The Personalization of Judicial Review:

The Cohesiveness of Judicial Nominations and Constitutional Courts[1]

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Gad Barzilai
Full Professor
Faculty of Law
Vice Provost
University of Haifa
Professor Emeritus
University of Washington
gbarzilai@univ.haifa.ac.il

Maoz Rosenthal
Assistant Professor
Lauder School of Government, Diplomacy and Strategy
The Interdisciplinary Center (IDC)
Herzliya, Israel
mrosenthal@idc.ac.il

Assaf Meydani
Full Professor
Dean, School of Government and Society
The Academic College of Tel-Aviv Yafo
assafmei@mta.ac.il

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Abstract

Recent literature on constitutional courts places increasing emphasis on the importance of the characteristics of individual judges for these courts' judicial review. We refer to this phenomenon as the personalization of judicial review. We assume that cohesiveness in the court's level of judicial activism or judicial restraint shows that the court is a unitary actor. However, if the court is less cohesive, the individual judges' discretion affects judicial review and consequent judicial activism. We look into it through analysis of both law and politics. We validate our theory that pays attention to both legal and social political variables using the case of Israel's High Court of Justice rulings between 1995 and 2016. During this period, the Court varied in its cohesiveness largely due to changes in the rules that the selection committee used to choose judges. As a result, the Court's cohesiveness declined and the influence of the characteristics of individual judges on the Court's judicial review increased. Hence, our article that refers to more than 9400 legal decisions points to possible realist and critical aspects of supreme courts in modern politics taking into account policy issues, as well, as the religious-secular rift, national security and military occupation.

Keywords: Constitutional Courts, Judicial Selectorates, Judicial Review, Personalization, Israel's High Court of Justice

Introduction

Is judicial review in constitutional courts the outcome of an intra-court process that yields a coherent judicial review based on the court as a unitary player, or is judicial review an outcome of the individual characteristics of the judges? When scholars examine this topic in the context of the US and other presidential political regimes, they tend to emphasize the judges' individual characteristics as the major factor affecting judicial review (Epstein & Knight, 2000). Given that about 45% of the world is ruled by parliamentary democracies (Cheibub, 2007, p. 43), and the scope of the judicial constitutional review of laws and administrative decisions has been expanding and includes constitutional courts in parliamentary democracies (Ginsburg, 2008), an understanding of judicial review in parliamentary democracies is of utmost importance for the understanding of democratic governability.

For the most part, scholars tend to analyze judges in constitutional courts in parliamentary democracies as part of a cohesive unit interacting with the government coalition and parliament over judicial review (Bricker, 2017; Brouard & Honninge, 2017; Hönnige, 2011; Vanberg, 2001). However, various analyses suggest that judicial review in constitutional courts depends on the individual characteristics of the judges that affect their attitudes (Barzilai, 2002; Bricker, 2017; Hanretty, 2012; Skiple, Grendstad, Shaffer, & Waltenburg, 2016). Empirically, the increased effect of an individual judge on judicial review would mean a court in which its judges differ on judicial review, yielding various trends in its review of government decisions. In such a court it is difficult to claim that the court is activist or passive in its judicial review. Such courts would be non-cohesive, and their outcomes would depend on the characteristics of the judges. Thus, an increase in a court's non-cohesiveness undermines the ability to regard it as a unitary institutional actor. Such a situation in a constitutional court is quite problematic and compels scholars and

practitioners to look into the court's "black box" and analyze its judges' individual preferences and behavior. The institution that should affect the level of cohesiveness of a constitutional court's is the committee that selects the judges for the court: the judicial *selectorate* (Atkins, 1988; Epstein, Knight, & Shvetsova, 2001). A selectorate that is more cohesive with regard to its members' preferences and choices should result in more cohesive courts.

The increasing importance of individual judges' preferences when evaluating the courts' behavior is similar to the phenomenon described by scholars studying executives in parliamentary democracies: the personalization of the policymaking process (Adam & Maier, 2010; Dowding, 2013; Poguntke & Webb, 2007). This concept refers to a situation in which the policymaking process, i.e, the judicial making process, becomes more dependent on individuals in positions of power, i.e, judges/justices, rather than collectives such as courts, political parties, governments and parliaments. We apply the concept of personalization to constitutional judicial review. In that context, personalization relates to an individual judge who is setting a policy agenda and pursuing it in accordance with his/her preferences. The institutional outcome of the personalization of judicial review is a court that is not a unitary actor but an aggregation of its judges' characteristics: their gender, professional background, social upbringing, legal theory schools of thought, and policy preferences. Our research question in this article (that is part of a larger project) is what are the effects of the nominations of judges on the personalization of the constitutional courts' judicial review?

We answer this question using the case of Israel's Supreme Court in its capacity as Israel's High Court of Justice (IHCJ), which in fact serves as a constitutional court, especially since 1995 (Hofnung, 1996; Shamir, 1990). We constructed an original dataset of IHCJ judges by using 3,700 court decisions handed down between 1995 and 2016. Since Israel's judicial branch publishes

individual judges' decisions and opinions for each court ruling, we were able to obtain the decision that each judge made regarding each legal case. Utilizing judicial review records yielded a dataset that included 9,490 individual judges' decisions based on the original 3,700 IHCJ collective decisions. Thus, to the best of our knowledge, this is one of the most extensive non-US non-presidential systems datasets of judicial review. Below, we present our theoretical claims, test them empirically and offer some conclusions about how the data validate our theory.

Judges in Constitutional Courts in Parliamentary Systems: Judicial Selectorates' Cohesiveness and the Personalization of Judicial Review

Constitutional courts functioning within parliamentary democracies review, inter alia, government policies and their implementation. They can conduct judicial review of specific decisions or policy issues that are the subject of public debate. In addition, they can also conduct judicial reviews of a wide range of government actors (Epstein, Knight, & Shvetsova, 2001), and may be endowed with the authority to repeal primary parliamentary legislation, declaring laws null and void due to their content (e.g., if they are discriminatory) (Vanberg, 2015). Currently, judicial review is a part of the policymaking environment in many democracies (Herron & Randazzo, 2003).

Scholars refer to activist judicial review as reflecting the trend of the "judicialization of politics" whereby elected governments face courts that veto government decisions (and parliamentary laws) by declaring them unconstitutional (Hirschl, 2008; Hönnige, 2011; Shapiro & Stone, 1994). In this context, the constitutional courts' judicial review is usually analyzed assuming a cohesive court that operates as a coherent collective or a unitary institutional actor rather than as a group of individual judges (e.g., Krehbiel, 2016; Meydani & Mizrahi, 2010;

Vanberg, 2005). If the court is a unitary actor, then replacing a judge on a court panel reviewing a petition against the government should not matter: the court should cohesively rule for or against it no matter who reviews the petition. However, if court rulings are based on an aggregation of individual judges' preferences, then replacing a judge reviewing a petition against the government could result in a different decision (Epstein & Knight, 2000).

Consequently, if the judicialization of politics thesis is correct, we should see courts that are cohesive in their mindsets, autonomous in their activities and seeking to subjugate political systems to the judicial rule of law. However, accumulating evidence points that constitutional courts in common law systems increasingly exhibit the effect of individual judges' preferences on their judicial review (Bricker, 2017; Brouard and Honninge, 2017; Hanretty, 2012; Skiple et al., 2016). There could be a variety of reasons for this increase in the importance of judges' preferences for judicial review. We focus here on the reasons associated with the institutional environment and the political preferences characterizing the court's policy environment, which increase the likelihood of the personalization of judicial review.

One such institutional mechanism is the judges' selection method or judicial selectorates (Atkins, 1988; Epstein, Knight, & Shvetsova, 2001). This mechanism creates incentives that could affect the judges' inclination to act independently (Epstein, Knight, & Shvetsova, 2001). Judicial selectorates, namely, institutions that select judges, vary between countries and legal traditions. In countries that follow the traditional British model, judges are selected by the executive, with different government branches having varying influence on this choice. In some cases, it will be the Attorney General recommending judges to the country's most senior judicial position (Australia and New Zealand). Some modifications in that model allow for the cabinet to approve the selection of judges (Canada) or involve the country's Supreme Court judges in this choice

(India and Israel). In several South American countries the judges' selection takes place as an interaction between the President and Senate (Volcansek, 2011). In Germany and Italy, the parties in parliament determine which judge will be selected for the constitutional court, but in Italy judges on the lower courts also have a vote on the judges' selection (Volcansek, 2011). Countries in South-East Asia and South America also use this blend of approvals from political parties and the judiciary (Volcansek, 2011).

The selectorate model for judicial appointments that Israel uses and somewhat similarly exists in Scotland, England and Wales, Eastern European, South American and few African countries is supposed to reduce the effect of politics on judicial review. In Israel this model includes a blend of three Supreme Court Judges, including the Chief Justice (or Supreme Court President), the Minister of Justice, opposition and coalition representatives as well as representatives of the Israeli Bar association (for more details see: Shetreet, 2003). This model, which enjoys international appreciation, seemingly ensures the judges' independence and professional accountability (Volcansek, 2011).

What would be the effect of such judicial selectorates on the emergence of the personalization of judicial review? Let us examine this issue through the lens of the selectorate's cohesiveness and its effect on the court's cohesiveness. In his seminal 1957 paper, Robert Dahl claimed that the US Supreme Court makes decisions that reasonably coincide with those of the executive. The reason for that congruence at the time was the fact that the US President chose judges whose preferences coincided with the President's preferences, and the Senate confirmed judges whose political preferences were similar to those of the political mainstream (Dahl, 1957; Epstein, Knight, & Martin, 2001). With such congruence between political selectors and selected

judges, the court should be cohesive about policy choices within itself and with the selectorate's preferences (Dahl, 1957; yet see: Epstein, Knight, & Martin, 2001).

Extrapolating on Dahl's analysis, with a lack of cohesiveness within the nominating judicial selectorates, players with differing political preferences would nominate judges with varying preferences regarding judicial review. Consequently, the court would include a variety of policy preferences and potentially would be non-cohesive with regard to rulings on issues of public policy. Therefore, the court would not function as a unanimous, single-minded, unitary player but as a set of individuals with varying policy preferences. The result would be a personalized model of judicial review where each judge's views on various issues of public policy matter and affect the court's decision-making. Consequently, non-cohesive political systems with politicized judicial selectorates would create non-cohesive constitutional courts and the personalization of judicial review.

How would non-cohesive, personalized courts emerge in a small selectorate like the increasingly popular Israeli model? The literature on committee decision-making shows that a clear committee decision (in this case: support for a judge's candidacy) happens when committee members sincerely support one option (a candidate for a judge's position) as opposed to all other options (other candidates for a judge's position) (Plott, 1967). Another way to obtain a decision from a committee is based on the committee chairperson's setting an agenda that includes the possible candidates in a manner such that his/her favored candidate would defeat any other candidate (Riker, 1986). Hence, by manipulating the committee selection process, an agenda setter can lead the committee to choose the chairperson's favored option (McKelvey, 1979; Riker,

1986).[2] One can assume that committee members who spot such activities might vote strategically in a manner that would allow their choices rather than the chairperson's to win (Shepsle, 2006).[3]

Thus, with a lack of cohesiveness within the selecting committee regarding the favorite candidates for judicial positions, a strategic agenda setter can manipulate the various members into selecting a judge s/he supports. With a lack of cohesiveness judges with a variety of convictions, professional backgrounds and beliefs will be selected for the court. Thus, the court will become less cohesive, giving rise to the personalization of judicial review in constitutional courts.

The Case Study: Israel's High Court of Justice 1995-2016

Israel's Supreme Court serves as the highest and final appeal instance. In petitions against the government's decisions and activities on constitutional matters, the Supreme Court serves as the first instance (Dotan, 2000)[4] in its judicial role as Israel's High Court of Justice (IHCJ) (Eisenberg, Fisher, & Rosen-Zvi, 2010). We should note that Israel does not have a formal written constitution. Its constitutional structure is based on an incremental process of constructing Basic laws, which define Israel's institutional structures and some human rights to which it commits (Hofnung, 1996;

[2] As an example of an agenda setting manipulation, assume a situation in which there are four candidates for judicial positions on the constitutional court, two of whom are YE and RS. Assume also that there are three committee members: A, N and C. A can set the agenda, opposes RS and is indifferent about YE. C favors YE over RS and N favors RS over YE. In such a divided committee, A is the agenda setter and also enjoys a decisive vote. S/he wants to get rid of RS and can therefore set the agenda as a choice not between all four candidates but between YE and RS. A decides to strategically support YE alongside C, thereby taking RS off the agenda who enjoys only N's support.

[3] In the example of YE against RS, N sees s/he is about to lose. S/he can offer A another candidate, OG, who resembles RS in judicial preferences and enjoys A's support. A sets the agenda so that the choice is YE against OG where N and A support OG against YE. Consequently, OG wins due to N's counter-manipulation.

[4] It should be noted that in one of the lower level courts (district courts), there is also a group of judges who, since 2000, have presided over administrative matters regarding the interactions between citizens and the state (Beit Mishpat LeInyanim Minhaliyim) (Goren, 2008). Such matters are specific and localized, and therefore do not need to be set on the IHCJ's agenda unless they have broad implications for many other cases and constitutional issues (Goren, 2008).

Lerner, 2011). Since Israel does not have a formal written constitution, no constitutional court was formally established (Doron & Meydani, 2007).

After the passage of two Basic Laws (originally) in 1992 that institutionalized Israel's formal constitutional commitment to some human rights and liberties,[5] Israel's Supreme Court decided to take a broad legal interpretation of these laws, thereby expanding the Court's jurisdiction with regard to constitutional review. This jurisdiction includes the authority to void legislation and annul policies (Barak, 2006).[6] The Court had handled judicial reviews of government decisions even several decades before that ruling in 1995.[7] However, the decision to use the Basic Laws as the constitutional basis for voiding legislation has endowed the Supreme Court with powers similar to those held by constitutional courts (Barzilai, 1998; Friedmann & Watzman, 2016; Hofnung, 1998; Navot & Peled, 2009; Shetreet, 2002). Israel's Supreme Court has been under political pressure due to its broad interpretation of its judicial review powers (Barzilai, 1998; Doron &

[5] The basic laws are "Basic Law: Human Dignity and Freedom" (Knesset, 1992) [amended 1994] and "Basic Law: Freedom of Occupation"(Knesset, 1994). These laws were enacted originally in 1992 amended in 1994, 1996 and then 1998. The legal controversy associated with the laws prompted a variety of studies and analyses of the Court's constitutional powers (Barak, 1997; Dorner, 1999; Gavison, 1999; Hofnung, 1996; Kretzmer, 1992). In broad-brush terms, the legal controversy relates to these laws' scope regarding the Court's jurisdiction over Knesset legislation and the values to which the Court should adhere when assessing legislation and government decisions (Mautner, 2008). We explore this issue below.

[6] This broad interpretation of the authority that the 1992 Basic Laws gives to the Supreme Court as a whole and the IHCJ in particular (United Bank Hamizrahi LTD v. Migdal, Cooperative Village, 1995) is controversial among legal scholars (Dotan, 2000, 2002; Elon, 1992; Gavison, 2000; Kremnitzer, 2000; Segal, 2011). This interpretation was set and upheld by Chief Justice Barak's unique legal theory (Salzberger, 2010). This theory views the law as associated with any aspect of social activity, making these activities justiciable. Furthermore, according to this approach judges enjoy discretion in which they can use values and norms to interpret government decision-making including legislation (Barak, 1987; Maj. (res.) Yehuda Resler (adv.) v Minister of Defense, 1988). In legal theory terms, this perception had two main effects on the scope of judicial activism: it gave a wide range of social actors standing before the Court and accepted their plea for the court's assistance as justiciable. Consequently, this stance opens the door for the Court to decide on a wide range of policy issues (Salzberger, 2010).

[7] There has been a long, piecemeal process in which the Court gradually increased its involvement in political decisions even before the 1992 Basic Laws and the 1995 Supreme Court decision (Landoy, 2001; Salzberger, 2010). The Supreme Court first stated that it could intervene in government decisions given the principles set by Israel's declaration of independence (Bergman v Minister of Finance, 1969, Kol Haam v The Ministry of Interior, 1953, Rubinstein MK v Speaker of the Knesset, 1983). Afterwards, the Court declared it would annul Knesset legislation if that legislation were discriminatory and violated basic human and civil rights (Cohen v The Minister of Labor and Welfare, 1987, Laor Movement v The Speaker of the Knesset, 1990; Salzberger, 2010).

Meydani, 2007; Dotan, 2013; Shetreet, 2002). This pressure has resulted in a series of institutional attempts to affect the procedures of judicial nominations and various political initiatives aimed at reducing the powers of the judiciary (Navot & Peled, 2009). Let us examine the particular changes that took place in Israel's judicial selectorate, the judicial selection committee.

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. Basic Law Judiciary states that judges are selected by a judicial selection committee that includes nine members (it must not include less than seven members). The law requires that this committee consist of the Supreme Court's Chief Justice, two other Supreme Court judges (selected by Supreme Court judges), the Minister of Justice (who is the committee's chairperson) and another minister whom the government nominates. Two Members of Knesset (elected by the Knesset) are also committee members along with two lawyers from Israel's Bar association (elected by Bar members).[8] After being selected by the judicial committee, judges take their oath of office before Israel's President who is a symbolic head of state.[9] Judges have tenure until they reach retirement age, 70, resign or take an office outside the Court. Judges can also lose their position due to a decision made by the judicial selection committee or by a disciplinary board.[10] Judges cannot be demoted without the Chief Justice's consent. A special Knesset committee determines the judges' salaries and cannot reduce their salaries. Only the (state's) Attorney General can approve inquiries about criminal allegations against judges.[11] These laws create a comparatively independent judiciary. Once in office, politicians have very limited ability to threaten judges with firing, demotion or even making

[8] (Knesset, 1984a), articles 4b and 4c.
[9] (Knesset, 1964).
[10] (Knesset, 1984a), article 7.
[11] (Knesset, 1984a), articles 8-12.

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threats regarding any post-bench career considerations they have in mind (Epstein, Knight, & Shvetsova, 2001).

The Law of Courts from 1984 determines the rules governing the judicial selection committee.[12] An amendment to the law enacted in 2004 states that committee members do not represent the institution that placed them on the committee but must select judges by their preferences.[13] This amendment changed the situation in which the committee selected judges by a simple majority rule. In such cases, factions on the committee (judges, politicians and lawyers) selected candidates while taking instructions from their nominating institutions (the Supreme Court, the Knesset and Israel's Bar). This amendment meant that there could be defections from the factions. Therefore, for example, the Bar representatives on the committee could have decided to make a coalition with the judges or politicians to support a candidate even against the will of the Bar. Another amendment added in 2008 stated that in order to select a Supreme Court judge there has to be a majority of seven of the nine committee members.[14] When a simple majority was the selection rule, it gave the judges an advantage if they had even two supporters from the other committee factions (politicians or lawyers), or if these factions were split (Shetreet, 2003). In practical terms, this amendment means that a coalition supporting a judge's nomination has to include some of the committee's political members (Friedman, 2016, ch. 33).

Regarding committee members' preferences, during the 1990s and until his retirement in 2006, the committee was dominated by the Supreme Court and its Chief Justice Aharon Barak. Barak had the full support of the Bar and most of the Justice ministries (Friedman & Watzman,

[12] This law unified several laws that defined Israel's court structure and was repeatedly amended throughout the years (Knesset, 1984b).
[13] (Knesset, 1984b) article 6.
[14] (Knesset, 1984b) article 7 c 2.

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2016, ch. 23). Barak's successor as Chief Justice, Dorit Beinish, found herself bargaining with several Justice Ministers who tried to increase the political influence over the committee and the Court, reduce its institutional powers and change the socio-cultural habitus characterizing the Supreme Court (Friedman, 2016, ch. 33). Beinish's successors, Asher Grunis and Miriam Naor, enjoyed even less cooperation with the Justice Ministers. In particular, Naor and Justice Minister Ayelet Shaked became involved in conflicts over the choice of new Supreme Court judges. In these disputes, the political branch was able to push forward its candidates even against the will of the Court (Friedman, 2016, ch. 36). Going back to our theoretical claims, we maintain that a variance in the selectorate's rules can affect Supreme Court nominations through the committee, potentially resulting in increasingly personalized judicial review.

Data, Variables and Measurement

Dataset

We collected the legal data from several sources, mainly from the Israeli legal database Nevo[15] that regularly publishes IHCJ rulings and decisions. Our original dataset includes all court rulings and decisions made by the IHCJ during the period from the landmark case of *United Bank Hamizrahi LTD v. Migdal, Cooperative Village, 1995* until December 2016. In this case, the Supreme Court declared that it could annul legislation based on the constitutional rights set by the Basic Laws we discussed above. Beginning with this case, we examined all of the decisions the Court handed down on petitions to the IHCJ regarding government ministers' activities and decisions, until December 2016. This period of about 20 years provided us with a pool of 3,700

[15] Nevo is widely used by scholars of Israeli legal affairs. Typing "Nevo legal database" in Ggoogle Sscholar yields dozens of papers and books using the dataset or referring to it.

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court rulings. We divided these court rulings into 9,490 judicial decisions made by individual judges who belonged to the Court panels that made the 3,700 court rulings. Thus, our unit of analysis is a judge sitting on an IHCJ panel reviewing petitions against the government.

The dataset includes the date of the petition, the date of the ruling, the main issues raised in the petition, the petitioning parties, the petition respondents, the court ruling, and the legal opinion made by each judge sitting on a case. This dataset includes about forty judges dealing with a variety of constitutional and administrative matters by a court interacting with about eight different parliaments and ten different governments in times of varied intensity regarding Israel's internal and external conflicts. Consequently, this dataset fulfills the main requirement from a case study used for theory testing: the ability to maximize variance in the studied variables (Gerring, 2004).

Dependent Variable. The dependent variable is the judges' activism in judicial review: their tendency to reject, partially accept or fully accept petitions against the government (Cross & Lindquist, 2006). We use the term "judicial activism" as a synonym for judges' rulings in favor of a petitioner against the government's decisions and activities. Thus, for us, judicial activism is indicative of a legal doctrine regarding the place of a constitutional court vis-à-vis the executive and parliament (Hirschl, 2009). In our theory's context, the main question regarding this variable is whether judicial activism or passivism is a Court characteristic or an individual judge's characteristic. We use the following independent variables to probe this issue.

Independent Variables. To study our hypotheses we need to examine variables that relate directly to our theory and variables that can control for alternative hypotheses explaining patterns of judicial review. These variables relate to the manner in which the court is affected by the judicial selection committee, the instability of coalitions and governments, and the judges' characteristics.

We also control for the policy field being reviewed, assuming that structurally it should prompt more activism in the Court regardless of the judges' characteristics and their political environment.

Chief Justice. Following our review of judicial selection committees and since the manner in which this committee functions and affects the Court's cohesiveness varies between Chief Justices, we use the identity of the Chief Justice as a proxy for the cohesiveness of the Court based on the selection committee. We do not go into the topic of a Chief Justice's epistemic authority over her/his colleagues on the court and political leaders. As we showed above, each Chief Justice's term in office coincided with institutional reforms in the selection process and interactions with other committee members. As we assume that each such interaction had a different effect on the way the committee selected the judges, we use the Chief Justices' terms as a proxy for the varying effects of politics on the committee and the Court. Given Barak's dominance in the committee, the level of cohesiveness in the IHCJ should be the highest. We would expect cohesiveness to decline from Beinish to Grunis and more so under Naor due to increased friction with other government branches and the changes in the judicial selectorate's rules (Friedman, 2016). Hence, judicial activism under Barak would be the outcome of a collective action led by an activist Chief Justice who dominated the judges' faction in the judicial selection committee and with the cooperation of the political faction. Beinish's term represents a turning point with regard to conflicts in the committee, resulting in the Grunis and Naor terms as Chief Justices in which we should see a more non-cohesive and diverse IHCJ.

Judges' Characteristics. To estimate the effect of the judges' background on their court rulings, we collected data from their biographies using the Israeli judicial authority's website and media reviews of their biographies. We included the judges' gender, religiosity (for Jewish judges) and ethnicity/nationality (Arab or Jewish). Research has demonstrated the relevance of these traits

with regard to judicial review in Israel (Eisenberg, Fisher, & Rosen-Zvi, 2012; Gazal-Ayal & Sulitzeanu-Kenan, 2010; Grossman, Gazal-Ayal, Pimentel, & Weinstein, 2016; Weinshall-Margel, 2011). Consequently, with an increase in the personalization of judicial reviews, we should see these traits having a stronger effect on judicial activism.

We tested other characteristics of the judges including their prior background as judges in courts of lower standing, prior background in the state's legal counselor's office (Praklitut), and whether the judge served in the military as a lawyer. We added this prior experience because empirical research demonstrates the effect of judges' professional backgrounds on their judicial review (Bricker, 2017; Skiple et al., 2016). The theoretical reason for considering their professional background is that such a background could affect their legal doctrines regarding judicial review. A conservative approach to judicial review is based on the premise that in a society in which a judge believes that rights are being maintained and that its democratic institutions are functioning, s/he would refrain from an activist judicial review (Waldron, 2006). Hence, previous experience with the practice of rights and democracy in Israel as a judge, a military lawyer or a state lawyer should create a consistent belief regarding civil rights in Israeli public policy and result in a conservative attitude toward judicial review. Thus, considering the individual traits of both the judges' identity and professional background should give us a fair picture of their policy preferences.

Political Environment. An essential control variable that should affect judicial review is the political environment in which it is conducted. Specifically, we focus on the instability of the ruling coalitions because it should affect the Court's functioning and its ability (and need) to act decisively vis-à-vis the government (Meydani & Mizrahi, 2010; Segal, 2011). To analyze the

court's political environment, we used data from the Israeli parliament's (Knesset) website[16] that includes all of Israel's governments and Knesset terms during the period between 1995 and 2016. The measure we use here in order to assess systemic instability is the effective number of parties in parliament (ENPP).[17] This measure is based on the number of parties in parliament, and the proportion of their share of seats in parliament. As it declines, it implies that in parliament there is a large party whose share of seats is much larger than the share of seats other parties have. As the effective number of parties increases, it shows that there are many parties in parliament, each of which has a small to moderate share of seats in parliament. This allocation of seats in parliament means that there is no political party dominance and could imply that there is political fragmentation (Laakso & Taagepera, 1979). Political fragmentation due to many parties is associated with a high level of instability in the coalition that could lead to policy instability (Duverger, 1962; Huber, 1998; Riker, 1982). ENPP has already been verified as a major factor affecting coalition stability in Israel, which is strongly correlated with the ability of governments to complete their tenure and pursue consistent policies (Rosenthal, 2016). Hence, we use it here as a key to quantitatively estimate the IHCJ's political environment.

Policy Issues Reviewed by the Court. Another variable in the context of judicial review is the policy issue that is the subject of the petition because we assume that judges act as policymakers who react to public policy dilemmas unique to their policy fields (Barzilai, 2002; Sommer, 2010; Weinshall-Margel, 2011). To assess the effects of various policy issues on judicial policymaking, we coded the ministries to which the petitions were related using Rose's typology

[16] http://www.knesset.gov.il

[17] We also measured the effect of governments serving their CIEP and the gaps in Knesset seats between the leading parties in parliament, which both serve as efficient measures of coalition instability (Rosenthal, 2016). Both of these measures were correlated with ENPP. Therefore, ~~so~~ we decided to utilize ~~stick to~~ this measure and avoid multicollinearity and statistically biased estimations.

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of government ministries' bureaucratic functions (Rose, 1976; Rosenthal & Wolfson, 2013). Due to religion's unique position in Israeli public life (Dowty, 1999) and its influence on the court's decision-making (Barzilai, 1998), we added a separate category to Rose's typology for petitions submitted against state religious institutions and the Ministry of Religions.[18] Figure 1 depicts our empirical model.

Figure 1 about here

Due to institutional and political changes in Israel, each of the Chief Justices we examined faced different circumstances with the judicial selection committee. This interaction affected the characteristics of the judges nominated to the IHCJ. Their judicial review patterns interacted with the public policy field of the petitions they reviewed. Another factor that varied over time was the effective number of political parties that affected the coherence of the judicial review.

Our main interest relates to the effect of a Chief Justice's term in office on his/her activism in judicial review. While we can expect that the Chief Justice's identity would create variance in the dependent variable, we expect it to be consistent: either a low level in a standard deviation of activism levels within each Chief Justice's term, or a similar level of standard deviation of activism between terms. More deviation tells us that the Court is not consistent and that different judges make different decisions. In addition, if the activism is Court based, we would expect the judges' characteristics to have low estimates. However, if the activism is based on the judges' preferences, we should see the judges' characteristics having a strong and significant effect on judicial activism. Below, we test our theory using a mixed-effects logistic regression model.[19]

[18] Please see the list of ministries in codes and the codes we used in Appendix A.

[19] Mixed effects models (also referred to as hierarchical or multilevel models) use a two-fold estimation process: they first estimate ~~a~~ random or background variables. Then, they estimate the fixed effects, which are the variables that directly affect the dependent variable. These models are constructed assuming that there is a phenomenon (e.g., high school students' grades), caused by fixed effects (e.g., children's cognitive capabilities), nested and therefore affected by background factors or random effects such as the level of educational rigor the schools offer. When the random effects vary, the way the fixed effects impact the dependent variable would also vary. In the example of school grades,

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Findings for IHCJ Judicial Reviews 1995-2016

Figure 2 about here

Figure 2 shows that the IHCJ tends to dismiss most petitions against government ministries. Of about 9,490 recorded judges' decisions on petitions, about 1,000 are decisions to accept petitions. Hence, we are studying a phenomenon that amounts to 10.5% of the events.[20] However, the phenomenon's frequency is diverse enough to allow further exploration of the judges' decisions.[21] We turn to the multivariable estimation of IHCJ judicial policymaking, with the judges' judicial review activism as a dependent variable.[22]

Table 1 about here

Table 1 presents the results of three models: one model estimating the effect of the judges' characteristics on their judicial activism given the Chief Justice's identity, the second examining the effective number of political parties in parliament, and the third model exploring the policy areas (with the special importance of religion and national security, and the 1967 military occupation) and their interactions with the judges' characteristics. The Table is also divided among the fixed effects, the mixed effects and the models' fit measures, which capture each model's explanatory power in comparison to the other models. Regarding the fixed effects, the only

rigorous academic environments would impact children's cognitive capabilities, which would affect high school students' grades' (Gelman & Hill, 2006).

[20] Noteworthy is the fact that quantitative analyses of Israel's Supreme Court's judicial review patterns (not including the IHCJ) show that when the Supreme Court examines appeals set against lower-tier courts, there is a general trend to reject appeals (Eisenberg, Fisher, & Rosen-Zvi, 2010).

[21] Please see Appendix B for a list of judges and their level of activism.

[22] To simplify the presentation of the data analysis, the models included in Table 2 estimate only some of the variables we collected: the variables that had clear effects on the dependent variable when estimating the random effect. For the judges' characteristics, the only explanatory factor that was significant for this round was the judges' professional background, which we retained here. For the policy fields variables, two policy topics emerged as salient in reflecting general trends in IHCJ judicial reviews: security and religious affairs. These results should not be a surprise to anyone dealing with IHCJ judicial reviews (Hofnung & Weinshall-Margel, 2010; Sommer, 2010; Weinshall-Margel, 2011). However, in Table 3 we introduce other characteristics that did have an effect during the Grunis and Naor periods.

component we used in this table (as it was the only component that had an effect on judicial activism here) shows that if a judge served on a lower-tier court, s/he would tend to reject petitions. This trend also persists in model three with the coefficient only becoming stronger when added to other variables. The second model tests the influence of the effective number of political parties on judicial activism: as the number of parties in Knesset increases, it also varies negatively with judicial activism. In the third model when adding various policy fields, petitions associated with national security and the 1967 military occupation reduce judicial activism and petitions regarding religious matters encourage activism. The interactions between the different variables in this model are insignificant. A strong coefficient emerges when observing the combination of a judge's previous tenure on lower-tier courts and petitions regarding religious affairs, which shows increased judicial activism. Hence, for the most part in the large dataset that includes all Chief Justices, the Court variables have quite a strong dampening effect on judicial activism with only one (but significant) judges' characteristic that accounts for judicial activism.

Putting our theory to one further test, we re-ran the models using cases heard under Grunis and Naor, this time using all of the judges' individual characteristics. The results appear in Table 2.

Table 2 about here

The first model now presents an elaborate list of personal characteristics that the literature tells us could affect judicial review. With regard to religiosity, we can see that secular judges tend to reject petitions submitted to the court. With regard to gender, men tend to reject more petitions than women. We can also see that the sole Arab judge on the Court at the time tended to reject petitions. For the other models, the picture is similar to the previous table. More political fragmentation, more rejection of petitions and the policy field model (that has the best fit) indicate

that judges tend to accept petitions on religious matters and reject petitions on security matters and the 1967 military occupation. Hence, focusing on the IHCJ after the judicial selection committee allowed competing forces (politicians, judges and lawyers) to determine the judges chosen in a non-cohesive manner underscores the effect of the judges' individual characteristics. These personality traits did not have a clear effect on the dataset as a whole. This effect exists alongside more structural issues such as party system traits and the policy fields to which the petition relates. Consequently, the degree of cohesiveness of the judicial selectorates affects the Court's cohesiveness and may personalize its judicial review. This effect becomes clear in the dataset when the emergence of the judges' individual characteristics becomes a dominant factor affecting the level of the Court's judicial activism.

Concluding Discussion

Our aim in this paper is to show that judicial selectorates affect patterns of judicial review. Once the selectorate becomes non-cohesive in its preferences and interests, its selection of judges becomes similarly non-cohesive. The resulting non-cohesive courts pave the way for the personalization of judicial review. Such personalization of judicial review shifts the weight and patterns of review from a court functioning as a unitary collective to a court acting as an aggregation of the individual preferences of its judges. What are the analytic implications of our study?

For research programs that deal with judicial review as a policymaking process either from a behavioral or a strategic perception, judicial selectorates have to be a part of the analysis because they can explain whether judicial activism or passivism in a court depends on the institutional arrangements that placed the judges on the court. Furthermore, once we understand that individual

judges' preferences determine judicial activism levels in a court, we should pay attention to the personalization of judicial review, taking into account partisan politics and policy issues.

Moreover, situating the sources of judicial activism in an institutional context and understanding that activist judicial review could be an outcome of a court cohesive in its preferences or the outcome of individual judges' decisions also has implications for the judicialization of politics thesis. Using institutional terms, this thesis defines constitutional courts that use activist judicial review as the act of agents who have abdicated legislation based on political principles. However, our analysis compels critics of activist courts to search for the reasons for this activism, which are not necessarily embedded in the court itself but in the political equilibrium that created its structure through its effect on judicial selectorates. Law is molded and framed through politics not only regarding policy dimensions- a relatively secular court encouraged privatization of Jewish Orthodox religion and a Jewish court was highly effected by national security arguments and ethno-nationalism. Furthermore, politics determines the essence of judicial nominations and in turn the personalization of judicial review.

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