Reichman University
Lauder School of Government, Diplomacy and Strategy
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KONRAD ADENAUER STIFTUNG

Political Power, Core Values, and the Rule of Law:

Israel's Political Elite Facing the High Court of Justice

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"When the castle of law falls into ruins, the rulers' millstone would grind the common man into dust."

Menachem Begin, Israel's Prime Minister 1977-1983 and Opposition Head 1949-1977

"No Castle is falling into ruins."

Esther Hayut, Israel's Supreme Court President, May 2020

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ABSTRACT

Israel's Supreme Court (ISC), mainly when serving as a High Court of Justice (HCJ), reviews and intervenes in matters relating to the core, value-laden issues that pertain to fundamental tensions the Israeli political system deals with. Some refer to the HCJ's policymaking as a *juristocracy* according to which judicial review subjugates other public branches to its power. I review the court's institutional powers and moves and examine the countermoves taken by politicians in Israel against the court. As in other institutional reforms, I show that the main guiding principle for politicians is to pursue the route with the lower uncertainty, namely affecting judicial nomination processes, rather than initiating broader institutional changes.

Keywords

judicial activism, juristocracy, institutional reforms, Israel, High Court of Justice

1. INTRODUCTION

The Israeli case offers a combination of a relatively independent court with wide-reaching judicial review powers (Dotan 2000; Jacobsohn and Roznai 2020; Posner 2007; Weill 2012), alongside a perplexed government system moving between varying levels of (in)stability and (in)effectiveness (Rosenthal 2016). The combination of determined legal and political elites seeking to institutionalize the rule of law while facing a political system that lacks legitimacy and resolve to curb down the court's powers yields the creation of a juristocracy. Juristocracy is a concept that depicts the judiciary as such that takes on handling the political system's major quandaries, relating to the state's core functions while taking a position associated with a particular political side over the other (Hirschl 2009a).

The juristocracy thesis claimed that Israel's Supreme Court, mainly when serving at its function as a High Court of Justice, became a significant policy agenda-setter enjoying supremacy over other government branches (Hirschl 2009a, 2009b). Politicians have sought to curb down this judicial supremacy seeking to erode the judiciary's power of influence (Navot and Peled 2009). Political players used various institutional tools, which succeeded in decreasing the court's involvement in government decisions (Rosenthal, Barzilai, and Meydani 2021).

Judicial independence emerges within a context of legal and constitutional review of matters pertaining to the political system's functioning (Whittington, Kelemen, and Caldeira 2008). If politics affects the law, and if courts sustain and maintain their authorities in the face of political powers, the question becomes: what are the political interests and powers of political institutions which support the court's powers? Others have already shown the effect of public opinion considerations deterring Israel's politicians from moving against the court (Meydani and Mizrahi 2010). In so doing, they offered a Theory of Moves setting in which the court and the political elite move between ordinal levels of conflict and their outcomes. Others showed that the political elite does move against the judiciary yet does so in smaller moves that do not create dramatic rifts in court powers but still affect its manifestation of judicial independence (Rosenthal, Barzilai, and Meydani 2021). Hence, the modeling strategy of inter-branch conflict should be examined subtly. Trying to offer such a manner for analyzing this paper's topic, I wish to question why Israel's politicians refrained from institutionally decreasing the court's powers in the more general context of institutional change and design as applied to study other cases and other institutions. The main component from institutional change analysis I offer here is the emphasis on certainty and the way decision-makers perceive the certainty of their moves' outcomes (Shvetsova 2003).

Below, I present the emergence of the HCJ's independence. I then review three of the main maneuvers taken in Israel against the HCJ: judicial nominations' procedures' reforms and actual nominations, seeking an override clause allowing the Knesset to overrule the HCJ's decisions trying to construct a constitutional court. Finally, I use the institutional change uncertainty framework proposed by Shvetsova to examine these changes critically.

2. ISRAEL'S SUPREME COURT AND THE JUDICIALIZATION OF POLITICS IN ISRAEL

Israel's Supreme Court (ISC) serves as a court of last resort in the Israeli court system. The Supreme Court handles appeals on decisions made relating to a wide variety of topics by lower courts in Israel's courts' system. Its decisions commit every other court beside the Supreme Court itself. The ISC can order additional hearings on cases, including opening a new trial (Deshe 2019, 398–400). The court comprises of fifteen judges and two senior clerks (Rasham). One of the ISC's judges nominated by her seniority on-court acts as the court President. The ISC usually sits in panels of three judges with their inclusion in the panel based on a random process of assignment (Eisenberg, Fisher, and Rosen-Zvi 2012). On rare occasions relating to cases of difficult circumstances, the ISC's President or their Vice-President can order the formation of a panel of judges higher than three based on an odd number of judges (Deshe 2019, 398).

In petitions against the government's decisions and activities on either administrative or constitutional matters, the Supreme Court serves as primarily a first and final instance referred to as the High Court of Justice (HCJ) (Dotan, 2000). Between 2011-2018 46% of the ISC's decisions were related to the HCJ.[1] No other legal procedure was as frequent as this one. Thus, while other procedures affect citizens' lives and relate to legislation and public deliberation, the main issue that occupies the court's attention is its functioning as the HCJ. Therefore, we turn our discussion regarding the ISC's judicialization of politics to how the HCJ deliberations affect politics and policy.

A person or group viewing an executive activity or a decision that could be harmful to the petitioner or some more significant collective need can petition the HCJ to ask for an injunction. The injunction (if given) could eventually become permanent. Petitioners have to sustain that they have a standing right before the court and that their petition is justiciable (Deshe 2019, 439). A judge on duty reviews the petition and can dismiss it or accept it for further review. If accepted, a panel of three judges reviews the case and can ask for depositions, examinations, and more evidence than already presented.[2] This panel makes a final decision regarding the petition to abolish the injunction or make it permanent. In rare cases of high public importance, which the HCJ accepts for review, there would be an extended odd number panel of judges (Cohn 2019).

[1] Weinshall Keren, Lee Epstein & Andy Worms. The Israeli Supreme Court Database, 2018 version URL: http://iscd.huji.ac.il

[2] Procedures in the High Court of Justice Regulations, 5744 1984, articles 16-18. https://www.nevo.co.il/law_html/law01/055_063.htm#Seif5 (Hebrew).

These authorities mean that the HCJ can annul Knesset (parliament) legislation and government decisions based on a demand to do so by citizens who receive a standing right before the court. In 1969, in the Bergman case (Bergman v Minister of Finance 1969), the HCJ declared that the basic laws give it the right to annul legislation if the Knesset legislates laws that deviate from lines set by the basic laws (Jacobsohn and Roznai 2020, 192–93). Since that case, the HCJ maintained and expanded its constitutional powers gradually over primary and secondary legislation, as well as on government decisions. It used both Israel's basic laws and the 1948 Israeli Declaration of Independence that included a human and civil liberties section (Jacobsohn and Roznai 2020, 193–94).

In 1992 the Knesset legislated two basic laws: Human Dignity and Freedom and Freedom of Occupation. The basic law Freedom of Occupation was amended and finally approved in 1994. These laws created a constitutional structure that potentially limited the Knesset's legislative powers not only due to procedural matters (as implied by the Bergman case) but in substance. The Knesset was to face judicial review for the liberal values embedded in these two laws and explain if legislation was to infringe on the rights set by these laws in a worthy and proportional manner. That legal interpretation became a political fact after the Israeli Supreme Court clearly made this point in the United Mizrahi Bank v. Migdal Cooperative Village case (Jacobsohn and Roznai 2020, 194–200). Hence, along time the court sustained its position as a veto player on government decisions, based on procedural faults in government and Knesset decisions as well as normative reasoning relating to core values guiding the Israeli political system (Hirschl 2009b).

Beyond constitutional law and stepping into administrative law, during the early 1980s, the HCJ determined that it would review government decisions under the realms of the reasonableness of their decisions: decisions are to be reasonable, unbiased, and non-arbitrary. Should the court decide that the government made an unreasonable decision, it will annul the decision (Weill 2020). The HCJ enhanced its usage of the reasonableness doctrine in scrutinizing government decisions while examining both the process of decision making and the particular considerations it included (Cohn 2019). This move potentially allowed judges to veto government decisions and set paths to a given line of decisions based on judges' considerations of a reasonable decision-making process (Dotan 2000). The court (mostly Justice Aharon Barak) went on to determine the range of reasonableness, allowing the government to maneuver in its policymaking processes. However, the court did not lay grounds for a deference doctrine (a-la Chevron), which limits court intervention in government decisions (Weill 2020).

Furthermore, the court expanded its justiciability doctrine, thereby allowing it to review various issues that used to be included in the space of non-justiciable decisions (Weill 2020). This enhancement meant that potentially every decision (and eventually laws) could be reviewed by the court (Weill 2020). Moreover, the court also offered standing rights to petitioners directly harmed by government decisions and public petitioners who could identify some collective level of rights' infringement by government activities (Cohn 2019).

Constitutional and administrative law coalesced as the proportionality doctrine stemming from reasonableness and embedded in the 1992-1994 basic laws, was expanded by the court to relate to various cases that arise from constitutional to administrative review (Cohn 2019). This

combination of maneuvers effectively instituted the Supreme Court's constitutional veto player's position. While the political elite was resentful of the court's interpretation of the said basic laws, it did little to establish a formal boundary on its review powers (Doron and Meydani 2007; Meydani and Mizrahi 2010). The only explicit limitation was instituted in Basic Law: Freedom of Occupation, which was amended in 1994 to include an option for the Knesset to legislate a law that contradicts this particular basic law. The law commits the Knesset that if it does override the basic law Freedom of Occupation, it needs to clearly state that it violates the basic law and that the overriding law has four years' time-limit (Knesset 1994, sec. 8).[3]

Thus, by the mid-1990s, Israel's Supreme Court interpreted the Israeli legal framework as allowing it to review cases set before the court by citizens and groups of citizens with an ability to claim for representing some collective's interests. Its review could relate to the infringement of individual and civil liberties stemming from the declaration of independence and set within the basic laws. Furthermore, it could use terms such as reasonableness and proportionality to examine government decisions with some uncertainty relating to how such principles should be applied in review and which principle overrides the other. Consequently, these conditions allowed the judiciary's power to outweigh all other government branches (Lindquist and Cross 2009).

Seeking to limit courts' veto and agenda-setting powers, leaders worldwide have gone to the extent of targeting courts using various violent means (Basabe-Serrano 2012; Levitsky and Way 2002; Nagle 1999). In democracies (including hybrid and defective democracies), leaders pursued constitutional reforms which decrease judges' and courts' review powers. Such transformations do not yield an abolishment of the court, but a decrease in its independence and a change in the court composition, ensuring that judicial review is limited and handled by the governing elite's nomenclature. In such cases, leaders use the court as a means to make sure that the court does not veto their policies but can be used as a tool against the opposition's political wills (von Bogdandy et al. 2018; Kelemen and Laurent 2019; Levitsky and Way 2010, 164–65; Özbudun 2015; Sadurski 2008). Thus, judicial independence is mitigated by a political environment that partially maintains the rules of play of liberal democracy, infringing on judicial independence by seemingly lawful procedures. Below I review such initiatives taken in the Israeli case.

3. ISRAEL'S POLITICAL ELITE COUNTER-COURT MEASURES

Since 1995, Israel's Supreme Court has been under political pressure due to its broad constitutional interpretation of its judicial review powers (Doron and Meydani 2007; Meydani and Mizrahi 2010; Shetreet 2002). This pressure resulted in a series of institutional attempts

[3] I expand below on the issue of override clauses.

to affect the procedures of judicial nominations and various political initiatives aimed at reducing the powers of the judiciary (Navot and Peled 2009). These attempts direct their efforts at various legal gatekeepers, either within the government and its ministries, law enforcement agencies, and the High Court of Justice's judicial independence. Due to the central place of HCJ rulings on the rest of the public legal community's decisions (Dotan 2014), I will focus this review on the efforts made to curb the HCJ's powers rather than the attempts to limit the powers of the public-legal gatekeepers.[4] I will examine here three such maneuvers: the attempts to affect judicial nominations to the ISC (and therefore the HCJ), the attempts to construct a Constitutional Court in Israel, and the attempts to legislate an override clause that would allow the Knesset to override the HCJ's vetoes on its laws.

3.1 JUDICIAL NOMINATIONS

The legal background for selecting judges for Israel's courts is determined by a combination of two laws: Basic Law Judiciary (Hashfita) and the Law of Courts (Knesset 1984a, 1984b; Rosenthal, Barzilai, and Meydani 2021)[5]. Judges are selected to office by a judicial selection committee. This committee includes three factions (three Supreme Court judges, four politicians—two from the government and two from the Knesset—and two lawyers) who select candidates representing their nominating institutions (the Supreme Court, the government, the Knesset, and Israel's Bar Association). An amendment to the Law of Courts (section 6a) enacted in 2004 states that committee members do not represent the institution that placed them on the committee but must select judges based on the committee members' preferences.[6]

Another amendment added in 2008 determined that in order to select a Supreme Court judge, there has to be a majority of seven of the nine committee members.[7] Before the 2008 amendment, a simple majority was the selection rule. It gave the judges an advantage in the committee if they had even two supporters from the other committee factions (politicians or

[4] Such attempts include the will to separate the powers of Israel's government's legal advisor (Yoetz Mishpati La'memshala) between two functions: offering legal advice to the government and the head of the prosecution agency. Although this maneuver carries many advantages for the rule of law (Barzilai and Nachmias 1998), once the attempts by the Israeli government prosecutors to indict Prime-Minister Netanyahu intensified, the prominent supporters for this move were right-wing parties which were seeking to decrease the legal advisor's institutional powers (Hovel 2015). Another such initiative is to constitute a law that would not allow the legal system to investigate or indict a ruling Prime-Minister (Wootliff 2021). This idea follows the convention in France where the President enjoys legal immunity while in office. However, in France, the President also faces term limits, and therefore that immunity is limited. In Israel, a Prime-Minister does not face term limits, and hence adopting that law could theoretically mean that a Prime-Minister will enjoy life-long immunity from legal proceedings.

[5] This section loosely follows Rosenthal, Barzilai, and Meydani 2021.

[6] (Knesset, 1984b) article 6.

[7] (Knesset, 1984b) article 7 c 2.

lawyers), or if these factions were split. Hence, until 2008 the Supreme Court (under the guidance of the Chief Justice) and the Bar Association could have selected Supreme Court Justices with no or almost no political influence (Shetreet 2003). Since 2008, however, a coalition supporting a judge's nomination has to include some of the committee's political members (Friedmann and Watzman 2016, chap. 33).

As long as the minister of Justice is keen on decreasing the court's powers, then she (or he) would use an opportunity to 'push' through her candidate. Ministers of Justice used opportunities to diversify the court, with judges who either came from circles the judges would not usually support (such as the private sector) (Friedman, 2016, ch. 36), or those associated with a conservative judicial agenda (Rosenthal, Barzliai and Meydani 2021). Minister of Justice Ayelet Shaked was able to steadily and purposefully maintain this policy direction between 2015-2018 bringing changes in the manner the judges on court reviewed petitions (Rosenthal, Barzliai, and Meydani 2021). Nevertheless, that effect was curtailed by existing traditions and path dependence within the court's already set doctrines and precedents (Rosenthal, Barzliai, and Meydani 2021).

3.2 THE OVERRIDE CLAUSE

An override clause is a legal mechanism that allows a legislature to veto a constitutional decision, particularly those made by courts, by declaring that it is aware that it explicitly rules against the constitution (Weill 2016). This mechanism effectively exists in the Israeli legal system since the 1994 amendment to the Basic Law: Freedom of Occupation (Jacobsohn and Roznai 2020; Weill 2016). Two ideas regarding legislating an override clause exist within the Israeli political system: one idea is to add an override clause to the Basic Law: Human Dignity and Freedom legislated in 1992. Another idea is to create a general override clause related more generally to ISC/HCJ decisions. When such decisions veto a Knesset decision, then the Knesset would be able to override that decision (Weill 2016). The more over-reaching override clause takes the Canadian example as its benchmark (Weinrib 2016). The Canadian override clause includes an option for the legislature to temporarily override the Canadian's Supreme Court decisions regarding the legislature's decisions' constitutionality (Weinrib 2016). The main supporters of these ideas since 2012 are the Israeli right-wing parties and religious ultra-orthodox parties.[8] These legislation efforts usually reach the phase in which they are set on the Knesset's agenda for a hearing yet do not go further than that.

It should be noted that Israel's center parties partially accepted the override clause. Prof. Daniel Friedman was a Minister of Justice on behalf of Kadima between the years 2007-2009: a center-right party. Prof. Friedman declared his will to ensure that the ISC/HCJ's decisions to

[8] Earlier bills on this matter were proposed by left-wing parties such as Meretz, which wanted to make sure that the Knesset cannot just arbitrarily change the basic Law: Human Dignity and Freedom (Vilan 2002).

nullify laws would have to be set on a clear legislative permission. However, in return, the Knesset would have the ability to override the court's decisions on constitutional matters (Friedmann and Watzman 2016, 309–10). Friedman leaned on a bill proposed by a public commission headed by a leading lawyer named Ya'akov Ne'eman. The Ne'eman Commission determined that the Knesset could override a court decision to veto a Knesset law due to lack of constitutionality, with a 70 MKs' majority (The Ne'eman Commission 2004). Friedman aimed at a lower threshold of 61 MKs (Friedmann and Watzman 2016, 309–10). Friedman was able to convince the government to approve his bill on that matter (Friedmann and Watzman 2016, 311–12). However, Kadima's government collapsed, and the Likud's new coalition did not wish to push through that bill (Friedmann and Watzman 2016, 311–12).

When the Likud came to power in 2009, Ya'acov Ne'eman became the Minister of Justice. He tried to promote the override clause based on a 65 MKs' majority. The Supreme Court and Israel's President opposed this bill, and it was not promoted (Zarhin 2012). MKs from all political sides have been setting various drafts of Basic Law: Legislation and Basic Law: Judiciary on the Knesset's agenda. A clear dividing line between the right and center on this matter is the number of MKs needed to override a court decision. While the right's bills propose a 61 MKs majority (Shaked 2020), the center proposes at least a majority of 80 MKs (Elharar 2020). For the most part, these laws did not even reach a preliminary vote stage in the Knesset. However, they show that Israel's political elite accepts the idea of an override clause relating to the Supreme Court's decisions but is split on the threshold for the Knesset to implement this law.

3.3 CONSTRUCTING A CONSTITUTIONAL COURT

Another measure which critics of the HCJ aimed at pursuing was to nominate a Constitutional Court that would serve as an instance higher than HCJ on constitutional matters. Since 1994 primarily right-wing and religious members of Knesset have been setting this bill on the Knesset's table to no avail. The reasoning offered by lawmakers submitting these bills is that there should be a court authorized to review laws based on the basic laws and nullify them and ISC/HCJ decisions. The proposed makeup of this court consistently determines that judges endorsed by HCJ judges would be a minority in this court.[9] Throughout these attempts to legislate a constitutional court, two patterns emerged: right-wing politicians lead the bill. The Likud ministers rejected the bill, with these bills' initiators facing opposition by pro-court activists (such as the Government Quality Movement) (Doron and Meydani 2007). Thus, this idea did not enjoy the support of any other institution, non-right-wing political parties, or the

[9] For example, in one of the recent bills in this series, there would be three judges selected by the judges' selection committee alongside a rabbi, two Muslim priests (Kaddis), five judges who are Supreme Court worthy to be selected by the government and two judges to be selected from the Opposition (Karai 2020). In another example taken from a 2009 constitutional court bill, the cosponsors also added three professors whose names would be proposed by Israel's Higher Education Council (Rotem 2009).

public opinion's support. Hence, while being still raised periodically on the Knesset's table, it is vetoed by the majority of parties in Knesset and did not enjoy the government coalition's support.

4. CONCLUDING DISCUSSION: INSTITUTIONAL POWER AND COURTS IN ISRAEL

When politicians face a veto player whose decisions potentially affect their survival prospects, they can use institutional reforms to eradicate this player's power. Such reforms entail different costs and benefits and varying uncertainty levels that are not clear for reformers at the time of institutional change (Shvetsova 2003). Indeed, it is far from being clear that when legislating the 1992 basic laws, all legislators in Knesset knew what their outcome would be. Shvetsova notes that trying to roll back an institutional reform or change an existing institution's rules depends on reformers' ability to understand how institutional outcomes came to be (Shvetsova 2003). A lack of such new information could yield a preference for the status-quo (Shvetsova 2003).

The Israeli case shows the political elite facing the court being reluctant to take the more complicated institutional reforms (an override clause and a Constitutional Court) while taking the more prudent measure of incrementally changing the court composition using Supreme Court nominations. Political controversy regarding the court does exist (Meydani and Mizrahi 2010). However, the consensus needed to invoke a large-scale institutional change (Shvetsova 2003) does not exist.

The Meydani-Mizrahi model offers an outline of the interaction between politicians and judges on this matter. Judges can use judicial review to pull out of the status-quo by holding independent judicial review of Knesset legislation and government decisions. However, politicians have the institutional moving power to eradicate the court's power by utilizing institutional reforms. Yet, as long as the court is backed by public opinion support make the politicians' threat power less realistic. This is because politicians are afraid from public opinion backlash. Hence, the court pushes review strategically in a manner that would make politicians refrain from reforming the court. Politicians are willing to accept judicial independence to some level, since losing of public opinion popularity is more costly than seeing some vetoes on government and Knesset decisions (Meydani and Mizrahi 2010).

Yet, the HCJ's popularity has been eradicated by politicians' efforts working against the court's legitimacy. This loss of popularity is not only evident within right-wing supporters who perceive the HCJ as a left wing party branch (Rotman 2019), but also within left-wing supporters disappointed with the manner the court has taken back its commitment to broad democratic values (Mordechai 1/18/2021). Hence, for politicians the risk from moving against the court decreases. In that context it is not a surprise that the current government in Israel is pursuing to promote some of the reforms I alluded to above (the override close and separating the functions of the Israeli government's legal advisor). Whether the influence of the court's decrease in popularity on the politicians' ability to see these reforms through is still an open question.

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