemption from open public tenders available to the different procuring authorities.[87] The initiative to present a new revision to the regulation at a time of political instability is faced with serious obstacles. The draft, as is, should be seen as a preliminary draft. However, it is a strong indication regarding the processes that the executive/government is trying to promote, in order to build a more competent regulatory framework.

5 Conclusion (interim) – the Quiet Revolution of Israel's Public Procurement Law

This article provides a legal and historical perspective on the evolution of the sources for Israeli procurement law. Now, in the aftermath of the outbreak of Covid-19 in Israel, what role/function does each of the legislature, the court, and the executive undertake in designing a competent public procurement regime? The executive is currently taking the lead, compared with a marginal contribution by the legislature and the judiciary. This is in contrast to the historical pattern, where the judiciary fulfilled a critical function in establishing the necessary principles for the design of an effective competent public procurement legal framework.

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[85] Forum of Legal Counsels of Non-Governmental Organizations, Comments to Mandatory Tenders Regulations 5782-2022 (draft for comments) נייר עמדה - טיוטת תקנות חובת המכרזים 2022 - פורום יועמשים בעמותות 5.7.22 (1).pdf; Benish and Tzaba, Comments to Mandatory Tenders Regulations 5782-2022 (בנישׂ וצבע הערות לתקנות המכרזים 05072022 סופי (1).pdf).

[86] See ss 71-73 of Dekel (2022) with regards to the proposed art 30 of the Mandatory Tenders Regulations (draft for comments).

[87] See s 82 of Dekel (2022) with regards to proposed art 46 of the Mandatory Tenders Regulations (draft for comments).

The government imposed various social distancing rules over a two-year period beginning in March 2020 due to the outbreak of the Covid-19 pandemic.[88] Social distancing rules were enforced primarily on the administrative/public sector. This compelled the government to implement more electronic methods and digital solutions so that work could continue despite social distancing restrictions. This required a higher level of professionalism among the various procuring authorities and a shift toward the implementation of digitalization solutions in the procurement process. Consequently, this increased the confidence of the various procuring authorities in their competence.

Due to political instability, with the fifth general elections within a period of two years (as of November 2022), these changes are being made by the government/executive with little contribution from the legislature. Moreover, during the outbreak of the Covid-19 pandemic, the legislature provided the executive with considerable flexibility in managing procurement. Due to political instability, funds were allocated without appropriate controls and supervision. This has led to criticism over the lack of accountability and concerns regarding good administration.[89] The question of whether the legislature will be able to take a more active role in the design of the regulation is linked to the general political climate. At the time of writing these concluding thoughts, this is an unsolved conundrum.

Moreover, during the last decade, the judiciary's public image and level of confidence gradually deteriorated. Consequently, the judiciary shifted towards a more restrained approach. This stands in direct contrast to the historical development of public procurement law in Israel. The development of Israel's public procurement law was primarily led by the court during the first four decades. The Supreme Court applied general doctrines of administrative law, contract law, and even constitutional law as a source for the applicable normative framework. However, such purposive interpretation of the law has been heavily criticized, as has affected the judiciary's overall status. Recent Supreme Court decisions indicate a more circumspect

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[88] Covid Information Center Israel Ministry of Health, updated info and official guidelines for daily life during COVID-19, דף הבית - מרכז המידע לקורונה של משרד הבריאות (health.gov.il).
[89] The State Comptroller (2021), Special Report: The State of Israel's Coping with the Covid-1 Pandemic: 24-26.

approach, and restrained independent judicial review[90] of the procurement- and award phase. The foretold *Bibi Roads* decision further demonstrated judicial restraint throughout the procurement cycle.

It is within this light, that the significance of the new proposed draft Mandatory Tenders Regulations 5782-2022 should be understood. The government/executive aims to achieve more discretion in the procurement process in a recent proposed revision of the Mandatory Tenders Regulations. The nonpartisan academic community and non-governmental organizations may play a more significant role in the future design of public procurement law as a potential countervailing force. As is evident from the initial set of comments submitted to the draft regulations by prominent Israeli scholars, the experience and knowledge of the academic community can be of great value in the design of a framework for public procurement. In addition, nongovernmental organizations with expertise in their field could play a crucial role in the development of a better regulatory framework that addresses more appropriate solutions for each sector.[91] Their impact as a balancing force should be evaluated in a future paper vis-à-vis the advancement of the legislative process and the amendments of the regulations.

Last but not least, the trends discussed in this article contribute to our understanding of the widespread confrontation for and against the judicial overhaul proposed by the 37th government (January 2023 onwards). The 37th government proposed to strengthen governance/governability by enacting laws that would limit the authority and powers of the judiciary to supervise the legislative branch and the administrative branch. However, these proposals were publicly condemned and met with demonstrations calling for the safeguarding of an independent and strong judiciary. This open conflict reflects the tensions underlying the quiet revolution led by the opposing sides respectively.

The 37th government's proposed reforms may have considerable ramifications for public procurement law and practice. For example, a proposal that would transform legal advisors in the various ministries into political appointees chosen by the director

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[90] Independent review is the term specified by the GPA, see: Article XVIII of the GPA.
[91] Reichenberg & Mezer 2022:38-42.

general and the minister is deeply contested. Legal advisors in the administrative branch play a central and active role in public procurement law in Israel as members of the tender committees. Opponents of the reform argue that legal advisors must be independent when issuing their legal opinions, and professionally subordinate to the Attorney-General rather than the minister in order to safeguard the legality of government actions and prevent corruption. Proponents of the reform argue that legal advisors require a high degree of trust to ensure that the chosen political ministers can fulfil their political mandate and govern.[92] Moreover, proponents argue that under the reforms such legal advisors must be qualified and abide by the law and that the concerns are accordingly exaggerated.

Another proposed bill intends to limit the power of the judiciary to supervise the work of the government and the legislature on the basis of a reasonableness or extreme reasonableness standard.[93] This proposal may have serious legal ramifications for effective review of procuring authorities' decisions. Courts often evaluate how reasonable the conduct of a procuring authority was. A serious deviation from the reasonableness standard is a common justification for judicial intervention in procurement decisions. For example, one fault in the tender documents may be found reasonable, however, a series of faults in the tender documents may result in a judicial decision against the procuring authority. The broad language of the reform proposal received widespread criticism and the reform bill continues to be debated. In the absence of a constitution, this widespread democratic tension is better understood in light of the change in the respective roles of the three branches, the legislature, executive, and judiciary, from an institutional vantage point, in designing the public procurement legal framework. Therefore, this article is concluded without discussing in detail the proposed judicial overhaul led by the 37th government.

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[92] Section 31 of the coalition agreement between the Likud and the Religious Zionism party states that instead of a tender, ministry legal advisors will be appointed by directors general, with this advisor's position falling into the category of "position of trust."
[93] IDI, The Judicial Overhaul - The Israel Democracy Institute (idi.org.il).

Bibliography

Literature

Arrowsmith, S., Linarelli, J., & Wallace, D. (2000). *Regulation public procurement-national and international perspectives*. Kluwer Law International BV.

Barak, A. 2010. *Proportionality: Constitutional Rights and their Limitations*. Jerusalem: Nevo Publishers Ltd.

Barak, A. 2005. *Purposive Interpretation in Law*. Princeton: Princeton University Press.

Cohen, N. 2001. Israeli Law as a Mixed System: Between Common Law and Continental Law. *Global Jurist Topics* 1:1-12.

Dekel, O. 2012. It is not necessary to Disqualify a Non-compliant Proposal in a Tender – a Proposal for an Alternative Arrangement with Regards to Non-Compliant Proposals. *Mishpatim* 45:157-201.

Dekel O. 2006. *Procurement Law: Theory and Practice*, vol 2. Tel Aviv: Shurat Hadin.

Dekel, O. 2004. *Procurement Law: Theory and Practice*, vol 1. Tel Aviv: Shurat Hadin.

Dekel, O. 2001. *The Legal Requirement of Competitive Bidding for Administrative Agencies*. Jerusalem: The Hebrew University of Jerusalem and the Academic College of Law Publishing.

Eckstein, E. Rozevich, S. & Zilberfarb, B. 1998 *Privatization of Public Enterprises: In Israel and Abroad*. Ramat Gan: Bar Ilan.

Harel, A. 2019. *Hybrid Bodies and Officeholders* 2 ed. Tsafririm: Nevo.

Kedar, N. 2002. Ben-Gurion's Mamlakhtiyut: Etymological and Theoretical Roots. *Israel Studies* 7:117-133.

Mandelkern, R. 2018. From Nationalized Ownership and Provision to Privatization in Israel: The Politics of Institutional Change. In Paz-Fuchs, A., Mandelkern, R. & Galnoor, I. (Eds.). *The Privatization of Israel: The Withdrawal of State Responsibility*. New York: Palgrave Macmillan:365-384.

Mandelkern, R. & Paz-Fuchs, A. 2018. Privatizing Israel: An Introduction. In Paz-Fuchs, A., Mandelkern, R. & Galnoor, I. (Eds.). *The Privatization of Israel: The Withdrawal of State Responsibility*. New York: Palgrave Macmillan:1- 18.

Razin, A. 2019, The Saga of Inflation in Israel. *The Economic Quarterly* 63(3/4):45-68.

Reich, A. 2017. Israel's Public Procurement Regime: International and Comparative Aspects. In Georgopulos, A.C., Hoekman, B. & Mavroidis, P.C. (Eds.). The Internationalization of Government Procurement Regulation. Oxford: Oxford University Press.

Reich, A. & Shabbat, O. 2014. The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform. *Public Procurement Law Review* 23:50-77.

Reichenberg S. & Mezer, R. 2022. The tender as a forerunner of all things? The Mandatory Tenders Law and the frameworks for placement Out-of-home care for troubled teenagers. *Hukim* 15(1):1-42.

Sapir, G. 2009. Constitutional revolutions: Israel as a case-study. *International Journal of Law in Context* 5:355-378.

Shabbat, O. 2017. *Administrative Petition and Remedies in Israeli Public Procurement Law: Theory and Practice*. Bar Ilan: Perelestein Genosar.

Shalev, G. 1999. *Contracts and Tenders of Public Authorities*. Jerusalem: Din Publishing.

Shalev, G. 1999. *Government Publishing*. Tel Aviv: Bursi.

Shany, Y. 2020. *Proposed Basic Law: Equality*. Jerusalem: IDI. Available at: חוק יסוד: שוויון (idi.org.il) (accessed 08-10-2022).

Tevet, E. 2018. Incorporation and Privatization in the Infrastructure Sectors in Israel: Processes and Consequences. In Paz-Fuchs, A., Mandelkern, R. & Galnoor, I. (Eds.). *The Privatization of Israel: The Withdrawal of State Responsibility*. New York: Palgrave Macmillan:73-97.

Vexler, A. & Tamir, D. 2012. Rethinking the Duty to Disqualify Non-Compliant Bid Guarantee following the Judgement re Afcon Automation Ltd. *Taagidim* 9(2):62-77.

Zamir, E. 2021. Contracts Interpretation: Theory, Law, Facts and Values. *Mishpatim* 51(1):81-129.

Case law

HCJ 292/61 *Bet-Ariza Rehovot Ltd and others v Minister of Agriculture and all* 16 PD 20.

HCJ 316/63 *Gazit ve Shaham Construction Ltd v the Port Authority and all* 18 PD 11.

HCJ 106/66 *Ehud Haim v Public Works Unit Manager* 20(3) PD 203.

HCJ 187/71 *Ramet Ltd v The Company for Renovation of Jerusalem Old City* 26(1) PD 118.

HCJ 794/78 *Herut Ltd et al v The Minister of Health* 33(2) PD 716.

HCJ 19/79 *Rosman v Ashkelon Municipality* 33(3) PD 794.

HCJ 35/82 *Yishpar Ltd v Minister of Defence* 37(2) PD 505.

HCJ 126/82 *Tiyulei Hagalil v Government of Israel* 36(4) PD 44.

HCJ 256/85 *Cohen v Kiryat Tiveon Local Municipality* 40(1) PD 610.

HCJ 649/89 *United Steel Industries Ltd v Ministry of Economy and Planning* 45(1) PD 485.

HCJ 991/91 *Pasternak v Ministry of Ministry of Construction and Housing* 45(5) PD 50.

CivA 4628/93 *State of Israel v Apropim Real Estate Development Ltd* 49(1) PD 295.

HCJ 6926/93 *Mispenot Israel v Israel Electric Corporation Ltd* 48(3) PD 749.

HCJ 9241/09 *Sheleg Halavan 1986 Ltd v Ashkelon Municipality et al* (08-07-2010).

HCJ 6101/13 *Yamit A. Security Ltd (1998) v The Jewish Agency for Israel* (02-02-2014).

HCJ 1777/14 *Chen Hamakom Ltd v Kiryat Ono Municipality* (16-06-2016).

CivA 7642/18 *Bibi Roads Dirt and Development Ltd v Israel Railways Ltd* (11-11-2019).

HCJ 7230/19 *Gili and Yoel Azaria Ltd et al v Ben Ari Tal Ram Projects Ltd* (26-05-2020).

HCJ 7002/19 *China Motors Ltd et al v Ministry of Transportation et al* (07-07-2020).

AdminA (Jerusalem) 2588-06-10 *Hevzekin Management Services Ltd v Municipality of Jerusalem* (Nevo) (01-06-2016).

AdminA (Tel Aviv) 2287-06-17 *Organization of Nursing Companies v Ministry of Defence* (Nevo) (01-07-2019).

AdminA (Lod) 5749-08-20 *Meitar Advanced Municipal Services Ltd v The Municipality of Qalansawe at all* (Nevo) (10-12-2020).

Legislation, regulations, practice notes and instruction notes

Administrative Matter Courts Law 5752-2000.

Contracts Law (General Part) 5733-1973.

Contract Law (Remedies for Breach of Contract) 5735-1975.

Draft Mandatory Tenders Regulations 5782-2022 (for public comments).

Mandatory Tenders Law 5752-1992, 5782-2022.

Mandatory Tenders Ordinance (Judea and Samaria) 5780-2020.

Mandatory Tenders Regulations 5753-1993.

Draft Mandatory Tenders Regulations 5782-2022 (draft for comments).

Mandatory Tenders Rules (Goods, Services and Works), (Judea and Samaria) 5780-2020.

Mandatory Tenders Regulations (local corporations) 5781-2021 (draft).

Mandatory Tenders Regulations (procurement by high education institutions) 5770-2010.

Mandatory Tenders Regulations (Ministry of Defence Procurement) 5753-1993.

Municipalities Ordinance of 1934.

Municipal Regulations (Tenders) (Temporary Order) (5780-2020).

International Sources

UNCITRAL Model Law on Public Procurement (2011).

WTO Government Procurement Agreement.

Documents on file with the author

Justice Hannan Meltzer, Israel Bar Association Practice Course, 26/12/12.

Zvi Hauzer, Former General Director of the Office of Prime Minister, Israel Bar Association Practice Course, 24/10/12.

Websites

Chief Justice Hayut. (2022). Available at: https://www.timesofisrael.com/topic/israel-supreme-court/ (accessed 25-09-2022).

Globes. (2021) *This time it was unsuccessful*. Available at: חוצה ישראל : כל החדשות והעדכונים - גלובס (globes.co.il) (accessed 25-09-2022).

Government decision No. 260 (2020). *Plan to promote e-government services*. Available at: ערבויות דיגיטליות (govextra.gov.il) (accessed 25-09-2022).

Government Decision No. 489 (2020) Available at: מדיניות ממשלתית למדידה והערכה בשירותים חברתיים במיקור חוץ | מספר החלטה 489 | משרד ראש הממשלה (www.gov.il) (accessed 25-09-2022).

Government Procurement Administration. Available at: Welcome to the Government Procurement Administration website (mr.gov.il) (accessed 23-09-2022).

Observatory of Public Sector Innovation. (2020). *Exploratory Scan of the Israeli public sector innovation system*. Available at: Initial Scan of the Israeli public sector innovation system (oecd-opsi.org) (accessed 23-09-2022).

Open Contracting Partnership. (2020) *How governments spend: Opening up the value of global public procurement*. Available at: OCP2020-Global-Public-Procurement-Spend.pdf (open-contracting.org) (accessed 23-09-2022).

The Israel Democracy Institute. (2019). Unity Coalition Governments: Explainer. Available at: Unity Coalition Governments: Explainer - The Israel Democracy Institute (idi.org.il) (accessed 25-09-2022).

The Israel Democracy Institute. (2023). The Planned Overhaul of Israel's Judiciary Available at: The Israel Democracy Institute (idi.org.il) (accessed 26-03-2023).

The State Comptroller and Ombudsman. *Annual Report 2010-2018*. Available at: https://www.mevaker.gov.il/En/publication/Pages/LinkstoReports.aspx (accessed 23-09-2022).

World Trade Organisation. (2022) Available at: Israel (wto.org) (accessed 23-09-2022).

Forum of Legal Counsels of Non-Governmental Organizations, Comments to Mandatory Tenders Regulations 5782-2022 (draft for comments). Available at: נייר עמדה - טיוטת תקנות חובת המכרזים 2022 - פורום יועמשים בעמותות 5.7.22 (1).pdf (accessed 23-09-2022).

Benish and Tzaba, Comments to Mandatory Tenders Regulations 5782-2022. Available at: בניש וצבע הערות לתקנות המכרזים 05072022 סופי (1).pdf (accessed 23-09-2022).

Dekel, O. (2022), Comments to Draft Mandatory Tenders Regulations. Available at: נייר עמדה - טיוטת תקנות חובת המכרזים 2022 - פורום יועמשים בעמותות 5.7.22 (1).pdf (accessed 23-09-2022).