I. Abstract

The hearing framework known as a *further hearing* has been familiar to the general public in Israel for some time. This procedure is granted upon the petition of the parties or by the justices of a specific panel of the Supreme Court. However comprehensible the concept appears to be, in view of its simple designation, this legal device has not merited meaningful attention in legal research. By law, a *further hearing* is a situation where “in a matter on which the Supreme Court has ruled, with a panel of three or more justices, it may rule at a *further hearing* as a panel of five or more justices.” In such a case, an expanded Supreme Court bench hears a matter that has already been ruled, but the Court may also convene an expanded panel in other instances. It may also do so in a case that was originally heard by an expanded panel without being designated a *further hearing*, in which case, it will simply be designated an “expanded panel.” This article will address the concept of the *further hearing*, as opposed to the phenomenon of “expanded panels” in general. The first part of this article will be theoretical, and we will seek a conceptual understanding of this legal institution. In the second part, the article will address empirical research on this subject and will present quantitative data on *further hearings* held in the course

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1 In spite of its complexity, this legal concept has appeared in the daily media in Israel several times over the past few years, owing a great deal to the possibility of a *further hearing* in the case of Aryeh Deri.
of over thirty years of Supreme Court adjudication (1970-2000). The third and last part of this article will present possible conclusions that may be drawn from the empirical results and will question the need for such an institution.

II. Further Hearing – Theoretical Basis

The Supreme Court generally sits in a panel of three. Although it may sit in larger panels, as well as smaller ones, in most cases it sits in a panel of three. A Supreme Court judicial panel, notwithstanding its size, is meant to be the end of the judicial road in the State of Israel, and Supreme Court rulings cannot be appealed. Nonetheless, petition may be made for a further hearing on a decision handed down by the Court. Section 18 of Basic Law: Judicature states that “in a matter adjudged by the Supreme Court by a bench of three, a further hearing may be held by a bench of five on such grounds and in such manner as shall be prescribed by law.” Thus, litigants are given a de facto opportunity to move for an appeal on a decision handed down by the Supreme Court, even though there are no appeals on its decisions. The parties in a case and the significance with which they view the adjudication in their matter are not the only issues, and not even the most important factors, to be considered in the hearing on whether to grant the petition for further hearing, thus rendering the designation “further appeal” inaccurate. Concomitantly, as we shall see below, there are cases in

4 Sec. 26 of the Courts Law, at 198: “The Supreme Court is constituted of a panel of three justices.”
5 Secs. 26 (1) and 26 (2) of the Courts Law empowers the President or the Deputy President of the Supreme Court to expand the size of the panel of justices, and in addition empowers each panel to expand the number of its members.
6 Secs. 26(3) and 26(5) of the Courts Law also empowers a single justice in certain cases to sit alone as a panel of the Supreme Court, mainly relating to judicial decisions that arise in the course of a trial.
7 A panel of three justices constituted 88.6% of the cases in forty-seven years of judgment that were consolidated and analyzed in the study by Shachar, Gross, and Harris, “Anatomy of Discourse and Dissent in Israel’s Supreme Court” (1997) 20 Iyunei Mishpat 749, at 795 (hereinafter: “Discourse and Dissent”). See this article for a good analysis of the entire question of the size of the panel in the Supreme Court, a subject that is not within the scope of this present article.
8 Provided in sec. 30 of the Courts Law, at 1123.
which a further hearing reversed the original ruling by the Supreme Court, and thus had a great deal of meaning to the parties themselves, which, for their part, may deem this to be the granting of the “additional appeal” for which they petitioned.9

Any attorney practicing in the courts knows that assignment of the judicial panel for an anonymous case is of no lesser importance than the legal arguments that the parties will present before that panel of judges. Nonetheless, the question of how the President of the Supreme Court determines the composition of the panel before which a given case will be heard has not received a clear and unequivocal response in legal literature. In their article,10 Miron Gross and Yoram Shachar state that “the question of the manner in which generations of Chief Justices have actually wielded this power [author’s note: the power to assign a panel for a Supreme Court hearing] has never, to the best of our knowledge, been examined in any public forum whatsoever.” Moreover, even the internal procedural rules that set out the work of the Supreme Court do not specify any “objective criteria whatsoever for the assignment of the judges who will sit in panels, or the manner in which the assignment process should be conducted. Neither these nor other instructions dictate that any criteria whatsoever be used in this process.”11 Their article drew on a quantitative empirical analysis of the work of the Supreme Court to address the question in general terms. This article does not intend to elaborate on the general question, but rather to focus on the question derived therefrom, the inferred question of the unusual framework of expanded and exceptionally complex panels specially assembled for a further hearing.

As noted, the factor that is of interest to us is that it is clear to the Israeli public that judges in general, and in particular the justices seated on the Supreme Court, do not hold uniform and unanimous positions on each and every subject. Thus, the question of who will hear a case often influences the outcome of the proceeding itself.12 When the

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9 The entire doctrine of further hearing and the procedure for petitioning for a further hearing, as well as the question of further hearing = (equal) additional appeal, will be clarified and explained in detail in this article.

10 Gross and Shachar, supra n. 3, at 567.

11 Ibid., at 568.

12 This subject also arose in the article by Gross and Shachar, supra n. 3, and also in Supreme Court adjudication. See, for example, Clement Attian Blan v. Executors of the Litwinsky Estate and others 15 P.D. 71, at 75.
question concerns the courts in Israel, as judicial institutions that rule on disputes and determine societal norms, then the setting of the precedent itself creates the framework to which judges in the lower courts will refer. This is a decision-making structure that will bind all those who act in the name of the law, in spite of the difference of opinions held by different judges, whether specifically – in a lower judicial instance bound to legal precedents set by the next higher instance — or in general, the various attorneys and agents of the court in legal practice. Even in cases in which there is dissent amongst the justices, or at least a substantive difference in the manner in which they reach a conclusion, once the ruling is issued – whether by majority or unanimously – it forms a precedent for the lower courts. As to the Supreme Court itself, there is no higher instance that can guide it. Supreme Court precedents oblige the justices of the Court itself to manifest a certain coherency. The Supreme Court may be bound to its own precedents by norms, but it is not similarly bound by constitutional dictates.  

The Courts Law, 5717-1957, explicitly states that the Supreme Court is not bound by its own precedents. Does the Supreme Court act as if it is bound to its precedents, or does it, perhaps, act otherwise? That is, do the justices of the Supreme Court themselves uphold the “stability” of the adjudication, or do they deem the internal “truth” of each and every judge to be of even greater importance? 

Precedents set by ordinary Supreme Court panels of any size have been discussed elsewhere. Is it possible, however, that the further

13 This article does not intend to delve into elaborate comparisons with various laws throughout the world, and only brief mention will be made, viz., that this problem is resolved in various ways elsewhere in the world: The United States Supreme Court always sits in a full panel of nine justices; the House of Lords in the United Kingdom sits in two fixed panels of five justices each; the French and the German systems draw on the specific expertise of justices and panels, etc. Israel’s Supreme Court does not have fixed or expert panels, see Gross and Shachar, supra n. 3, at 570.

14 Sec. 33 of 11 L.S.I. 157, at 163, provides that “A precedent established by the Supreme Court binds every court, except the Supreme Court,” (now sec. 20 of Basic Law: Judicature).


16 On this subject, see Y. Shachar, “Solidarity and Inter-Generation Dialectics in the Supreme Court – The Politics of Precedent” (2001) 16 Mebkarei Mishpat (hereinafter: “Solidarity and Inter-Generation Dialectics”); Y. Shachar, C. Goldschmidt and M. Gross, Precedent in the Supreme Court, not yet published; Gross and Shachar, supra n. 3; Shachar, Gross and Harris, “Discourse and Dissent,” supra n. 7.
hearing is the means by which the Court may state its case in a more uniform manner? Is further hearing the instrument that guides the "stability?" If the Supreme Court is intended to speak in absolute unison, then the solution of hearings in full panels (Umbank) of the Supreme Court on a permanent basis would decisively resolve the problem of variance of judicial opinions. This solution, however, raises the difficult question of efficiency. The further hearing in Israel is not a hearing by a bench of the entire Court. The panel is expanded, but it is still only partial. When the Supreme Court was relatively small, as it was upon the establishment of the State and in the ensuing years, then an expanded panel of five justices handing down a unanimous ruling did, in fact, determine the position of the Court, so long as the entire Court did not exceed nine justices. Today, with a Supreme Court comprising fourteen justices, the panel of five – a natural expansion of a panel of three – is not a majority, and does not even approach being a majority. Moreover, more combinations of panels of five may be assembled out of a total of fourteen than panels of three out of the same total. There are 2,002 different combinations of five that may be selected out of the total of fourteen, compared with 364 different combinations of three that may be selected out of a total of fourteen. In fact, the manner of assigning a further hearing panel of five out of a total of fourteen is far more significant than the initial selection of the original panel, as long as the panel is expanded to only five justices.17 This means of selecting the justices who will sit on an expanded panel in a further hearing has not, as mentioned earlier, been the subject of any public debate.

In addition, let us recall that no clear and unequivocal response was provided to the basic question: Is there an intention to present an absolute and uniform position of the entire bench of the Supreme Court? This question takes a certain twist if and when it concerns Supreme Court panels of justices with specific expertise. In cases of Courts that seat certain panels determined a priori because of the expertise of the justices in certain areas of the law, then no unified position may be expected at all, if it cannot extend to other panels in view of the varying areas of law considered by each panel. Therefore, before we can address the question of whether all of the Supreme Court justices present a homogeneous position, we must first address the question of whether Israel has a

17 As we shall see in the second part of this article, the empirical analysis, this may perhaps justify the recent tendency to assign larger panels for further hearings.
Supreme Court comprising panels with specific expertise in certain areas of law. Gross and Shachar addressed the question of “panels of specific expertise” in their study.\(^{18}\) In brief, according to their research, the combination of seniority and expertise in Supreme Court panels headed by the President of the Supreme Court, Chief Justice Shamgar (1984-1988) provides a major part of the explanation of the frequency variance of certain compositions of panels.\(^{19}\) In more recent years, however, these coordinates drastically decrease, and no meaningful explanation can be proposed for the general variance by seniority and/or expertise. In general, Gross and Shachar determine in their article that: “Supreme Court panels are not fixed over time but are not composed at random.”\(^{20}\) It would thus appear that in Israel, panels of the Supreme Court are not “arranged” according to specific expertise of its justices.

As noted, the question to be asked is whether the entire bench of the Supreme Court is intended to present a homogeneous position. It is possible, in fact, that the intention – overt or covert – is just the opposite: the Supreme Court is not intended to present a unified stance on each subject, one that would bind the entire Court. It is possible that the intention is to “unchain” the Supreme Court and to allow different panels to determine, over time, different positions that are not bound to the agenda of precedents of the Supreme Court itself. Such unanimity would cause considerable homogeneity of opinion amongst individuals who hold different concepts of law and society. Section 20 of Basic Law: Judicature states that “a rule laid down by the Supreme Court shall bind any court other than the Supreme Court,”\(^{21}\) and in doing so, dictates the obvious conclusion that the Supreme Court is not bound by its own precedents and may deviate from these. Clearly, however, such a deviation must be limited to rare cases: “Only after exercising cautious consideration and in appropriate exceptional cases shall the Supreme Court deviate from its precedents.”\(^{22}\) In their article, Gross and Shachar

\(^{18}\) Gross and Shachar, \textit{supra} n. 3.

\(^{19}\) 59% of the variance is explained by this union of seniority and expertise, where every other attempt to explain specific combinations of panels in the Supreme Court yields a far smaller explained variance. Gross and Shachar, \textit{supra} n. 3, at 583.

\(^{20}\) Gross and Shachar, \textit{supra} n. 3, at 583.

\(^{21}\) Sec. 20(b) of Basic Law: Judicature, 1110, 1984 38 L.S.I. 101.

\(^{22}\) \textit{Hossam bin Muaahid Hajj Yiyha v. The State of Israel}, 424 Dinim Va Od, Dinim Elyon 21, at 7, the comments by Justice Or; see also the ruling by Justice Silberg in \textit{Bln}, \textit{supra} n. 12, at 75; the ruling by Justice Barak in \textit{Of Haemek v. Ramat Yishay Local Council and others} 40(1) \textit{P.D.} 113, at 134.
add: "[There is no] systematic effort whatsoever to achieve a homogeneity of views in panels of the Supreme Court. We shall suffice by noting that an anecdotal examination of pairs of justices who often sat together illustrates conspicuous cases of fundamental dissent of positions ..."23

Although the Supreme Court does not often deviate from its own precedent, this question of truth or stability, presented to us by then-President of the Supreme Court, Chief Justice Zmora, appears from time to time amongst various justices throughout the history of the Supreme Court. The standard-bearer of siding with truth vis à vis stability was the then-Deputy President of the Supreme Court, Justice Elon. In his article, "Solidarity and Inter-Generation Dialectics in the Supreme Court – The Politics of Precedent,"24 Professor Shachar notes that Justice Elon breaks ground: "For the first time in the history of Israeli jurisprudence, a justice uses these metaphors [author's note: the metaphor of "intellectual freedom" and the metaphor of "independence"] against the power of the majority in his own Court."25 Justice Elon is not the only one. The tension between internal truth and the stability of Supreme Court adjudication appears throughout the years and is expressed by several different justices.26

All this could lead to the conclusion that not only is there no all-embracing expertise in the Supreme Court, but the Court does not even seek to achieve a homogeneity of opinion, despite its effort to only deviate from previous adjudication in rare cases. Let us ask a more

23 Gross and Shachar, supra n. 3, at 581, and also in their article "Acceptance and Rejection of Appeals to the Supreme Court – Quantitative Analyses" (1996) 13 Mehkarei Mishpat 329.

24 See supra n. 16. The article offers a fascinating historical analysis of several points along the timeline of the question of stare decisis in the Supreme Court. According to the article, "this question has merited different consideration throughout the years of case law in Israel," but this is not the occasion to elaborate thereon.

25 Ibid., at 179.

26 See supra n. 22, particularly in relation to the Hajj Yiyya affair. In addition, as this article is being prepared, Chief Justice Barak wrote, in Anonymous v. Minister of Defense 44(1) P.D. 721 at 744: "Because I am not counted among those who rule that finality of a decision attests to its correctness. Each of us may err. Our professional integrity obliges us to acknowledge our error if we have become convinced that we have indeed erred ... These comments apply to each and every judge who struggles with himself and who examines his ruling. In our difficult hours, when we examine ourselves, the immovable star that must guide us is to expose the truth that leads to the manifestation of justice within the gates of the law. We must not barricade ourselves behind our prejudices. We must be prepared to acknowledge our errors."
difficult question: Is the construct of further hearing intended to “frame the opinion” of the Court? Is it meant to “guide the way” on a certain matter, pursuant to the freedom given to the highest instance to deviate from a ruling of the highest instance itself? Hints at an affirmative answer can be found in the book by the Deputy President of the Supreme Court, Justice Shlomo Levin, who states that such decisions have greater force. Moreover, we find in Supreme Court adjudication the position that a principle established in an expanded panel of the Supreme Court has a special significance and should not be easily set aside. Years earlier, in his article “Rules and Discretion in the Making of Law,” Justice Moshe Landau noted that a custom had developed in the Supreme Court whereby an expanded panel of five or more justices settled disputes if and when these arose in various panels of three justices. From here, it is clear that adjudication in a further hearing is of far greater significance than an “ordinary” Supreme Court precedent. This is also explicitly articulated in Supreme Court adjudication. Such a constitutional possibility has, however, been rejected in the past – in Divrei HaKnesset we find, during the debates on the Courts Law, a subsection (c) to section 33, which stated that a “principle ruled on by the Supreme Court in a panel of five justices also binds the Supreme Court.” This section was deleted during the parliamentary debates, and the legislator decided – consciously – that the Supreme Court must not be restricted to its own precedents. The law is clear.

It appears, then, that Supreme Court adjudication, and not explicit legislation, affirms that it is possible that this judicial instrument of further hearing serves to “frame the opinion” of the entire bench of the Supreme Court, a manner of “joint utterance” of all of the justices. Such


28 See the ruling by Justice Or in Hajj Yihya, supra n. 22, at 9.


30 See, for example, the ruling by Justice Bach in Hajj Yihya v. The State of Israel, supra n. 22, at 19: “If the justices of this Court hesitate to deviate from a precedent ruled by an ordinary panel of the Supreme Court, a minori a majus those same hesitations are in order when the question concerns deviation from a principle ruled by an expanded panel, whether this panel heard a certain trial in the context of a further hearing on a ruling by three justices, or whether the expanded panel was convened especially because of the importance and principle of the matter being heard.”

31 Divrei HaKnesset, Vol. 22, 2496-2498.
a “framing of opinions” does not determine that a principle ruled in a
further hearing is a precedent that binds the Supreme Court itself. “Framing of opinion” is not “binding precedent,” neither in law nor in
normative drafting here. Moreover, Professor Shachar, in considering
the expanded ruling in the *Hajj' Yihya* case, the matter of the “silent
witness,” states, with respect to the dissenting justices: “Moreover,
loyal to their doctrine, they were not obligated to defer to the
*Hajj' Yihya* principle even if it had been handed down unanimously. If a judge does
not stand in awe of any other judge but stands in awe only of the law
itself, it is the same to him if he is in dissent with few justices or with
many, or even with all of the judges of Israel save himself.” And here
we may annotate his comment — even if he dissents with adjudication
ruled in a further hearing.

If we have no explicit legislation that binds the Supreme Court
justices to its precedents, and the adjudication of the Supreme Court
only hints at an “intention to frame opinion,” then what is the purpose
of this judicial instrument? To attempt to understand, we shall briefly
turn to the history of the legislation relevant to this judicial construct.

The further hearing in a certain form is, apparently, a singular
Israeli invention. It is a modification that first appeared in the mid-
1950’s, in the proposed Courts Law, 5797-1955. Under British Manda-
tory rule, any ruling by the Supreme Court could be appealed to the
Privy Council in London, England. Naturally, this option was elimi-
nated upon the establishment of the State and the independence of
Israeli judicature, thus leading to the sense prevailing since that time,
that there is a “lack of an appeals instance.” The privilege of a further
hearing constituted a solution for the new state of affairs that came into
being upon the establishment of the State, and it was an attempt to
replace the concept served by the additional instance of appeal to the

32 *Hajj’ Yihya*, 45(5) P.D., at 221, *supra* n. 22, see following for details in this matter.
34 *H.H. [Bills] Proceedings* 5715-1955, at 64. Then-Minister of Justice Pinchas Rosen
spoke from the Knesset plenum, *Divrei HaKnesset*, Vol. 19, Session 24 at 317: “… The
most important and remarkable innovation is, undoubtedly, the amendment that
proposes a further hearing in the Supreme Court …” See also the comment by the
Chairman of the Knesset’s Constitution, Law and Justice Committee, MK Nahum
Nir-Rafalkes, two years later, in further sessions on this legislation, *Divrei HaKnesset*,
Vol. 22, Session 303 at 2101: “… after all this is a great innovation admitted by the
government …”
Privy Council. Although the *further hearing* is not a construct for an additional appeal, as we shall see below, the significance of this hearing framework was already addressed in the proposed law, when then-Minister of Justice Pinhas Rosen explained its importance inasmuch as it would fill in for the absence of an instance of appeal to the Privy Council, and in fact was intended to constitute an additional quasi-appeal.35

While most countries have three levels, a ruling in a trial that began in the District Court may be appealed only to the Supreme Court, and unlike in most countries, an additional appeal to an even higher court does not exist. Although we do propose an important amendment in this matter, it is not to the extent of establishing a new court.36

It is an “important amendment,” but it is not a “new court.” What, then, is it? How have the sections of the law that address the *further hearing* been interpreted over the years?

**What Is a Further Hearing**

As we have seen, a *further hearing* is a situation where “in a matter on which the Supreme Court has ruled with a panel of three or more justices, it may rule at a *further hearing* as a panel of five or more justices.”37 This power of the Supreme Court is given to it on its own judgment and is also a possibility extended to each litigant that appeared before it. In such a case, the President of the Supreme Court himself, or a justice or justices whom he has so empowered, decide whether to accept a petition for a *further hearing*.38 In the first case, the Court itself is empowered to decide to conduct a *further hearing*; it is not bound to a particular framework and may make its determination for

36 See also the comments of MK Harrari who expressly specifies that the question being considered is an appeal, *Diurei HaKnesset*, Vol. 22, Session 327 at 241: “... in sec. 8 we determined a *further hearing*, which is a second level of quasi-appeal within that same Supreme Court ...”
37 Sec. 30(a) of the Courts Law.
38 Sec. 30(b) of the Courts Law.
different and varied reasons. The language of the law may be understood to indicate that there is a differentiation between the power of the justices on the bench to decide on a further hearing and the power to accept a petition submitted by a litigant. The legislator chose to distinguish between these two possibilities, and section 30(a) does not elaborate on the question of how to consider the possibility whereby the hearing is expanded on the judgment of the panel itself. It should be noted that the legislator deemed fit to allow the panel itself to decide on a further hearing as a separate procedure, even though, according to section 26(2) of the Courts Law [Consolidated Version], justices of the Court are empowered to decide on expansion of the judicial bench. It appears that the main difference between these two possibilities is defined by the stage at which the seated panel finds itself in the hearing process. The language of section 26 first refers to a situation in which the panel seeks to increase the number of justices on the bench at a stage "prior to commencement of the hearing" and thereafter upon "commencement of the hearing." Section 26 in its entirety concerns itself with the stage of deciding the size and substance of the panel, and it is entirely directed toward a preliminary stage of the proceeding. Section 30 in its entirety concerns itself with a more advanced stage of the proceeding, and it is entirely directed toward a situation in which a ruling was made, at which time the panel seeks, on its own judgment,

39 See, for example, Amad Ganimat v. State of Israel 49(3) P.D. 335, in which the justices granted a further hearing, without any rationale or reason, under the power accorded to them by sec. 30(a) of the Courts Law.

40 Hereinafter a "self-judged further hearing," to differentiate from a further hearing granted by the President of the Supreme Court upon petition by a litigant.

41 The full text of the section reads:

"The Supreme Court generally sits in panels of three justices, however –
(1) The President or the Deputy President of the Court is empowered to instruct, prior to the commencement of a hearing on a certain matter, that the hearing shall be held before a larger panel of an uneven number of justices;
(2) a panel that has commenced hearing a certain matter shall be empowered to instruct that the continuation of the hearing on that matter shall be held before a larger panel of an uneven number of justices, including those justices who began the hearing ..."

42 Sec. 26(1) of the Courts Law, which then addresses the power of the President of the Supreme Court.

43 Sec. 26(2) of the Courts Law, and the text of the section is explicit: "... that has commenced hearing a certain matter shall be empowered to instruct ..."
to conduct a further hearing on that same question. Whether the panel itself should so decide or whether the petition for a further hearing is made by a litigant, it occurs at a stage after the ruling has already been made.44

In the second case, the petition for a further hearing is made by a litigant, and the President of the Supreme Court, or a justice whom he has so empowered, must decide whether to accept the petition. He is not bound to do so and there is no vested right to a further hearing. A decision to hold a further hearing must take into account the circumstances of the case. A further hearing may be granted only in cases in which "the Supreme Court makes a ruling inconsistent with a previous ruling of the Supreme Court or where the importance, difficulty, or novelty of a ruling made by the Supreme Court justifies, in their view, such a further hearing.*5

These provisions of the law dictate cumulative conditions for accepting the petition of a litigant for a further hearing. The first and essential condition for a further hearing is composed of two parts: firstly, there must be a final ruling handed down by the Supreme Court. Secondly, this ruling must demonstrate one of the following: it is inconsistent with

44 One interesting case is Hajj' Yihya 45(5) P.D. at 221, supra n. 22. In that case, Justice Or ruled in the matter of the "silent witness," a subject of the judgment, in keeping with an existing Supreme Court principle (the Levy Rule). While drafting his ruling, he was apprised that two of his colleagues on the bench, Deputy President of the Supreme Court, Justice Elon and Justice Bach, were about to deviate from the Levy Rule. Justice Or sought to prevent a condition such as this, in which an "incidental majority in a panel of three" rules against an existing Supreme Court principle, and moved to expand the judicial bench that would hear the case, by virtue of the power provided in sec. 26. This proposal was rejected by his colleagues on the bench, and only his subsequent proposal was accepted: the decision to hold a further hearing on this matter would be made under sec. 30. Justice Or wonders at the initial dissent and the later concurrence, and is surprised that an interim ruling was necessary -- a ruling by this panel on this case -- to be able to move to the next stage in the process: an expanded further hearing. My analysis of this ruling integrates well with my comments above: Does the expansion of the number of justices on the panel fall under the powers provided in sec. 26, or under the power provided by sec. 30? The only way to answer this question is to determine what stage the hearing has reached. In this matter, it was the commencement of the hearing, and thus the Chief Justice did not decide to expand the number of the panel prior to the hearing, nor in its first stage, since once the hearing is underway the only option available to the panel is to decide on a self-judged further hearing after handing down the ruling itself.

45 Sec. 30(b) of the Courts Law.
a previous ruling by the Supreme Court, very important, very difficult, or innovates a Supreme Court principle. There are no objective criteria by which to measure the importance or difficulty of the principle so as to create the fundamental condition for a further hearing. Nonetheless, if the question concerns an inconsistent existing principle or innovation of an existing principle, the solution is sufficiently clear and quite literal: a new Supreme Court ruling that is inconsistent with a previous Supreme Court ruling or a case in which a novel subject was addressed in a previous ruling, but should be addressed in depth by an expanded and exceptional panel. The second condition is the decision of the President of the Supreme Court or another justice hearing the appeal, and this decision is given to the full discretion of that same justice. Here we seek practical justification to rehear a matter that was already judged by a Supreme Court judicial panel. The decision is not as to whether “the problem must be examined again,” an additional “quasi-appeal” in the Israeli judicial system. A further hearing is an exceptional and rare proceeding in Israeli judicature. Whether in view of the explicit law or whether in a long series of rulings, it has been unequivocally determined that a further hearing is not an “additional appeal.”

46 See the ruling by Justice Strasberg-Cohen in Afrofim Housing and Development, Ltd. v. The State of Israel, 56 Dinim Va Od, Dinim Elyon 348 at 351: “The question as to the scope and the nature of difficulty, importance, or innovation of rule that justify - together with considerations of the concrete case - the conduct of a further hearing, was not exhaustively and comprehensively answered in adjudication. It is likely that no such answer can be provided.”

47 Testing inconsistency is a simple matter of dichotomy, and conducting such a test should not be particularly difficult. See, for example, contra, the “silent witness” in The State of Israel v. Hosam bin Majaahid Hajji Yiyha 47(3) P.D. 661; compare with, for example, the Nachmani affair, which concerned novelty and difficulty, Ruth Nachmani v. Daniel Nachmani, 49(5) P.D. 598.


49 See, for example, further hearing 2751/94 “A Different Bureau” & others v. The Minister of Foreign Affairs & others 48(5) P.D. 543; further hearing 3081/91 Kozali v. The State of Israel 45(4) P.D. 441; further hearing 6490/96 Amir v. Amir 50(5) P.D. 55; further hearing 6/82 Yanai v. The Director of the Executioner’s Office and others, 35(3) P.D. 41; further hearing 14/87 The Daily Newspapers Association in Israel v. The Minister of Education and others 41(4) P.D. 602. See also further hearing 3489/93 Yair Ben Eliyahu Orr v. The State of Israel, 48(2) P.D. 661: “... What is the difference between a further hearing and a simple appeal? In an appeal on a conviction, the appeals instance examines the factual findings and the derived conclusions to ascertain whether they are grounded in the testimony presented..."
ther the doubts and/or the achievements that one may harbor regarding a Supreme Court ruling, nor the attempt to present additional evidence, permit a further hearing on a matter. The further hearing is meant to be a renewed examination of a ruled principle, and thus the matter that will be heard is the Supreme Court ruling itself, and not the proceeding or the evidence that was presented before the Court.

As mentioned above, the power to petition for a further hearing is given to the judgment of the Court itself according to section 30(a) of the Courts Law [Consolidated Version], and it is also given as a possibility to every litigant who appeared before the Court, according to section 30(b) of that law, as we have just seen. Adjudication in Israel reads section 30(a) and section 30(b) of the law as one solid piece. The consideration is whether the decision to hold a further hearing must be based on the principles of section 30(b), whether the situation concerns a further hearing sought by the panel on its own judgment or sought by a litigant who has submitted a petition to the Court. This is the approach of Justice Shlomo Levin, who states in his book that even though he is aware of the difference in the drafting of the different parts of section 30, in his view, the consideration should not differentiate between a further hearing sought on the judgment of the panel itself and a further hearing sought by a petition submitted to the President. He deems that the rules set forth in section 30(b) also apply to the cases that fall within the purview of section 30(a), even though the discretion of the President to accept a petition for a further hearing is more limited before the court of first instance, and whether no legal errors occurred that could have implications on the determination of the findings and on the application of the legal principle applicable to these findings. In its role as a court of appeals, in the ordinary sense, the Court views an appeal as being guided by principles that set limits on the intervention of the appeals instance in its determination of the first instance as to the reliability of witnesses ... this is not the case in the further hearing ... the further hearing is not an additional appeal, but is limited to an examination of the principles applied in the ruling for which a further hearing was sought." Nonetheless, as noted previously, the parties view, and justifiably so, the granting of the further hearing as an "additional appeal."

50 See, for example, the comments of Justice Dorner in Ruth Nachmani v. Daniel Nachmani 49(5) P.D. 598, at 614: "The President of the Supreme Court, or a Justice who has been so appointed, shall be empowered to decide - under conditions specified in sec. 30(b) of the Courts Law - to conduct a further hearing." See also the comments of the President of the Supreme Court, Chief Justice Olshan in Ovadia Farazi v. Haim Weisman and others 16 (1236) P.D. 1237.

51 See Levin, Procedural Rules, supra n. 27, at 195.
than the consideration of the panel that is hearing the matter. 52 This is not dictated by the language of the section, and it appears that there is no obligation to read the law in this way. The power of the panel itself is greater than a situation in which a petition is submitted by a litigant. The only delineation of the legislator in this matter refers to the question of the stage at which the justices are deliberating in the hearing, as has been explained above. 53 To reinforce this approach, we find in the Sidis case the determination that the difference in the language of the law in the two sections does in fact attest "... that the Court, in hearing the petition according to section 8(a), has more expanded discretion." 54

A further hearing is not possible in a case in which the first panel that heard the case in the Supreme Court was composed of a single judge. 55 While the drafting of the law does also not permit a petition for a further hearing in a case in which the original panel was expanded at the outset, Court adjudication in the Nachmani case determined otherwise. 56 The majority opinion 57 in that case was written by Justice Aharon Barak, current President of the Supreme Court, who determined that the then-President, Chief Justice Meir Shamgar, did not deviate from his power in deciding to hold a further hearing on the matter and that a further hearing may be granted even in a case in which the original panel was already an expanded panel. Nonetheless, in view of the reasoning of Chief Justice Barak, mainly the focus on the differences in the size of the Supreme Court bench over the years, and his determination that a further hearing of a matter heard by an expanded original panel should be deemed an extremely rare occurrence, it would not be an overstatement to declare that in cases of an uneven number of more than five

52 Ibid., at 196.
53 See text accompanying n. 44.
54 Justice Gutin in Esther Sidis v. The President and Members of the High Rabbinical Court and others 12(2) P.D. 1528.
55 The Court always sits in a panel of uneven number, and may sit in a panel of one judge alone, see secs. 26(3) and 26(5) of the Courts Law. See, for example, the ruling by Chief Justice Barak in Ehud Lavi v. Bank Hapoalim Ltd. 49(5) P.D. 155, noting that there is no further hearing in a case heard by one judge alone.
56 Nachmani, supra n. 50.
57 Justices Levin, Goldberg, Kedmi, Zamir, Strasberg-Cohen, Tal, and Dorner concurred with the opinion of the Chief Justice.
justices seated in the first panel, the chances of a further hearing are effectively non-existent.\textsuperscript{58}

It is therefore clear that the construct of a further hearing is intended to serve a relatively small number of cases, and there is no intention of transforming it into an additional quasi-judicial framework. Even when a Supreme Court ruling was passed with some of the justices dissenting (a majority opinion), the further hearing cannot be viewed as an alternative to an appeal against judgment. Desirable judicial policy would be for the Supreme Court to limit as much as possible the actual number of further hearings conducted. Although the Israeli court has earned a reputation for determining norms, whether private or public, the framework of the further hearing should be reserved as an exception in Israeli legal culture.\textsuperscript{59} We have seen that one of the causes for a further hearing is inconsistency with an existing principle. The question of whether a further hearing may be held regarding a principle ruled in an expanded panel also merited an affirmative response. The question that remains concerns deviation from a principle determined in a further hearing, or even a petition for a further hearing on a matter that was already heard in the past in that self-same framework of a further hearing. We have also seen that the Supreme Court is not bound by its own principles, and we find, albeit in rare cases, adjudication by the Supreme Court that is inconsistent with an existing principle of that same Court.\textsuperscript{60} In spite of all these factors, it appears that the discussion above leads us to the conclusion that even the Supreme Court would not consent to deviate from a principle ruled on in an expanded further hearing. Such a situation may be theoretically possible, but the principle of “finality of

\textsuperscript{58} Other than a situation in which the Supreme Court is greatly expanded, and then the rationale is that such a number of justices no longer represents a majority of the justices of the Supreme Court. See the ruling by Chief Justice Barak in Nachmani, supra n. 50. Note, however, that not only the ruling in Nachmani referred to an expansion from five justices; see, for example, the comments of Justice Minister Rosen during the parliamentary debates on the legislation, supra n. 34, who states that this option is not possible in a case heard by “... courts of seven or more.” This reinforces the view that an uneven number of seven or more in the original panel cannot generate a subsequent opportunity for a further hearing.

\textsuperscript{59} On this subject, see the comments by Justice Or in Hajj’ Yihya, supra n. 22, at 221; see also the comments by Justice Strasberg-Cohen in Afrofim, supra n. 46, at 348.

\textsuperscript{60} The most prominent of these is Hajj’ Yihya, supra n. 44, with the Levy Rules and the “silent witness.”
judgment” binds us, at least on the element of a further hearing, to the conclusion that it is difficult to envision the Supreme Court renouncing the doctrine of a further hearing. This is that same task of “framing of opinion” that was defined earlier – “permitted” by law, but “forbidden” by norms.

Ultimately, there is a greater question still: Are there “good” reasons for the endurance of the judicial doctrine of further hearing? Given all that is stated above, and in particular that there is no intention to achieve absolute unanimity of opinion amongst Supreme Court justices, and also in particular that the expanded panel in this framework of further hearing includes, in most cases, the justices of the original panel, do we need this instrument? As we have seen, the notion of the legislator that establishing a new level of hearing would replace the possibility of appealing to a completely separate judicial instance such as the Privy Council does not support a theory that it is desirable to achieve unanimity of opinion amongst Supreme Court justices. There is no such obligation, either, in further hearings, in spite of the greater force of such adjudication, and thus the smaller chance that a Supreme Court justice would dissent on adjudication ruled in a further hearing. But there is no such obligation in the law, or in the interpretation of the law. There is, however, a demand on the part of litigants before the Supreme Court to be granted a further hearing in a considerable number of cases. Thus, the greater burden is imposed upon the President of the Supreme Court, or anyone whom he has so empowered, to decide whether a further hearing will be granted in an anonymous case. It is clear to us now that the further hearing is an exceptional judicial instrument that is used by the Supreme Court at relatively rare intervals. Nonetheless, from the perspective of petitioners at the gates of the Supreme Court – the litigants in a case – is it “worthwhile” for them to seek a further hearing in their matter? Is a principle generally reversed in a further hearing? To answer these and other relevant questions, we shall attempt to view the further hearing also through an empirical lens, in light of the quantitative data collected.
III. Further Hearing – Empirical Basis

A. Database of Rulings in This Study

The research encompassed rulings that appeared in the computerized databases, i.e., the further hearings that were granted between 1 January 1970 and 1 January 2000, so that we could report on thirty years of judicature. Each ruling that was defined and that appeared in the computerized databases Dinim [Laws] and Takdin (Juridisc) as a further hearing held in these judicial years was entered into the research database. Subsequently, the written publications Piskei Din shel Bet Hamishpat HaElyon [Decisions of the Israeli Supreme Court] Jerusalem were examined to verify that all of the further hearings conducted in those years did in fact appear in the computerized databases. The overall number of further hearings (petitions or actual hearings) that appear in the published rulings was 285, of which 192 cases (some 67 percent)61 were denied, and 93 cases (about 33 percent), were accepted, that is – a panel was assigned to them that heard the matter in depth.62 It may be that this number overestimates the rate of petitions accepted, pursuant to the reasonable assumption that many petitions were summarily denied or were not of sufficient import to be reported in any publication. Thus, it may be safely said that at most, one-third of the petitions for further hearing were accepted by the President of the Supreme Court (or on his behalf), and a further hearing, with an expanded panel of justices, was conducted on these matters. Moreover, an examination of the written publications disclosed that all of the further hearings that were actually heard did in fact appear in the

61 Where the President of the Supreme Court decides that the case does not warrant a further hearing. Most such rulings are brief, but dismissals may be found in which the reason for dismissal covers many pages.

62 At this point it should be noted that this database of 93 further hearings contains two original rulings, Uzi Meshulam and others v. The State of Israel 42(5) P.D. 1; and also The State of Israel v. Uzi Meshulam and others 42(5) P.D. 1; even though one panel heard both cases in further hearing and one, consolidated document was issued that includes both rulings. Although other matters in which cases were consolidated for a further hearing appear in the database as one consolidated case, here I chose otherwise, given that the further hearing makes a clear distinction between the two. In fact, this separation reflects the Court’s decision to grant further hearings to two separate petitions – that of the State and that of Uzi Meshulam and others. It is also appropriate given the difference in the decisions handed down for each of the cases.
research database, which reported a higher number than was reported in the written publications of denied petitions for further hearings where the ruling contains only an explanation by the President of the Supreme Court as to why the petitioners were denied a further hearing. In total, 117 further hearings were conducted by the Supreme Court of Israel from the date of its establishment up to the beginning of 2000.

B. Quantitative Historical Data on Further Hearings

This part of the article is drafted in the form of quantitative historical queries on further hearings in Israel, followed by quantitative replies culled from the research findings, and ending with proposed explanations of the quantitative results.

1. Are a greater number of further hearings conducted on certain subject matters? In addition, given that the Supreme Court, when seated as the High Court of Justice, is the first and last judicial instance for most of the cases it hears, it may be expected that a greater number of further hearings are conducted on matters heard by the High Court of Justice than on matters concerning other types of rulings. Are there, in fact, a greater number of further hearings when the Court sits as the High Court of Justice, the only occasions on which it hears — as a court of first and last instance — petitions of individuals?

Of the 93 further hearings that were analyzed, 13 (14 percent) were on matters that concerned public law issues (when the Court sits as the High Court of Justice), 23 (25 percent) were on matters of criminal cases, and 57 (61 percent) were on matters of civil cases. In absolute terms, less further hearings are conducted on matters of administrative law than on other areas of law. In fact, most further hearings concern matters of civil law. The Shachar-Gross results, in comparison, found that 21 percent of Supreme Court rulings concern matters of public law, 24 percent concern matters of criminal law, and 55 percent concern matters of civil law.63 In matters of public law, there is a clear decline from 21 percent to 14 percent, which is balanced by an increase of the number of hearings in matters of civil law, with no substantial change in the

63 Gross and Shachar, supra n. 23, at 332.
number of hearings on matters of criminal law. The fact that matters in the realm of public law “lack” a judicial instance in comparison with matters in other areas of law does not lead to an increase in the rate of further hearings conducted on such matters. In fact, the opposite is true. This reinforces the conclusion that the purpose of this judicial tool ranges from serving as an instrument that is a “quasi-appeal,” as was announced in the Knesset plenum during legislative debates preceding the Courts Law that admitted this innovation into our judicature, to another judicial tool, completely distinct from an appeal. Again, it is possible that this result also reinforces the proposal raised in the part of this article that addressed the theory of further hearing, namely, that the further hearing is a judicial instrument intended to help the Court achieve a “more uniform utterance,” a means of “framing of opinion” of Supreme Court justices on a given matter. At this juncture, it should be noted that the division of rulings into secondary subjects, mainly on matters of civil law, indicates that a wealth of subjects are addressed in further hearings — tax matters (about 10 percent), torts (about 10 percent), family matters (about 14 percent), land (about 7 percent), contracts (about 10 percent), property (about 7 percent), and more — the division into secondary subjects does not indicate any clear preference for any specific subject.

2. How many further hearings were held each year in this thirty year period (1970-2000)?

On average, throughout this period, 3.1 further hearings were held each year, with a median of 3. The range extended from 0 to 8 further hearings per year. In fact, throughout the entire period, up to 5 further hearings were conducted each year, other than in the years 1976 (7

64 It would be helpful to recall the comments of then-Minister of Justice, Pinhas Rosen, in the Knesset plenum during the debates on this legislation, Divrei HaKnesset, Vol. 19, Session 24, at 315: “... in constitutional matters such as these, which have been handed to us by power of the Supreme Court in its capacity as the High Court of Justice ... it is the first instance and also the last instance.”

65 See n. 36 and accompanying text.

66 This separation is not methodologically “pure,” since quite a few rulings address more than one subject, and it can be difficult at times to determine the specific subject of the further hearing. Here, only a general examination was undertaken to examine whether one specific subject is particularly prominent.
further hearings), 1995 (7), 1996 (6), and 1998 (8). When considering the number of hearings during the entire period, a division into decades highlights the 1990's, during which 3.4 further hearings were conducted each year, and the two decades – the 1970's and the 1980's – during which 2.9 and 3.0 such hearings were held each year, respectively. When considering a period, it is illuminating to divide the thirty years according to tenures of various Presidents of the Supreme Court,67 in view of the prominent function fulfilled by the President in deciding to grant a further hearing, as we have shown above. Table 1 illustrates that Chief Justices Landau and Barak were the most prominent Presidents in this regard. During their tenures, the number of further hearings rose significantly. The low numbers may be deceptive, and it must be emphasized that if translated into an average of 3.1 further hearings in a year throughout the entire term, an increase to 4.6 hearings each year during one period is a significant rise of 50 percent in the rate of further hearings.

### Table 1

Presidents of the Supreme Court over thirty years and the number of further hearings held during their respective tenures

<table>
<thead>
<tr>
<th>President</th>
<th>Length of Term</th>
<th>Average Number of further hearings</th>
<th>Years of Tenure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agranat</td>
<td>6.5</td>
<td>3</td>
<td>1970-1976</td>
</tr>
<tr>
<td>Sussmann</td>
<td>3.5</td>
<td>2.7</td>
<td>1976-1980</td>
</tr>
<tr>
<td>Landau</td>
<td>2.5</td>
<td>4.6</td>
<td>1980-1982</td>
</tr>
<tr>
<td>Yitzhak Cohen</td>
<td>1.5</td>
<td>1.7</td>
<td>1982-1983</td>
</tr>
<tr>
<td>Shamgar</td>
<td>11.5</td>
<td>2.6</td>
<td>1983-1995</td>
</tr>
<tr>
<td>Barak</td>
<td>4.5</td>
<td>4.6</td>
<td>1995-2000</td>
</tr>
</tbody>
</table>

3. Has there been an increase in the number of further hearings conducted by the Supreme Court over the years? Are more further hearings conducted today than were conducted in the past?

67 When a President of the Supreme Court was replaced in the course of the year, his tenure was rounded upward to the respective full or half year.
As stated, 0 to 8 further hearings were conducted each year over the past thirty years. The correlation (Pearson linear correlation coefficient) between the years and the number further hearings each year is 0.08.\textsuperscript{68} If the period of the research is divided in two, then the first fifteen years had a correlation of 0.07 in the number of further hearings, whereas the following fifteen years had a correlation of 0.37 in the number of further hearings. Here we see a clear connection\textsuperscript{69} and we can therefore state that there has been an increase in the number of further hearings over the years, but this is correct only with respect to the second half of the period covered by the research, the period that included the presidential tenures of Chief Justice Shamgar and Chief Justice Barak. The trend as it is demonstrated in the research indicates that the number of further hearings conducted each year has increased only in recent years.\textsuperscript{70}

4. Has the size of the panel assembled for further hearings varied over the years? Is there an increasing tendency toward benches composed of larger panels, in light of the expansion of the Supreme Court?

In this study, most cases were heard by panels of five (78/93, amounting to 84 percent). The remainder are eleven panels of seven (12 percent); two panels of nine (2 percent); and the first case in which a panel of more than five justices was assembled in 1991 for a hearing that was decided only in 1993, which comprised 11 justices.\textsuperscript{71} The next ruling that was presided over by an expanded panel of more than five justices was in 1994, with the ruling handed down in 1996, and it comprised nine justices.\textsuperscript{72}

\textsuperscript{68} Not significantly different from zero. The past year, in which no further hearings were held, was anomalous, and in particular it deviated from the trend of the last few years. This coordinate rose to some extent, to 0.18, when examined without including the past year, but still remained low and insignificant.

\textsuperscript{69} A significant coordinate only at 8%, but in comparison with the coordinate for the entire period, the trend is apparent. If the past year is omitted, as was done here, the result is a relatively high coordinate of 0.64, and that, of course, has a significance of less than 1%.

\textsuperscript{70} As noted above, except for the deviation from this trend in adjudication year 1999, during which no further hearings were held at all.

\textsuperscript{71} See the "silent witness" in Hajj Yihya, supra n. 47.

\textsuperscript{72} Nafisi v. Nafisi 50(3) P.D. 573.
panel of seven, with the ruling handed down in 1995. These were the harbingers of change. Since 1995, we view panels of more than five justices as routine. Ever since adjudication year 1996, we have witnessed a very prominent tendency to expand the size of the panel: in the past four years seventeen cases were heard, of which twelve were heard by panels of more than five! Nonetheless, in view of the rationale derived from the ruling by the President of the Supreme Court, Chief Justice Barak, regarding a further hearing by an expanded panel, we would have expected this increase earlier, considering that the Supreme Court had expanded in size many years earlier. On average, there were 10.7 active justices in the first decade (the 1970's); 12.6 in the second decade (the 1980's); and 13.6 in the third decade (the 1990's). There have been at least twelve justices since as early as the beginning of the 1980's, and throughout most of the 1990's there have been thirteen or more. Attention should also be given to the fact set forth at the beginning of this article, noting that the President or someone whom he has empowered to assign a panel of three out of fourteen (364 panels) has far less choices than when selecting a panel of five out of fourteen (2,002 panels). Although we do not know how panels are assigned in the Supreme Court, and in particular how panels are assigned to further hearings, it is clear that given the composition of the present Court, there are far more options for such assignment when selecting a panel of five, as opposed to the options available when selecting a panel of three. If we refer to a past era in which five justices were selected for a further hearing panel, out of a total bench of nine Supreme Court justices, then the choice would have been made out of a relatively limited field of 126 possible combinations. The trend of recent years toward selecting seven out of fourteen only increases the number of possible combinations: there are 3,432 possible combinations when selecting a panel of seven out of fourteen justices. The increase in the size of the typical panel for a further hearing by the Supreme Court supports the claim that in this way we are granted a broader view of the "position of the Supreme Court," but at the same time we are expanding the ability of the President of the Supreme Court to select, and thereby to shape, certain panels.

73 This refers to Zaki Nusseibeh and others v. The Minister of Finance 49(4) P.D. 68, a further hearing that was expanded by a Supreme Court panel on its own judgment.
74 In 1988, all of the original rulings that subsequently moved to further hearings were handed down by panels of more than five.
75 See text accompanying n. 17.
5. How many rulings were reversed after being heard in a further hearing? May an assumption be made that once a further hearing has been set, there is a relatively greater chance that the ruling will be overturned?

In the research database of 93 further hearings during that period, 43 reversed the original decision. That amounts to 46 percent, so that almost half of the further hearings reversed the original Supreme Court ruling, which was subsequently granted a further hearing. This is a particularly high rate when we compare it to data from the Gross and Shachar study, in their article "Discourse and Dissent,"76 which found that about 33 percent of Supreme Court rulings were reversals (the appeal being affirmed). This indicates an increase of almost 50 percent! It may be argued that this high rate is a consequence of “natural selection” of rulings by the President of the Supreme Court or someone whom he has empowered to grant a further hearing. Clearly, if a further hearing were allowed for every ruling handed down by the Supreme Court, we would obtain completely different percentages. Nonetheless, not only is it partially also true in evaluating petitions to the Supreme Court to be dismissed or to be granted “leave to appeal,” but it is also difficult to ignore the possibility that such vetting by the President of the Supreme Court “signals” Supreme Court justices that a case that has undergone his evaluation and has been granted a further hearing must be examined through a different lens. It is likely that the justices who join those who sat in the original panel understand that their position and their decision in the further hearing must be thoroughly considered.

6. In light of the phenomenon we have just seen – a relatively high rate of reversals of Supreme Court rulings in further hearing – we should examine whether justices change their opinions when they sit in a further hearing, compared with the position they espoused in the original panel that handed down the ruling that was subsequently granted a further hearing.

We shall divide the justices into two groups. The first, which we will designate the “original group,” comprises all of the justices on the panel

76 Gross and Shachar, supra n. 23.
of the further hearing who also sat on the original panel that passed the ruling which was subsequently granted a further hearing. The second, which we will designate the “assigned group,” comprises all of the justices assigned to the panel for the further hearing, but who did not sit on the original panel. The justices in the “original group” possess an important attribute that justices in the “assigned group” lack: each one knows his position on the case in question. What is the rate of change in position for the “original group?” Recall that this group comprises a judge and the panel on which he sat, so that in fact, a certain justice may make numerous appearances in the group. All in all, there are 511 such cases of judicature, with 226 justices in the “original group” and 285 in the “assigned group.” Sixteen judicial events (with eleven different justices) changed the position in the further hearing as opposed to the position expressed in the original ruling. Sixteen out of 226, a mere 7 percent of the “original group,” changed their positions!! Almost all, 93 percent, adhered to their original positions even after a further hearing on the matter in question. We now see that in view of the earlier response, in which we saw that 46 percent of all original rulings are reversed after a further hearing – a particularly high rate in relation to the tendency to reverse a ruling handed down by a lower instance, it is surprising to discover that the change is in the “assigned group.” It should be empathized that there is no unambiguous, published rule on how many justices may be added (although we have just seen that there has been a trend over the years to expand the panel for a further hearing) and there is also no unambiguous, published rule as to how many justices in the “original group” remain on the panel for the further

77 One case in which a justice changed his original opinion was the ruling by Chief Justice Barak in Anonymous v. The Minister of Defense 44(1) P.D. 721, at 741-743, which was not entered into this data base because it was ruled after this research had concluded. His clear and forthright comments on this subject are, however, important: “Firstly, my conclusion here contradicts my conclusion in the ruling that is the subject of this appeal ... Because I am not counted among those who rule that the finality of the decision attests to its correctness. Each of us may err. Our professional integrity obliges us to acknowledge our error if we have become convinced that we have indeed erred ...”

78 As we saw in the data presented by Gross and Shachar in their article, supra n. 23. While this clearly does not refer to a ruling in a lower instance that is reversed in the further hearing, the analogy is possible, with the reservations regarding the fact that it refers to the same Court.
hearing. In the majority of cases, we find that two justices from the “original group” (33 out of 93, or 35 percent), or three justices – the entire original panel (49 out of 93, or 53 percent) move on to the further hearing panel. There are also cases in which not even one justice moves on (a single instance), or in which one justice from the original panel moves on (7 out of 93, or 8 percent). Selecting the justices who will remain on the panel for the further hearing, selecting the justices in the “assigned group,” and, naturally, determining the size of the panel, have a powerful effect on the possibility that the decision will be reversed after the further hearing, particularly in light of the data regarding “initial judicial inflexibility:” the condition in which a justice is not

79 As we saw in the first part of this article, the text of the law does not expressly specify how many justices from the original panel will remain for the further hearing, and the only reference we found took note of the original intention that all the justices would remain was in a comment by MK Sharabi, in Diurei HaKnesset [Parliamentary Debates], Vol. 19, Session 24 at 355: “... A court of three, having ruled on procedure... shall pass it to a further hearing before seven, including the three justices who already concluded their labor ...”

80 See, for example: No justice moved on: Mazliach Kachlon v. The State of Israel 94(3) Taksir piske din Shel Bet Hamishpat Haelyon 445; one justice moved on: Liebel v. The Competent Authority for the purpose of the Law for Invalids (Nazi Persecution) 35(3) P.D. 29; Neiger v. Mittelberg 49(5) P.D. 314; two justices moved on: Nafisi v. Nafisi 50(3) P.D. 573; Pineider Co. Ltd. v. David Castro 37(4) P.D. 673; three justices moved on (i.e., the entire original panel remained for the further hearing): Garfinkel v. Pollock 35(1) P.D. 200; Hazon David and others v. The Director of Land Betterment Tax 49(2) P.D. 705; and a single case in which four justices moved on, that same Nachmani affair, supra n. 50, which is the only case to date in which a further hearing was held on a ruling originally handed down by a panel of five.

81 In at least some of the cases in which not all of the justices move on, it is clear that the withdrawal is simply a consequence of one or another of the justices having retired from the bench during the interval between the original ruling and the further hearing on the matter; these findings, however, indicate that this cannot be the only reason.

82 This is not a new phenomenon, and was also noted in the records of the parliamentary debates on this legislation. See, for example, the comments of MK Bader in Diurei HaKnesset, Vol. 19, Session 24, at 321: “... Mr. Minister of Justice, I am convinced that this is a most unfortunate innovation ... with all of the objectivity of the justices, they have nonetheless committed themselves to something. It would not be beneficial if those same justices later sat with others, and consequently issued a different ruling.” See also the comments of MK Sharabi, Diurei HaKnesset, Vol. 19, Session 24 at 355: “... The further hearing will be of no value if some of those who participate in it are fixed and resolute in their opinions ...”
prepared to deviate from the initial position he espoused in the original Supreme Court ruling.\textsuperscript{83}

7. In light of all of that has been stated above, the question remains whether the chance of reversing the original ruling depends on the form in which the original ruling, which was accepted for \textit{further hearing}, was made. Is there a difference between the rates of \textit{further hearings} that reverse majority original rulings and \textit{further hearings} that reverse unanimous original rulings?\textsuperscript{84}

Of 52 \textit{further hearings} that reviewed majority rulings, 31 (60 percent) reversed the decision of the original panel. Of 39 \textit{further hearings} that reviewed unanimous original rulings, nine (23 percent) reversed the decision of the original panel.\textsuperscript{85} Thus, we learn – as could have been easily estimated – a unanimous original ruling is far less likely to be reversed in a \textit{further hearing} than a majority original ruling. At this stage, we turn to question the connection between these results and the results set forth in paragraph 6 above, regarding how many of the justices who sat on the original panel remain on the panel for the \textit{further hearing}. Is there a connection between the form in which the original ruling was made (by majority or unanimous) and the question of how many justices remain on the panel for the \textit{further hearing}? Does the entire original panel remain mainly if the original ruling was by majority? In matters that concern a unanimous ruling, in half of the cases (19 out of 39, or 49 percent), all of the justices move on to the panel for the \textit{further hearing}, and in the second half of the cases, some of the justices

\textsuperscript{83} Referring to the fact that this study found that 93\% of the justices do not change their positions, and also to the psychology of decision-making. See, for example, S. Fiske and S. Taylor, \textit{Social Cognition} (New York, McGraw-Hill, 1991); T. Srull and R. Wyer, “Person Memory and Judgment” (1989) 96 Psychological Review 58-83. See also an analysis of the process in another area of decision-making in A. Bukspan and Ch. Goldschmidt, \textit{On Negotiations and Contract Laws} (Shamgar Book, 2001, not yet published).

\textsuperscript{84} In this study, two kinds of rulings were consolidated: “joint rulings,” which do not specify the name of the justice who wrote the opinion, and “unanimous rulings,” which do specify the name of the justice who wrote the opinion, and also of any other justices who added their reasoning to the written opinion.

\textsuperscript{85} By this stage, 91 \textit{further hearings} remained out of the 93 contained in the original database, since two of the original rulings that subsequently moved to \textit{further hearings} were unpublished and could not be retrieved.
(one or two) move to the further hearing. When we examine majority rulings accepted for a further hearing, in 60 percent of the cases (30 out of 52), the entire panel moves on, and in about 40 percent of the cases (22 out of 52), only some of the justices from the original panel move on. The difference is not substantive, in spite of the increase from 50 percent to about 60 percent, so it is difficult to state that the reasoning behind the determination of the number of justices in the “original group” who remain for the further hearing relies on whether the original ruling was by majority or unanimous.

Another interesting element is the question of the extent of the interaction between the number of the “original group,” the form of the original decision (majority/unanimous), and whether the principle was reversed in the further hearing. On this question, see Table 2. The issues are already clearer, although the findings should be viewed with discretion in view of the small number of observations in each cell.

**Table 2**

Number of further hearings according to the manner of the decision in the ruling

<table>
<thead>
<tr>
<th>Original ruling reversed</th>
<th>Majority</th>
<th>Unanimous</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Partial</td>
<td>Entire</td>
</tr>
<tr>
<td></td>
<td>panel</td>
<td>panel</td>
</tr>
<tr>
<td>remains</td>
<td>remains</td>
<td>remains</td>
</tr>
<tr>
<td>Original ruling reversed</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td>Original ruling affirmed</td>
<td>3</td>
<td>18</td>
</tr>
</tbody>
</table>

In cases in which the principle was reversed, if the original ruling was by majority, there is an increase of more than 50 percent of cases in which the entire panel remained (12 cases) over cases in which only a part of the panel remained for the further hearing (19 cases, an increase of 58 percent). If the original ruling was unanimous, there is

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86 The single case in which none of the justices from the original panel moved on to the further hearing was also included here.

87 Clearly this entire subject becomes less significant once the subject turns to the question of a further hearing before a considerably expanded panel that comprises almost all of the justices of the Court, such as in cases of panels of eleven.
an increase of 100 percent of the cases in which the entire panel (3) remained over cases in which only a part of the panel remained (6). Nonetheless, there are only a small number of cases in all, and it may be generally stated that in both instances, there is a significant increase in the number of cases in which a partial panel remains. In cases in which the principle was not reversed, if the original ruling was by majority, there is a massive decrease from the number of cases in which the entire panel remained (18 cases) to the number of cases in which a part of the original panel remained (3 cases, a decrease of 83 percent!). If the original ruling was unanimous, there is an insignificant decrease in the number of cases in which the entire panel remained (16), compared with the number of cases in which a part of the original hearing panel remained (14, a decrease of 12 percent). If this pattern attests to the future, it may be said that in cases in which an original ruling for which a further hearing is sought was by majority or unanimous, then – if there is a desire to reverse the principle, care should be taken to ensure that some of the justices who sat on the original panel should remain for the further hearing. If there is, however, a desire to affirm the principle, then there is a distinction between an original ruling by majority and a unanimous original ruling: If the original ruling was by majority, it is critical that the entire panel should remain for the further hearing. If, however, the original ruling was unanimous, it is almost insignificant if the entire panel or a part of it remains for the further hearing on the matter.

8. The research answers to the last two questions above need to be addressed further. We found that in the further hearing, an overwhelming majority, 93 percent of the justices, do not change their positions from the original position of the Supreme Court panel that initially heard the case. This may be contrary to expectations, in light of the finding that almost every second Supreme Court ruling for which an additional hearing is held is overturned upon further hearing. Thus, the requisite conclusion, also evinced in the study, is that the change, meaning the overturning in the further hearing of the precedent set by the Supreme Court, is done by the justices empanelled for the further hearing (and who did not sit on the original panel.)\textsuperscript{88} We also saw that there is an interaction between several of the justices from the original panel who “remain” for the further hearing and the type of original

\textsuperscript{88} See the results and the debate to question 6 above.
ruling (majority or unanimous) and the outcome of the further hearing. This is expressed where in a case in which a further hearing overturns the original Supreme Court ruling, it does not matter whether the original ruling was unanimous or by majority. In any case, the instance in which only some of the original panel of justices remain for the further hearing greatly increases the chance of overturning the original ruling, as compared with the instance in which the entire panel remains. Notwithstanding, where a further hearing leaves intact the original Supreme Court ruling, we found that when the original ruling was by majority, moving the entire original panel to the further hearing greatly increases the chance that the original ruling will not be overturned, and when the original ruling was unanimous, the question of whether some or all of the original panel remains for the further hearing does not affect the chances of the original ruling being left intact.89

The question to be asked is whether there is some personal perspective on the part of certain justices that may help us to understand these last findings. Are there justices who are often empanelled for further hearings, and are there justices who are (relatively) seldom called? Is there a syndrome of “selecting” or “preferring” certain justices to sit for further hearings?90

Taking into account their tenure in the Supreme Court (duration of the term and its relevance to the period of the study), we can list the various justices by the number of further hearings in which they participated by year of tenure. The four justices who participated in the largest number, relative to others, are Shamgar, Ben Porat, Mazza, Goldberg. The four justices who participated in the fewest number, relative to others, are Zamir, Agranat, Sussmann, and Elon. It is interesting to discover that Presidents of the Supreme Court appear at both ends of the list – Justice Shamgar at the head of the list of participants, and Justices Agranat and Sussmann at the end.91 The low ranking of

89 See the results and the discussion for question 7 above.
90 This is significant, clearly, only when the further hearing is not before a panel of all of the Supreme Court Justices, or most of them, which is the case for almost all of the rulings examined in this data base.
91 It should be noted that taking into account the period of the study, Presidents Agranat and Sussmann served brief terms (about three and six years), while the long tenure of Justice Shamgar was entirely within the period of the study (about eleven years). Although this index was already weighted relative to the length of the tenure, this point should be taken into account.
Deputy President Elon comes as a surprise, considering his lengthy tenure (some 11 years as a justice and 5 additional years as Deputy President of the Supreme Court, all within the period of the study).

As we examine the list, the question arises as to whether sitting on the panel for a further hearing is contingent upon having been a part of the original panel that ruled in the case for which the further hearing is being held, i.e., is it possible that a justice hears a greater number of further hearings when he participates in a relatively large number of rulings that are heard again in further hearing, the precedent set by which having appeared to the President of the Supreme Court (or to whomever has been granted the authority to decide on a further hearing) as being worthy of additional consideration. Another possibility is that this justice is empanelled more than others to participate in further hearings without having been a part of the original panel. If we list the various justices of several original panels (that were later heard in further hearings) on which they sat, i.e., those justices who generate more cases for additional further hearings, then the four justices who participated in the greatest number, relative to others, are Bechor, Asher, Tal, and Strasberg-Cohen. The four justices who participated in the smallest number, relative to others, are Agranat, Elon, Landau, and Sussmann. It is interesting to note that the four justices who sat in the smallest number of such panels are three who served as Presidents of the Supreme Court and one who served as a Deputy President (Justice Elon). This may be evidence that it is more difficult to obtain a further hearing when the original panel included Presidents or Deputy Presidents of the Supreme Court. Deputy President Elon and Presidents Agranat and Sussmann stand out in another aspect: although they did not generate precedents that were deliberated in further hearing, they also did not sit for as many further hearings, relative to others.

As noted, we also examined which justices are called to sit for further hearings more or less frequently than others, that is, justices who were not a part of the original panel but were empanelled to hear and rule in the further hearing on the same case. The four justices called most often to sit on the panel for further hearings (in relation to year of tenure), relative to others, are Shamgar, Mazza, Kedmi, and Landau. The four justices least often called to sit on panels for further hearings, relative to others, are Netanyahu, Halima, Strasberg-Cohen, and Zamir. It is interesting to note that in any case, almost all of the Presidents who
served on the Supreme Court during the period of the study\textsuperscript{92} appear in
these lists, whether as participants in the panels that generated relatively few further hearings (Presidents Agranat, Sussmann, and Landau),
whether as participating in the further hearings (Shamgar and Landau),
and whether as participating in the panels of the further hearings
themselves (President Shamgar), while President Barak does not ap-
ppear in either list, neither at the beginning nor at the end.\textsuperscript{93} It should
be recalled that this is particularly surprising in light of the findings of
the number of further hearings each year in the course of the tenures
of the various Presidents,\textsuperscript{94} in which we saw that the highest average
number of further hearings transpired during the tenures of Presidents
Shamgar and Barak.

IV. Conclusion

The empirical findings of this study attest that there are more further
hearings in areas of civil law and a decrease in the number of further
hearings of petitions to the High Court of Justice, even though it is the
realm of issues affecting public law that is “lacking an appeals instance.”
Up to eight further hearings have been conducted each year in the past
thirty years. In the second half of the period covered by the study, which
includes the tenures of Supreme Court Presidents Shamgar and Barak,
the number of annual hearings increased each year. The bench for the
further hearing almost always comprises five justices, other than the
change in recent years, with most hearings in the past four years being
heard by a bench of seven or more.

It seems that the power of the President of the Supreme Court to
decide on a further hearing is greater than what it appears to be upon
reading the letter of the law. We have seen that once a petition for a
further hearing has been granted, there is a good chance that the
principle ruled by the Supreme Court will be reversed (almost half of the
further hearings reversed the original ruling). We have also seen that

\textsuperscript{92} Other than Justice Yitzhak Cohen who served a brief tenure of less than two years
as President of the Supreme Court, and Justice Barak who served for five years as
President during the period of the study.

\textsuperscript{93} As noted above, this is true also in respect of Justice Cohen, however in light of his
brief tenure, whether as President or as Deputy President, this is only natural.

\textsuperscript{94} See results and discussion in question 2 above.
the “change” is almost solely a function of the justices in the “assigned group,” who join the panel for the further hearing. We have seen that Supreme Court adjudication has determined that notwithstanding the explicit letter of the law, a further hearing may be granted even if the original ruling was handed down by an expanded panel. Inasmuch as neither the published literature nor the results of this study yielded rules or directions for determining the size of the panel of the further hearing, or for determining which of the justices from the original ruling will remain on the panel for the further hearing, the power of the President of the Supreme Court in this matter, in view of the findings, is multiplied tenfold.

As noted, the possibility that the principle will be reversed depends upon whether the original principle was decided by majority or unanimously: it is significantly lower if the original ruling was based on a unanimous decision. This also depends, however, on the number of justices in the “original group” who remain for the further hearing. If there is an interest in reversing the principle, one should ensure that only a part of the original panel of justices remains, whether the original principle was decided unanimously or by majority. If there is an interest in affirming the original principle, then the original ruling should be examined. If it was by majority, it is important that the entire panel remain for the further hearing. If, however, the original ruling was unanimous, it makes no difference at all how many of the justices from the original panel remain for the further hearing.

These findings present the further hearing as a somewhat problematic judicial instrument, mainly because judges do not generally change their opinions, but remain firmly fixed in their first position. Also, given that the evaluation of petitions for further hearing conducted by the President of the Supreme Court is not a transparent process, it may also persuade the justices in the “assigned group” to express a position that reverses the original Supreme Court ruling.

It appears that although no Supreme Court precedent legally binds the justices of the Court themselves, this instrument serves the purpose we have described as “framing of opinions,” guiding the justices of the Supreme Court towards a more uniform position. In a further hearing,95 the President of the Supreme Court, Chief Justice Barak, after explaining why he changed his position from the position he expressed in the original ruling, wrote: “We find ourselves in a process of further hearing

95 Supra n. 77.
that determines a formal framework for revocation of a principle that was unlawfully ruled.” Given that the further hearing, whether by law or by interpretation, is not meant for “revocation of a principle that was unlawfully ruled,” [author’s emphasis], this would appear to be a powerful testimony of that selfsame attempt to “frame the opinions” of justices of the Supreme Court. Some of the problems posed here would be resolved if further hearings were held before the entire panel of the Supreme Court, or at least its decisive majority. This would forestall the possibility of petitioning for a further hearing on a ruled principle, and it would, clearly, reduce the presidential influence on assignment of justices to the expanded panel. In addition, more consideration would be given to the question of deviation in the use of the further hearing process. It would also diminish the importance of any one justice sitting on the panel for the further hearing. “Initial judicial inflexibility” would fade where the entire bench presides over the further hearing, including the entire panel that ruled in the original hearing.

Even this, however, would not resolve all the problems inherent in the doctrine of further hearing. As long as the supremacy of the further hearing is not determined in legal terms that oblige the justices to affirm the stability of a principle ruled in a further hearing, this judicial instrument is almost pointless except to preserve its current ritual: expanding the original Supreme Court panel and rehearing matters that have already been ruled in the past.

96 As to the argument that the drafting “... determined unlawfully” derives from the lawful option of granting a further hearing in light of an “inconsistency with an existing principle,” I must emphasize that even inconsistency in principles in the same Supreme Court is entirely legal! See the entire theoretical discussion on this subject in the first section of this article.