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Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective

GAD BARZILAI

INTRODUCTION

This article explores significant changes in the public status of the Israeli Supreme Court, which since the 1970s has assumed a central place in Israeli politics, and considers sources of the Court's public legitimacy. I argue that the high, even hegemonic status of the Israeli Supreme Court resembles a global phenomenon that has politically empowered supreme courts in many democracies. The high public status of the Israeli Supreme Court and its involvement in political controversies have two main causes. The first is a fragmentation and polarization of other power centers, including the legislature and the executive, while the second is a cultural Americanization and the prevalence of liberal values in some segments of Israeli society.

These causes of change have enabled the Supreme Court to mobilize three sources of legitimacy: specific, diffuse, and primarily mythical. Transforming those sources of legitimacy into institutional power *vis-à-vis* other institutions, the Court has become a hegemonic institution. This has made the court a popular target for litigation and a forum for airing sociopolitical rifts. A major condition for judicial power is the scope of its legitimacy. The Court's expanded authority cannot be comprehended without a theoretical framework comparing Israel to other nations. As noted above, changes in the status of the Court parallel those in other democracies such as France, Germany, and Italy. This article examines relations between supreme courts, public environments, and judicial legitimacy, explores the sources of judicial legitimacy, investigates the

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historic sources of faith in the court, and inquires into the sociopolitical limits of adjudication.

PUBLIC ENVIRONMENT AND LEGITIMACY OF SUPREME COURTS

Judicial involvement in value-based political affairs is not unique to Israel. Courts in France, Germany, Israel, Italy, and the United States have addressed political disputes, including executive powers, emergency powers, ethnic relations, education, elections, abortion, military service and disobedience, freedom of association and expression, and property rights.¹ The growing tendency to adjudicate public disputes creates a public sphere into which more groups are subjected to the attention of the court and react to its decisions.² The US Supreme Court (hereafter, USSC), for example, has been defined as “one governmental agency among many,”³ and as a significant pillar in the administrative democracy.⁴ While the executive and legislative branches in democracies are linked to the general public through the procedures of elections, supreme courts often lack this institutionalized linkage.⁵ Nevertheless, they often maintain visible communication with the general public.

The political nature of judicial review necessitates democratic judicial legitimacy,⁶ a concern which protagonists of judicial activism and advocates of judicial restraint have emphasized.⁷ Judges are less likely to be replaced or impeached than legislators or elected government officers, and the average career on the bench is frequently longer than those of elected politicians and even many other administrative officials. Public legitimacy is thus crucial if courts are to serve as messengers of democratic virtues.⁸ But how can a court engage in democratic discourse and inject norms and values into a democracy without undermining its own legitimacy?⁹

The literature on judicial legitimacy is rich and varied. Some scholars have emphasized the impact of the court’s legitimacy on its relations with other political institutions, arguing that public support lessens institutional vulnerability.¹⁰ Others underscore the effect of judicial legitimacy on public compliance with court rulings.¹¹ My emphasis in this article, however, is on the sources of judicial legitimacy and the institutional and cultural conditions necessary for judicial domination of the political sphere.

There are three commonly proposed theories of judicial legitimacy. The first underscores the irrational aspect of public dispositions towards higher courts. Here, legitimacy is based on public myths of judicial supremacy deriving from their perceived “impartiality,” “fairness,” “professionalism,” “morality,” etc.¹² This is called mythical legitimacy, and is based on ideal symbols of the judiciary.¹³ These symbols portray the supreme court as an impartial institution whose decisions are based

on objective criteria of law and justice. Mythical legitimacy asserts the positive uniqueness of supreme courts in comparison to other state branches and public organizations.¹⁴ Myths regarding supreme courts reflect national narratives. In the United States, these narratives include the reconstruction of the Union and the capitalist order of the post-New Deal welfare democracy.¹⁵ In Israel, the narratives are Jewish nationality and the “need” to fight the perceived siege of the Jewish democracy.¹⁶

Fiction is a central component of myth.¹⁷ Accordingly, mythical legitimacy is not contingent upon a specific judicial outcome, but rather on the symbolic reflections of the judicial institution. However, a salient court decision that contradicts national narratives or a series of controversial decisions might undermine mythical legitimacy. The probability of such a crisis is low, however, because supreme courts tend to articulate national narratives.

The second possible source of judicial legitimacy is diffuse public faith. This means public support for the judicial institution (e.g., public trust in the court) without specifically referring to the content or repercussions of its concrete decisions.¹⁸ Diffuse support shares an important quality with mythical support in that both address the judiciary in terms of “faith” or “prestige.” However, the dissimilarity between the two is pronounced. Diffuse support is primarily contingent upon the judicial policy and the general functioning of the court, and it does not expressively attribute to the court mythical characteristics. Mythical support is, instead, conditioned upon symbols, partly fictitious, which present a transcendent normative context to the court.

The third theory of legitimacy asserts that the general public consciously reacts to specific judicial decisions,¹⁹ an incremental and rational process of agreement with specific court decisions breeding legitimacy based on collective consent.²⁰ Such a conceptualization has been entitled “hypothesis of positive response.”²¹ Attitudes towards court decisions tend to adapt to collective values,²² and, sometimes, reactions to specific judicial rulings are negative. They then reflect tendencies of social dissent. In such cases one does not presume that legitimacy will always be generated. For example, some evidence suggests that the USSC decisions in *Furman v. Georgia* (1969) and *Roe v. Wade* (1973) have weakened the Court’s public support.²³

THE ISRAELI SUPREME COURT: A SYSTEMATIC ANALYSIS OF A JUDICIAL CHANGE

The Israeli Supreme Court (primarily in its capacity as High Court of Justice, HCJ) has never been only an administrative court, despite its similarity to the English model. The English model prohibits the Court from abolishing parliamentary laws. Until 1995, the HCJ had never ruled that it might cancel a Knesset’s law because of its content. However, since the 1950s, and especially since the 1970s, the Court has

advanced characteristics of a constitutional court, in some accordance to the German, Austrian, and American models. According to these models, supreme courts are guardians of the political order, and under specific conditions interfere in political affairs. The Israeli Court has canceled Knesset's laws because of wrong legislative procedures, and developed a bill of civil rights. Since the 1970s, its intervention in parliamentary affairs has become more intensive, and its judicial review of executive acts has been more extensive. Certain constitutional reforms have recently taken place in Israel. Two new so-called Basic Laws, Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Freedom were enacted in 1992 (with the former reenacted in 1994). Several civil rights, such as the freedom of occupation, the right to property, and the right to freedom, human dignity, and privacy can no longer be infringed unless by legislation supported by an extraordinary majority in the Knesset. The new Basic Laws empower the Supreme Court to rescind normal legislation shown to contradict certain human and/or civil rights. Overall, the reforms that they introduce may cause the Israeli Supreme Court, as a constitutional court, to develop a closer resemblance to the constitutional courts or bodies in Europe, e.g., Germany, and the USSC.

Similarities between the USSC and the HCJ are particularly clear. Both have constitutional powers *vis-à-vis* the executive and the legislature. Both have developed their authority for active judicial review to the degree that both Israel and the US might be defined as judicial-administrative regimes. Moreover, both have adjudicated public issues in the midst of deep conflicts and were crucial for the creation and empowerment of civil rights. They have broadly defined judicable issues, curtailed the scope of the "political question" doctrine and, in turn, have increased their judicial involvement in the midst of severe crises. The HCJ and the USSC should be understood in the context of the Anglo-American legal tradition. Many HCJ landmark decisions have been inspired by American constitutional law, despite (and because of) the lack of an Israeli written constitution and an entrenched Bill of Rights. Both courts have activated *a posteriori* judicial review, or rulings are not based on abstract issues of law but on specific problems raised by litigants. Finally, both courts have faced criticism of judicial activism as being undemocratic and as poor replacements of political debate by verbal legalism.²⁴

This kind of western constitutionalism has not been absorbed in the Middle East. Judicial power in the region has often been subjected to authoritarian political and coercive religious institutions. The judicial review activated by the HCJ is one of the rare and prominent exceptions to this historical process. Since Israel's inception (1948), the Supreme Court has functioned within a democratic setting, enjoying relative autonomy *vis-à-vis* the political administration. Although Israel cannot be defined as a western liberal regime, its institutional sphere (in the pre-

1967 borders) has democratic fundamentals, and its cultural setting is marked by a relatively high trust in its democratic institutions.²⁵

Until the 1970s, the HCJ had often resisted creating new civil rights, although a judge-made bill of rights did eventually emerge, including freedoms of expression, organization, demonstration, and occupation, all without explicit legislation. Despite Israel's protracted state of emergency, the Court posed restrictions on executive emergency legislation and reduced the probability of the government damaging individual rights. Yet, using formal-legal-administrative arguments of "political question" and "presumption of legality," the HCJ's involvement in civil-political and especially security-military controversial issues remained quite marginal.²⁶

What explains the shift during the 1970s? There are two likely explanations for the increasing judicial activism and more hegemonic position of the Court. The first is the growing impact of liberal values on the political culture, combined with the lack of a written constitution in a highly divided, polarized, and fragmented setting. While social rifts have become more severe, political polarization more prominent, and political corruption more frequent, the HCJ has continued to be perceived as one of the most reliable institutions in the country, more reliable than the parties, the parliament, or the government.²⁷ Not only have public expectations for judicial solutions become more prevalent and diverse, but since the 1970s more politicians and pressure groups have appealed to the Court. Litigation has become a source of political pressure, a means of social communication, and a way to resolve conflicts. In 1950 there were 86 appeals to the HCJ. In 1960, there were 333, and in 1970, 381. After the 1970s, the appeals climbed dramatically: 802 in 1980, 1,308 in 1990, and 2,209 in 1994. This rate of increase in appeals to a supreme/constitutional court can be found in few other democracies,²⁸ and relative to its number of inhabitants Israel has experienced a massive litigation explosion.

Broad adjudication has focused public attention on HCJ rulings. Various pressure groups and political parties have been prominent in their reactions to its decisions. Media reports about judicial nominations, litigation, judicial decisions, and public reactions to salient rulings have become more frequent. In the midst of hectic public contention about the future of the occupied territories, the HCJ, since 1972, has adjudicated issues concerning military and security activities in those regions.²⁹ Public controversies regarding the court's judicial powers and rulings have therefore become inevitable.

The HCJ has been reluctant to intervene with the armed forces and other security organizations in the occupied territories. While the Court has recognized the right of Palestinians, most of whom are not Israeli citizens, to appeal, it tends to support arguments raised by state authorities.³⁰ Hawkish-right protagonists have nonetheless criticized the HCJ, claiming that the country's war management should not be based

on legal texts. The Palestinians captured by the security forces, their argument has asserted, should not enjoy the legal right of standing before the court or any remedy. In contrast, the dovish-left has criticized the judicial legitimacy granted to state activities in the territories, where the Israeli rule is authoritarian and its adjudication is only an illusion of “democratic supervision.” Indeed, in most cases the HCJ has dismissed the appeals of Palestinians, legitimating the military occupation.³¹

This change from a rather secondary public institution to a much more prominent one has continued in the 1980s and the 1990s. The HCJ has become more involved in regulating democratic procedures within Israel. It has molded rules regarding, among others, the validity and disclosure of political agreements,³² specific legal criteria for excluding radical parties from participation in parliamentary elections,³³ and the legality of governmental appointments for senior administrative positions.³⁴ Since the beginning of the 1980s, the Israeli public has rather extensively debated HCJ rulings. Recently, international attention has been drawn to the HCJ’s decision to approve the massive deportations of Hamas activists (January 1993).³⁵

Public opinion has played a limited but distinct role in the expansion of judicial authority. The judges, aware of public debates and contradictory political expectations of their decisions, have been reluctant to engage controversial issues. They have used the notions of “public consensus” and “public morale” to justify intervention in appointments for administrative positions or non-intervention in decisions about the scope of military conscription.³⁶ Thus, the Court has leaned on public opinion to erode the doctrine of “political question” and enlarge HCJ judicial review.

HCJ’S LEGITIMACY: PUBLIC SUPPORT FOR JUDICIAL HEGEMONY

The Israeli public (Arab-Palestinians and Jews) has generally acknowledged the Court’s legitimacy and no organized social movement has taken on the Court. Nevertheless, judicial legitimacy is not without limits, and some questions have been raised. A 1991 study established that the Jewish public has generally approved of the Court, and the majority has clearly supported most of the Supreme Court’s rulings.³⁷

The Supreme Court ruling approving of the exclusion of an Arab-Palestinian political party from Knesset elections (1965) was the most popular decision (81.4%), while the ruling to adjudicate the expulsion of Palestinians from the occupied territories was the least popular (34.8%). Thus, rulings which have plainly preserved political procedures of the Jewish community were the most popular, while those aimed at including Arab-Palestinian political parties in the Jewish political game, and especially decisions that increased judicial supervision over the security authorities in the occupied territories, were the least popular.

Despite a wide range of public reactions to salient decisions (from 34.8% to 81.4% of agreement), the general tendency has favored court decisions (mean = 59.01; median = 59.10; standard deviation = 14.14; coefficient of variation = .24).

Tables 2a and 2b present public reaction to the HCJ as an institution. The public has tended to differentiate between support for the Court's decisions (Table 1) and support for the Court as an institution (Table 2) (t value = 108.02; 2-tail probability < .000). Part 2a exhibits confidence in and agreement with its judicial powers and its overall judicial policy, i.e., diffuse support. Part 2b demonstrates ideal symbols related to the Court, i.e., mythical support. My empirical tests show that those two types of legitimacy are somewhat different in the public view (t value = 145.69; 2-tail probability < .000).

Approval of the Court as an institution was more pronounced than approval of its specific rulings (mean = 66.20; median = 67.40; standard deviation = 15.25; coefficient of variation = .23). As Table 2 demonstrates, the most popular attitude was the support in principle of a broad judicial review (92.4%). Yet, the Jewish public considered Israeli-Arab-Palestinians as outside the scope of the Court's guardianship. The least popular attitude was granting individual rights for the Palestinians in the occupied territories (34.9%).

Given this high level of specific, diffuse, and mythical legitimacy, the HCJ has enjoyed greater public legitimacy than its American counterpart.³⁸ In fact, the scope of judicial legitimacy given to the HCJ is broader than the legitimacy conferred to any of the constitutional or supreme courts in Europe and South Africa.³⁹ Hence, the HCJ can mobilize more social forces and political groups in order to be a hegemonic institution. While the scope of public legitimacy for the HCJ has been broad, measured and analyzed at the collective level, the sources of such a judicial legitimacy should be analyzed at the individual level, and at the historical level of cultural origins. It has been already established that, at the individual level, mythical symbols were the main source of judicial legitimacy. Table 3 presents the results of a rotated factor analysis of individual dispositions based on the data set of 1991. It reveals three main sources of legitimacy.

The first and the most prominent source of judicial legitimacy is myths. It has had two dimensions: Factor A has reflected the perception of the HCJ as an institution significantly "contributing" to the State (factorial grade, fg 84.6). This type of perception indicates mythical support. The HCJ has been publicly categorized as an institution similar to the army (IDF), the State Comptroller, and the police, all of which are perceived as "contributing" a great deal to the State, and as national, a-political, professional, objective, and protectors of the State. Only 10.2 percent hesitated to define the court as "contributing" to the State, and only 2.1 percent have opposed such a definition. Hence, Factor A articulated public myths. The Court was not only perceived as functional to the Israeli

TABLE 1
PUBLIC REACTIONS TO SUPREME COURTS DECISIONS

Question and its number in the questionnaire	Pro	P.C.	Con	N
(Q. 39) Exclusion of an Arab political party from parliamentary elections, if it strives to change the regime	81.4	8.9	9.8	100.1 [944]
(Q. 41) HCJ should not intervene in executive's decisions to release or not to release Palestinian guerrillas jailed in Israel	75.4	14.3	10.3	100.0 [970]
(Q. 36) Military disobedience is illegal	74.8	12.1	13.2	100.1 [975]
(Q. 35) Right of Standing should be broadened to extreme cases of constitutional grievances even if appellant has not suffered damage	73.4	15.5	11.1	100.0 [959]
(Q. 42) HCJ is authorized to nullify executive decisions which don't include considerations important for the preservation of democracy	68.6	20.6	10.9	100.1 [957]
(Q. 40) HCJ will not adjudicate pure governmental political issues like diplomatic relations with Germany	64.3	23.3	12.6	100.2 [959]
(Q. 43) Palestinians should be equipped with the same protective Gas masks, as Israeli citizens, during the Gulf War	60.1	17.2	22.7	100.0 [972]
(Q. 25) Military censorship on the press is prohibited unless the publication will constitute a proximate danger to national security	59.1	21.1	19.7	99.9 [979]
(Q. 53) HCJ will intervene in governmental decisions regarding activities of economic organizations	55.8	33.4	10.9	100.1 [962]
(Q. 34) HCJ recognizes right of Palestinians in the occupied territories to appeal	54.4	18.6	27.0	100.0 [976]
(Q. 37) Exclusion of a militant right-wing Jewish party from parliamentary elections	50.4	15.9	33.6	99.9 [973]
(Q. 27) Palestinians should enjoy a right to be heard in court, before the security authorities inflict a punishment of house demolition, unless an immediate military need dictates otherwise	50.0	20.1	29.9	100.0 [970]
(Q. 26) HCJ will nullify decisions of the security authorities, which do not attribute a sufficient importance to human rights	46.4	25.9	27.6	99.9 [970]
(Q. 38) Inclusion of radical Arab-Jewish political party in parliamentary elections	36.2	22.4	41.4	100.0 [965]
(Q. 51) HCJ has the authority to nullify decisions to expel Palestinians from the occupied territories	34.8	18.9	46.3	100.0 [974]

Pro: those respondents who replied "support very much" or "support;" Con: those respondents who replied "oppose very much" or "oppose;" P.C.: those respondents who replied that they "partially support and partially oppose." N: valid percentage, and in brackets number of respondents to a specific question.

TABLE 2
PUBLIC DISPOSITIONS TOWARDS THE SUPREME COURT AS AN INSTITUTION

Question and its number in the questionnaire	Pro	P.C.	Con	N	
A. DIFFUSE SUPPORT					
(Q. 7)					
Broad judicial powers of the HCJ are appropriate (Q. 56)	92.4	-	7.6	100.0	[948]
HCJ contributes to the State (Q. 20)	87.6	10.2	2.1	99.9	[974]
Confidence in HCJ (Q. 21)	78.1	17.7	4.1	99.9	[979]
HCJ contributes to the preservation of the Israeli democracy (Q. 12)	72.5	22.6	5.0	100.1	[980]
HCJ should increase its supervision over the parliament (Knesset) (Q. 14)	71.5	20.0	8.6	100.1	[970]
HCJ is a supreme institution and its rulings should be adhered to regardless of the respondent's attitudes (Q. 47)	70.4	16.6	13.0	100.0	[979]
HCJ should increase its supervision over the government (Q. 54)	67.4	18.9	13.8	100.1	[976]
HCJ should enjoy the authority to review Knesset legislation and nullify non-democratic laws (Q. 50)	65.6	18.1	16.2	99.9	[966]
HCJ should increase its supervision over religious institutions (Q. 49)	65.2	19.2	15.6	100.0	[976]
HCJ should increase its supervision over the police (Q. 52)	59.8	21.1	19.1	100.0	[977]
HCJ should continue its policy of not intervening in the discretion of the security authorities (Q. 11)	59.0	24.6	16.4	100.0	[966]
HCJ should strengthen freedom of religion (Q. 10)	58.7	24.2	17.1	100.0	[972]
HCJ should strengthen freedom of expression and demonstration (Q. 44)	56.5	28.2	15.3	100.0	[970]
HCJ should be involved in state-religion issues (Q. 9)	53.4	25.9	20.7	100.0	[970]
HCJ should grant more civil rights to the Israeli Arabs (Q. 48)	39.6	29.9	30.4	99.9	[966]
HCJ should increase its supervision over the army (Q. 8)	36.5	23.6	40.0	100.1	[976]
HCJ should grant more individual rights for the Palestinians in the occupied territories (Q. 13)	34.9	27.1	38.0	100.0	[971]
B. MYTHICAL SUPPORT					
HCJ is politically neutral (Q. 33)	85.5	-	14.4	99.9	[948]
HCJ is the protector of the citizen <i>vis-à-vis</i> the authorities (Q. 32)	79.4	16.3	4.4	100.1	[971]
HCJ operates in wisdom (Q. 29)	79.2	16.6	4.1	99.9	[967]
HCJ is the public body with the highest morality in the country (Q. 31)	71.7	17.6	10.7	100.0	[974]
HCJ examines every relevant argument without discrimination (Q. 30)	70.8	21.1	8.1	100.0	[968]
HCJ represents the common citizen	66.8	18.8	14.4	100.0	[972]

Note: Categories as in Table 1.

TABLE 3
DIMENSIONS OF PUBLIC DISPOSITIONS TOWARDS THE SUPREME COURT; FACTOR MATRIX*

Specific Legitimacy	Diffuse Legitimacy			Mythical Legitimacy		
	Judicial Empowerment of Civil Rights	Supervision over other Institutions	State-Religion	Diffuse Dispositions	Judicial Myths	Perceived as 'Non-Political'
Right of appeal (-.71)	Freedom of expression and demonstration (.58)	Police (.68)	Religious affairs (.59)	Confidence (.77)	Fairness (.74)	IDF (army) (.67)
Right to be heard (-.64)	Freedom of religion (.58)	Government (.67)	Religious Institutions (.48)	Satisfaction (.63)	Representation of citizens (.63)	State Comptroller (.52)
Individual rights for Palestinians (.63)		Army (.65)		Contribution of the court to democracy (.43)	Guardianship (.61)	HCJ (.49)
Exclusion of Jewish militant political party (.56)		Religious Institutions (.54)			Wisdom (.60)	Police (.49)**
Inclusion of Arab-Jewish political party (.56)					Highest morality (.56)	
Need that security authorities will respect human rights (.53) G(FG 53.8)	F(FG 63.3)	E(FG 63.8)	D(FG 64.3)	C(FG 69.8)	B(FG 71.0)	A(FG 84.6)

* numbers in parentheses indicate a variable's loading on the overall factor

** in addition to this factor, another has been detected which includes institutions defined as political (fg. 59.5): the parliament (.74), the parties (.65) and the government (.63).

a. all computations are based on rotated factor analysis (communalities, eigenvalues, factor loadings) while initial matrix was formed by factor extraction by using the Principal components analysis of the SPSS (V 4.0).

b. the t values between the factors are significant at the level of $p < .0001$ in two tailed probabilities.

democracy, it was also categorized as a non-political institution in contrast to the Knesset, the political parties, and the government. Those bodies were perceived as somewhat damaging to the State, probably due to their image as partisan, self-interested political institutions.

The second dimension of mythical legitimacy (Factor B) involves expressively articulated myths towards the HCJ (fg 71). The Court was perceived as fair because it “investigates every argument brought before the bench without bias and discrimination” (70.8%). In addition to its procedural justice, the court was conceived as “representative of the ordinary citizen” (66.8%), one which “operates in wisdom” (79.2%), and “takes care that the authorities will not harm the citizen” (79.4%). The public imagined the court as “the institution with the highest moral authority in the country” (71.7%). These images are myths, not because they are wholly fictitious, but because they abstract relative facts into absolute “realities” which have become part of the collective discourse.

Institutional reliability (diffuse support) is the second most important source of judicial legitimacy. It was primarily attributed to institutional faith (Factor C, fg 69.8): confidence in the court, satisfaction with the court’s overall functioning, and belief that it contributes to the preservation of the Israeli democracy. Such support was very widespread: only 4.1 percent had no confidence in the court; only 11.4 percent were dissatisfied with the overall institutional functioning of the court; and only 5 percent rejected the belief that it helps to preserve the Israeli democracy. Factors D (fg 64.3), E (fg 63.8), and F (fg 63.3) articulated diffuse support as well. Yet, while Factor C manifested diffuse support for the institution or its overall judicial functioning, Factors D, E, and F expressed diffuse support for the exertion of judicial review in defined public spheres.

Factor D exhibited diffuse support for adjudication of religious affairs. The public tended to encourage secular judicial intervention in national religious issues in order to separate religion from state (53.4%). The public also favored more judicial supervision by the HCJ over religious institutions (65.2%). The fifth dimension (Factor E) showed public support for judicial supervision over the executive and its agencies (primarily government [67.4%] and police [59.8%]); while only a minority supported judicial supervision over the military (36.5%). The sixth dimension (Factor F) reflected public support for judicial review which empowers civil rights, primarily freedom of expression and demonstration (56.5%), and freedom of religion (58.7%). The common characteristic to Factors D, E, F was diffuse support for broad judicial review over public institutions, except for the army.

The third and the least important source of judicial legitimacy was support for specific Court rulings regarding the Palestinians in the occupied territories and Israeli-Arab-Palestinians (Factor G, fg 53.8). Positive responses to several salient rulings were the source of specific legitimacy. Factor G included three types of public reactions: positive,

negative, and mixed. Positive reactions indicated approval of granting the Palestinians procedural rights; negative and mixed reactions indicated opposition to granting the Palestinians far reaching procedural or substantive rights.

Positive responses were given regarding the following decisions: the Palestinian procedural right of standing (54.4%); the Palestinian right to be heard prior to the demolition of his/her house by the authorities, so long as there is no contrary "immediate military need" (50%); exclusion of the Jewish, ultra-nationalist party of Rabbi Kahane from the Knesset elections (1988) (50.4%); supplying Palestinians in villages around Jerusalem with gas masks, on the eve of the Gulf War (60.1%). Negative responses were expressed to the following rulings: empowering Palestinians with individual rights (38% opposed, 34.9% agreed); inclusion of the leftist Arab-Palestinian-Jewish "Progressive List" in the 1988 Knesset elections (41.4% opposed, 36.2% agreed); HCJ authority to prevent the expulsion of Palestinians from the territories (46.3% opposed; 34.8% agreed). Mixed reactions were formed regarding the empowerment of Israeli-Palestinian-Arabs with civil rights (only 39.6% approved; 30.4% opposed; 29.9% reserved); prohibiting security forces from acting in ways that do not respect human rights (only 46.4% agreed; 27.6% opposed; 25.9% reserved).

The 1991 data set has explored prevailing public mood among the Jewish population in the end of the 1980s and the beginning of the 1990s. This public was inclined to adopt a more secular and liberal discourse that respected litigation as a source of raising issues to the agenda, mobilizing resources, and resolving disputes. Hence, the large support for tightening the judicial supervision over the religious institutions. This spirit of Americanization, i.e., a respect for a discourse of individual rights, is reflected in this 1991 poll, but it was confined to the Jewish public. The Jewish public was reluctant to include the Arab-Palestinian minority in its liberal discourse of individual rights. The Court was perceived as a Jewish institution that was suppose to grant rights to Jewish litigants. The Court was also perceived as different from other political institutions as the government, the political parties, and the Knesset. While the Court received high levels of popular confidence, the latter institutions were perceived as unreliable. This mirrored the polarization and fragmentation that generated a decline in the faith given to democratic institutions and to democratic practices of election and representation. The HCJ was perceived, on the other hand, as different. Due to the myths referred to it, the Court was considered to be detached from the inefficient and corrupted politics.

HISTORICAL SOURCES OF MYTHICAL AND DIFFUSE SUPPORTS

Jewish sacred law (*halachah*), German democratic law, English common law, and American constitutional law have all affected the Israeli legal

system. *Halachah* emphasizes the importance of litigation as a method of conflict resolution. German law underscores the supremacy of state values (*Rechtsstaat*) and obedience to its agencies while preserving democratic procedures. English common law engenders legal formalism as a means to facilitate legal discourse, and American law stresses the supremacy of individual rights. English common law and German law underscore the “rational” and “objective” nature of law and judges. They were very influential among judges of the HCJ until the 1970s. This was due to the legal education of the justices. Until 1970, 13 out of 16 justices who served in the HCJ (1948–1969) studied law in Germany (six) or England (seven). After 1970 (1970–1992), however, 11 out of 20 appointed justices learned law in Israel, while only two judges studied in Germany and one in England.⁴⁰ Judges educated in Israel were more exposed to the American rhetoric of individual rights than judges who were educated in Europe. After the 1970s, the American liberal rhetoric has also characterized the legal discourse among the legal community. This was reflected in legal texts, legal arguments, court rulings, and courses in law schools.

Jewish law and English common law have had a special impact on the formation of legal principles that ascribe preferences to judge-made laws, based on a process of interpretations and *stare decisis*. *Halachah* and common law presumed that judges symbolize pure wisdom, pure morality, and objectivity. Despite the frequency of illegal instances in Israeli politics, the legitimacy of the HCJ has not often been questioned.⁴¹ Historical changes in judicial doctrines have had their effects as well.

Before the 1970s, the HCJ was not perceived among other elite as a source of political intimidation. The Court excluded itself from adjudicating issues governed by counter elite: religious issues were primarily submitted to religious tribunals, military issues were often discussed in military courts, parliamentary procedures were formed and altered almost exclusively by the parliament, and partisan procedures were formed and altered by the political parties. The Court was therefore seen as remote and irrelevant to politics. This distance partly resulted from disagreement within the Court on the scope of adjudication. In formal terms, the contention was about the judicial definition of the “right of standing”⁴² and the theory and practice of justiciability. In essence, the dispute was over the desired involvement of the Court in the political setting. The predominant position of the Court advocated restraint, and fear of anti-judiciary legislation was a strong motive for this restraint.

The change to more active judicial review since the 1970s was built on public images of the Supreme Court, forged during governmental crises. Frequent instances of government corruption have generated public expectations of “order” and “responsibility.” The absence of a written constitution has aggravated public demands for increased judicial

involvement. The HCJ has been considered a reliable institution (for many, the only reliable civil institution) for creating and preserving a governable political order. The polarization and severe factionalism within the parliament and the inefficiency of the government have transformed the Supreme Court into a consensual political institution.

The process by which justices are selected and nominated contributes to their reputations as non-political and professional actors. In Israel, justices are nominated by a “professional” and “independent committee.” In France, Germany, or the United States, judges in the supreme/constitutional bodies are rarely politically anonymous,⁴³ while in Israel they have only rarely been politically known. In spite of the prevailing myth, however, two facts have been very clear about justices of the HCJ. First, they often side with government policies, and, second, incumbent justices have only seldom and very reluctantly supported nominations of potential dissenting justices.

ADJUDICATION WITHIN LIMITS

The legitimacy that advanced the HCJ to hegemonic position came with limits. Traditionally, the Court was careful not to intervene in the legislative body in a way that might raise anti-judiciary legislation. For example, in 1995 a draft of a coalition agreement between the ultra-orthodox party of Shas and Labor was signed, whereby the parties consented to alter in legislation any ruling of the Court against the “religious–secular status quo.” An appeal was submitted to HCJ against the validity of that agreement. In a split voting of the bench, the appeal was dismissed.⁴⁴

This tradition of respecting the legislative body was relevant even under the leadership of Chief-Justice Aharon Barak, who accelerated the expansion of the Court’s judicial review. In 1993 Barak asserted that the HCJ should be able to strike down Knesset laws.⁴⁵ He was not the only justice to declare it, but under the influence of the liberal discourse, and facing the polarized fragmentation of the Israeli body politics, his declarations formed a new image of the Supreme Court. Barak’s stance became the formal judicial policy of the Supreme Court, which ruled in an *obiter dicta* in 1995 that it held constitutional power to supervise the content of Knesset legislation and nullify a law that cannot be reconciled with the values of Israel as a “democratic and Jewish state.”⁴⁶

But the HCJ was careful not to enforce its power, and as of 1997 no Knesset law had been abolished by the Court. On September 24, 1997 the HCJ canceled a clause in a law dealing with vocation of brokers in the stock market. While the general appeal to abolish all legislation in this matter was dismissed, the Court claimed that a specific clause imposed too many restrictions on brokers, contradicting the Basic Law: Freedom of Occupation.⁴⁷ The Court may invalidate Knesset laws in the future, but will likely do so only after considering the possible reactions

of the elites, public institutions, the government, and the Knesset. In the case of the stock brokers, the HCJ did not involve itself in a sphere that could generate a sociopolitical change and incite significant opposition to the Court.

In addition to institutional caution, the Court has operated under the constraints of two national narratives: Jewishness and national security. In adjudicating controversial issues, the Court has sought to preserve its public image as a majoritarian, Jewish, and security-minded institution. Hence, while the political setting was highly fragmented and polarized, the Court has not challenged any major tenet of the Israeli political regime, it has not altered any fundamentals of the Jewish character of the state, and it has not questioned the military regime in the territories or the dominance of security considerations in Israel's public life. While the HCJ has issued few liberal rulings in the field of freedom of expression *vis-à-vis* national security, it has generally acted more as an agent of political maintenance than as an agent of sociopolitical change.

The pervasiveness of judicial myths has been dominant within the Israeli society, though not at the same intensity. The empirical findings analyzed above point that the Jewish secular public has inclined to grant a high degree of support to the Supreme Court. The findings are from 1991, and since then the drift has probably been stronger. From 1993 until the elections of 1996, the period of the Labor-led peace process, the HCJ experienced its most distinct liberal period. In a series of rulings, the Court ruled in favor of gender equality and homosexual rights, restricted the power of the Chief Rabbi and the orthodox religious establishment, and enhanced its judicial supervision over the military.⁴⁸ All those rulings have been favored by the secular Jewish public. The few public opinion polls conducted since 1991 suggest that indeed the Court's popularity has not diminished. For secular Israeli Jews, the Court has been a source of stability.

Israeli-Arab-Palestinians also grant high level of diffuse and mythical support to the Supreme Court. Minority lawyers and political activists see the HCJ as their last resort of hope for a sociopolitical change in Israel, this despite the fact that most of their appeals were dismissed by the HCJ, primarily those dealing with land confiscation. Arab-Palestinian activists generally identify the Court as a Jewish institution, but see its 'professional' facet as rendering more 'objective' judgments than any other public (and Jewish) institution.⁴⁹ The fact that courts are controlled by one ethnic group and yet are legitimized by other groups and classes is a striking global phenomenon.

The HCJ is less acceptable among the orthodox religious public in Israel, especially the ultra-orthodox public, than among the secular public. The orthodox public has inclined to perceive its prime loyalty to the *halachah*, while the virtues of state's law were contingent upon its reconciliation with and inclusion of halachic principles. Judicial rulings that incrementally restrained the social control of orthodox religious

institutions decreased the popularity of the HCJ among the Zionist-religious public. Yet, the diffuse and mythical legitimacy have not been completely eroded. Most of the Zionist-religious public has conceived the HCJ as a reliable Jewish institution, and tended to comply with its rulings.⁵⁰

Such perceptions and behavior depend on the Court's rulings. As a reaction to the Court's more liberal rulings in the 1980s and especially in the 1990s, an anti-judiciary coalition accused it of taking an anti-religious stance. Political attempts to stop the Court's judicial activism included suggestions of religious MKs to restrict the HCJ's authority to decide in state-religious issues and a suggestion to limit the position of Aharon Barak as a Chief Justice. These initiatives were raised following the ruling of the Court in favor of equality in benefits to homosexuals and heterosexuals in the working place.⁵¹

Opposition to the HCJ intensified after the Netanyahu-led Likud rise to power in the 1996 elections, due to its reliance on the support of the religious parties. Reluctant to further sacrifice legitimacy among the religious public and face anti-judiciary measures, the Court also hoped not to lose legitimacy among its main audience – the middle class, secular, and Jewish public. Hence, the HCJ has been more careful in its tendency to impose judicial norms. The Court would intervene, however, if the issue raised clearly necessitated judicial intervention based on the Court's previous rulings, if no severe opposition to the Court was expected, or if the judicial intervention was in accordance to a majoritarian public mood.⁵²

CONCLUSIONS

The Israeli case of judicial change is not unique. The ability of courts to translate its sources of judicial legitimacy into a better bargaining position through political fragmentation and polarization has occurred in other countries, including Germany, Italy, and the United States. In addition to the widely noted US case, the fragmented parliament in Italy in the 1980s and 1990s, and the fragmented political structure in Federal Germany, at the level of the Lander (states), have generated a more active judicial review in the political sphere.⁵³

The change in the HCJ's public position has been evident, from a more restrained judicial approach prior to the 1970s, to a more active one since, and from a more passive stance of legitimizing the state to a position of articulating and imposing norms. Such a change was possible due to the HCJ's multidimensional legitimacy, chiefly its mythical legitimacy, in a fragmented and polarized fabric. The Americanization of the Israeli setting, the increasing effect of a liberal discourse of individual rights and litigation, has fueled an immense increase in appeals and litigation at the HCJ regarding political issues, and the Court has contributed to this by signaling about its aspiration to become a

hegemonic institution. This judicial expansion has led to challenges regarding the Court's legitimacy. In a divided society like Israel, this might result in more serious challenges to the Court and in turn in more initiatives to halt its drive to gather more political power.

The case of the Israeli Supreme Court is comparable, and yet it has, like any other case study, its own uniqueness. The cultural sources of the myths should be traced in the history of the Israeli legal and political culture. The same can be said about the timing of the change from one to another judicial strategy. In this article I have dealt primarily with broader variables of judicial legitimacy which have comparable and theoretical value. This study illuminates the need to further explore changes in public environment of supreme courts, and to evaluate three facets of judicial legitimacy (specific, diffuse, and primarily mythical) which accompany changes in the public position of supreme courts.

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