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How do Courts Establish Political Status, and How do they Lose it:

An Institutional Perspective of Judicial Strategies*

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Abstract

In this article we treat supreme courts in democracies as strategic players, mostly concerned with their status vis-a-vis other political institutions in their environment. We use a sequential game to model the structure of the interactions between the Supreme Court and the Executive. We refer to situations that the Executive acts, its act is possibly illegal according to legal texts, and an appeal submitted. Then, we argue, the Court is likely to vary its ruling depending on two basic variables in its environment: the support or lack thereof of the public at large and the support or lack thereof of elite coalition. In technical terms, the unique feature of our article is that it analyzes an interaction between two political institutions in four different environments. Those environments define four different payoff matrices for the institutional players in the game and, by consequence, point to four different equilibria, each characterizing a different expected outcome in each one of the four different political settings in which the game is played. In substance, our analysis highlights the importance of elite coalition, and especially the importance of the majoritarian/countermajoritarian basis of appeals to supreme courts, as factors that may have a crucial causal effect on the rulings of the courts. We use a series of rulings of the Supreme Court in Israel to illustrate our argument, demonstrate its empirical relevance and lend it empirical support.

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I. Introduction

Supreme courts are political institutions. First, they operate in a political sphere of public goods, abdicating or adjudicating controversial issues that are fundamental to this sphere. Second, their decisions are derived not only from formal and informal legal norms, but also from ideological, political, and policy concepts. Third, supreme courts do not only interpret legal texts, they often cooperate and struggle with other state organs, and non-governmental organizations. Supreme courts are not fully autonomous, their behavior is contingent on political culture and institutional structure of political regimes. Those variables contextualize the degree, content and repercussions of adjudication. Hence, supreme courts (hereafter- courts) are political institutions by the nature of their role in society, including in countries like England where the legal system emphasizes the 'a-political nature' of the judiciary (Brewer-Carias: 1989, Jacob, Blankenburg, Kritzer, Provine, and Sanders: 1996, North and Weingast: 1996).

If courts are weak, or when they lose their political status, they risk to be mobilized by other state organs and affiliated institutions to legitimate controversial public policies. Alternatively, if courts are strong, or when they enjoy a high political status, they can detract from the political status of other state organs and affiliated institutions and challenge controversial public policies. As W.F. Murphy (1964: 175) asserted: "A Justice who wishes to preserve judicial power- and thus to maximize the chances of achieving his policy goals- would not seek conflict for its own sake, but neither would he allow the Court to acquire a reputation for timidity. He would want the Justices to appear to be cautious, broad-minded, and reasonable men- but also brave, strong-willed, decisive, and both willing and able to use their sanctions on fundamental issues."

This article is an effort to systematically comprehend the ways supreme courts accumulate political status and the circumstances whereby they might lose it. We define the courts' political status as the ability of judicial intervention in executive decisions and legislative acts. Courts might be interested in solving the specific case in light of a concrete legal text or public policy lines (Epstein and Knight: 1998). Yet, courts as other political institutions aspire to be influential in shaping the public sphere. Hence, they must establish and maintain their political status vis-a-vis other political institutions in their environment.

Our main attention is given to executive-judiciary interactions presuming that courts strive to establish and maintain political status. The model we present is a sequential game that starts with an executive action that might be interpreted as illegal. This is the common instance that tends to incite institutional struggles for political status between the judiciary and the executive in modern democracies. We then model the court's possible reactions and a range of executive responses in order to predict expected outcomes of the game. The empirical relevance of our analysis is illustrated by an investigation of rulings by the Israeli Supreme Court.

II. Theory

There are several theoretical prisms to comprehend how courts accumulate or lose political status **(** Caldeira and Gibson 1992; Eskridge 1991; Gillman 1997; Knight and Epstein 1996,1998; Sarat and Grossman 1975; Scigliano 1971; Segal 1997; Segal and Spaeth: 1993; Stearns: 1998). Each approach has its merits and limitations. Here, we endorse a rational choice theoretical approach, which studies the court's interactions with other institutions, in strategic terms. This approach is essential in exploring the ways

courts interact with their institutional environment, confronting or cooperating with other state's organs in their efforts to gain, maintain and use their political status.

While a single case analysis using game theory in judicial studies has been successful in helping us comprehend courts as political institutions, a more general model is lacking. Our model includes the strategic options of the players, a scale of payoffs, and a characterization of the environment in which the institutional interactions take place. We look at two environmental conditions that determine four payoff matrices of the institutional games between the court and the executive: (1) the coalitions of political elite outside the court; (2) the court's basis of public support for a specific appeal.

The common conceptualization of the court as applying rules to specific legal cases only within a context of *stare decisis,* disregards the extent to which rulings assist courts to establish a political status or contribute to its erosion. The agglomeration of political status is treated as an unintended result of the court's action. This approach strips courts of their meaning as political institutions and ignores the tendency that justices display for strategic behavior.

A growing body of literature questions the proposition that courts are merely guardians of the 'rule of law' without other political interests. Courts incline to rule in accordance with the interests of the ruling elite, prevailing cultural propensities, and the expectations of the general public (Rosenberg: 1991, Mishler and Sheehan: 1993). Other studies show that courts tend to avoid constitutional confrontations with head of states, especially in times of exigency and warfare, unless they enjoy strong public support (Barzilai, 1996, 1997; Koh, 1988). When courts generate civil rights and minority rights they do so only after they have established sufficient broad legitimacy (Gibson and

Caldeira: 1995). Nullification of legislation by the US Federal Supreme Court has significantly been effected by the degree of presidential support given to Congress (Dahl 1957; Epstein and Knight 1998; Segal 1997). Justices vote while taking into consideration possible reactions of the executive (Brams and Muzzio: , Brenner: 1979, Epstein and Walker: 1995, Segal: 1997). Finally, it was shown that courts facilitate social change only if no broad legislative or administrative opposition is expected (Rosenberg: 1991; cf. Feeley: 1993; MacCkan: 1993). Most of these studies are on the US Federal Supreme Court. Data on other settings is rare but points to the same conclusions (Ackerman 1992; Cappelletti 1989; Jackson and Tate 1992; Jacob, Blankenburg, Kritzer, Provine, Sanders: 1996; Shapiro and Stone 1994).

Judicial nominations for supreme courts are not politically neutral either. Processes of judicial selections and nominations in different countries are various: appointments by 'professional committees' (England and Israel), by constitutional courts (France), by head of states (the USA), by legislature (colonial America), by judicial commission (South Africa) etc. Invariably, however, justices calculate their moves strategically because they are political actors and not only jurists (Dahl: 1957, Abraham: 1992, Comisky and Patterson: 1987, Edelman: 1994).

Works by Knight and Epstein (1996, 1998) and Brams and Muzzio (1977) have proved the usefulness of game theoretic analysis of the interactions between courts and the executive. Those studies reconstruct a legal case or series of cases in the USA, and show the benefit of studying the strategic calculations of courts. Following in their footsteps, we build a more general model by including the structure and the environmental conditions that determine executive-court games in general.

Institutional and cultural environments do matter (Caldeira 1986; Casey 1974; Franklin and Kosaki 1989; Epstein and Walker 1995; Epstein and Kobylka 1992; Caldeira and Gibson 1992; Gibson and Caldeira 1995; Epstein and Knight 1998). Courts are asked by individuals, groups and organizations to intervene in daily political processes. They are perceived as last resort to advance human and civil rights, and to resolve conflicts between state's organs. Courts can impose upon politicians new policies, norms, values, and even (rarely) outcast political leaders. Israel, Pakistan, Russia, and the USA, are good examples of the fact that supreme courts might become, under special circumstances, a menace to heads of states. Under some constitutions, supreme, 'constitutional' courts are defined as the guardians of democratic order (cf. the German Constitution of 1949, the South African Constitution of 1996), a fact that can further consolidates the political status of these courts.

If the issues under judicial review are important to the executive, a constitutional crisis may develop. An anti-judiciary legislation and administrative reluctance to implement court's rulings may be the immediate results of such a crisis. Courts might be deprived of areas of jurisdictions, their authority might be confined, and the function of judicial review might be abolished. Tenure conditions of justices might be impaired, popular and media criticism might be raised against the institution and its members. In addition, the court may become a target for intimidation, and the executive and legislative bodies might be committed to override court's rulings (Cappelletti 1989; Eskridge 1991; Jackson and Tate 1992; Murphy 1972; Schubert and Danelski 1969; Epstein and Knight 1998).

In relatively open societies with a certain prevalence of liberal discourse, courts are

prominent targets for social mobilization. Environmentalists, 'pro-life' or 'pro-choice' activists, opponents of capital punishment, feminists, deprived employees and many others see litigation in court as a way to achieve remedies. While the belief in courts as sources of such help is frequently overrated and is criticized (Feeley: 1993, Scheingold: 1974, McCann: 1994), courts do play a significant role in political struggles over the shaping of democratic virtues.

Our discussion of the literature entails the following postulates:

a. Supreme courts are political institutions.
b. Supreme courts are aware of the institutional and cultural environments in which they operate. They are also aware of the interactive essence of their functioning vis-a-vis other state's organs, and non-government organizations.
c. Supreme courts operate within institutional and cultural contexts that might be conducive or detrimental for the establishment and maintenance of their political status.
d. Legislative and executive branches can defy rulings and react to adjudication by imposing restraints on supreme courts or by abolishing the results of their rulings using counter legislation, and variety of administrative means.

These postulates assist in defining the political status of supreme courts (hereafter-courts) in their environments. But we can suggest a model that explicates the ways and circumstances under which courts accumulate and loose this status. Justices consider possible reactions of public opinion, the executive and the legislature to their rulings (Epstein and Knight 1998). Courts do not have the power of the sword or the power of the purse. Hence, their sensitivity to the reactions of other institutions that have that power. They strive to preserve their statutory position or whatever position they have come to occupy, by the legal and political praxis. In most democracies such a process is based on reviewing administrative acts, and in some democracies it means also the authority to

review legislative acts, and even to declare laws as unconstitutional.

Realists and post-realists in political jurisprudence have shown that courts and justices deal primarily with interpretations that enable them to construct, deconstruct, and reconstruct legal texts, legal practices, and legal issues (Fisher, Horwitz and Reed: 1993). In so doing, courts adjudicate political spaces, governed by other elite and institutions. Hence, the need to construct interactive institutional games, where different institutional actors seek to serve selfish interests, to better understand courts in their political context.

III. The Executive-Court Institutional Game

Epstein and Knight (1996, 1998) and Brams and Muzzio (1977) have clearly demonstrated how game theory can help to explicate a specific historic court ruling. We use the same approach but suggest a broader and original model. We define general conditions for different possible equilibrium contingencies in a game between the court and the executive.

Before we specify the game we need to emphasize several points:

a. *Information:* justices do not have complete information about how the executive and the legislature may react to their rulings. Yet, they are well informed about different possible reactions to different court rulings, and have considerable knowledge regarding the possible repercussions of their actions (Brenner, 1979; Eskridge, 1991; Murphy, 1964; Schubert and Danelski, 1969; Segal, 1997; Epstein and Knight, 1998).

b. *Policy Sphere:* justices and other political actors identify the relevant policy dimension in the same way, since political actors in any state operate within common narratives.

c. *Options:* legal texts, practices and political cultures limit options. No one, be it a court, an executive or a legislature, enjoys unlimited domain of optional actions.

d. *Payoffs:* the payoffs we attach to contingencies reflect our assumption that one

objective of the court is to maintain its political status vis-a-vis the executive.

e. *Political Status:* in this context it is defined as the extent to which an agent can impose its values and concepts on other institutional agents.

There are two ways to study games that courts play - as finite and infinite games. Infinite games presume that justices are mostly concerned with the long- term effects of their rulings. We do not find it to be accurate as far as supreme courts are concerned. Supreme courts, in most democracies, react to appeals and adjudicate only concrete issues made available to them by the environment in which they operate. Justices are more preoccupied with immediate effects that their rulings may have on their relations with the public, the executive and the legislature than the ramifications of their rulings on remote future interactions. Therefore, we use a finite sequential game to model the interactions between the executive and the courts. Finally, we assume that the court is a unitary player. Obviously, it has its own internal contentions and conflicts, but here we are looking at it as one institution that is interested in establishing its political status. A common way in which the same assumption often appears in the literature is to assume that the court acts upon the preferences of the median justice.

Players' Strategies:

There are two players in this game: $N=\{C,E\}$. C denotes the Court, E denotes the Executive and $i \in N$ denote any one of the two. σ_C and σ_E denote the strategy spaces or choice sets of the Court and the Executive respectively.

The Court has three possible strategies when it faces the Executive:

1. Abdication (AB) gives judicial legitimacy for the status quo without challenging the Executive. It is expressed by a dismissal of an appeal- not necessarily on its merits-

without finding illegal aspects in the Executive's action.

2. Adjudication (AD) is a strategy where the Court passes a judicial review, it dismisses the appeal on its merits, but issues a legal warning to the Executive due to illegal aspects in its action.
3. Upholding (UP) means accepting an appeal against the Executive. In that instance the Court fully and directly challenges the Executive.

We use the following notations for the Court's strategy space: σ_C={AB, AD, UP} with $\sigma_C \in$ {AB, AD, UP} denoting any single strategy of the set of strategies available to the Court.

The Executive has its own three strategies:

1. Compliance (CM) - the Executive accepts the ruling or lack thereof by the Court.
2. Evasion (EV) – implicit opposition to the Court articulated by failing to implement the Court's ruling.
3. Counter (CU) – direct opposition to the Court expressed by an anti-judiciary legislation endorsed by the Executive or a direct administrative opposition to the Court.

We denote the Executive's strategy space as: σ_E = {CM, EV, CU} and use $\sigma_E \in$ {CM, EV, CU} denoting any single strategy available to the Executive in this game.

Given the players' strategies we end up with the following extensive form game:

Figure 1: The Executive-Court Game -- about here

Payoffs

In defining the payoffs of the players in different environments, we focus on two conditions:

1. Whether an elite anti-judiciary coalition is likely to form against the Court's decision.
2. Whether the public is likely to support or reject the Court's decision.

We end up with four different environments in which the game may be played:

1. *No anti-judiciary coalition and majoritarian support for appeal.*
2. *No anti-judiciary coalition and no majoritarian support for appeal.*
3. *Anti-judiciary coalition and no majoritarian support for appeal.*
4. *Anti-judiciary coalition but a majoritarian support for appeal.*

Each of the above environments determines a different payoff matrix in the game. We premise that the Court and the Executive derive their utility mainly from the extent to which their status vis-a-vis each other is weakened or strengthened. We assume that the utility of each player is a linear and additive function of three variables that provide our precise definition of the term "political status":

(1) $$U_i (CC, BP, DL) = U_i (CC) + U_i (BP) + U_i (DL)$$

CC stands for 'constitutional crisis'. It can take the value of -1, when such a crisis emerges, or 0 when no such crisis occurs. BP stands for Bargaining Power. BP gets a value of -1 if a player loses in terms of bargaining position, 0 when a player maintains its bargaining position and 1 when the player improves its bargaining position. DL stands for Diffuse Legitimacy. Here we follow Caldeira and Gibson (1992, 1995) who show the importance of public support for the institution. They make a distinction between specific legitimacy that refers to the support for each judicial ruling, and diffuse legitimacy, which refers to the support for the institution. DL takes the value of -1 when a player loses diffuse legitimacy, 0 if the player's diffuse legitimacy has not changed, 1 when the player's

diffuse legitimacy increases. Thus, U_i (CC, BP, DL)$\in${-3,-2,-1,0,1,2}.

Solution Concept – Subgame Perfect Nash Eqilibrium and Backward Induction

Definition 1 : A pair of strategies (σ_C^*, σ_E^*) is a Nash Equilibrium if and only if:

1. $U_C(\sigma_C^*, \sigma_E^*) \geq U_C(\sigma_C, \sigma_E^*) \quad \forall\, \sigma_C \in \Sigma_C$ = {AB,AD,UP} and

2. $U_E(\sigma_C^*, \sigma_E^*) \geq U_E(\sigma_C, \sigma_E^*) \quad \forall\, \sigma_E \in \Sigma_E$ = {CM,EV,CU}.

Condition 1.1 requires that, in Equilibrium, the Court chooses a strategy, σ_C^*, so that, given the strategy of the Executive, σ_E^*, the Court cannot be made better off by choosing another strategy $\sigma_C \in \Sigma_C$ = {AB, AD, UP}. Symmetrically, Condition 1.2 requires that, in Equilibrium, the Executive chooses a strategy, σ_E^*, so that, given the strategy of the Court, σ_C^*, the Executive cannot be made better off by choosing any other strategy in its strategy set, Σ_E = {CM, EV, CU}.

Definition 2: A strategy vector (σ_C^*, σ_E^*) is a Subgame Perfect Nash Equilibrium (SPNE) if:

1. It is a Nash Equilibrium for the entire game, as defined in definition 1 above; and
2. Its relevant action rules constitute a Nash Equilibrium for every subgame.

In the context illustrated in Figure 1, each decision by each player starts a subgame of the Executive-Court game. Every SPNE is a Nash Equilibrium. The converse is not true. Subgame perfection is one of the most commonly accepted refinements of the Nash Equilibrium solution concept (Rasmusen 1989 87-8; Ordeshook 1986: 141). To identify a SPNE we use the method of backward induction. One calculates what the last player to act would do at his or her last move in the game, when s/he is called upon to act, and what would be the consequent payoff vector for all the agents given the anticipated behavior of the last player to take an action. One then treats the anticipated behavior of the last player

and its consequences as given and repeats the exercise for the one-before-last player. One works this way up the game tree until one reaches the starting point of the original game.

IV. Four Environments and Four Payoff Matrices of the Game.

We now analyze the Executive-Court interaction game with four different payoff matrices generated by the four environments in which it is played.[i]

Environment 1: Majoritarian Support with No Anti-judiciary Coalition

Figure 2 describes the Executive-Court game in a political environment where the Court does not expect an anti-judiciary coalition to emerge against its decision, and the majority of the public supports the appeal. This is a worse case scenario for the Executive.

Figure 2: The Executive-Court Game in Environment 1:

Majoritarian Support with No Anti-Judiciary Coalition

Proposition 1: In the absence of an anti-judiciary coalition, if the Court enjoys a majoritarian support for the appeal, the Executive acts only if the cost of no action is non-negative, the Court Upholds appeals and the Executive evades compliance with the Court's ruling.

Proof: By backward induction. Following the game tree in figure 2, the Court knows that if it abdicates the Executive will comply and the Court gets a utility of -2. If it adjudicates the Executive evades and the Court gets 0. If it upholds the appeal, the Executive evades and the Court's payoff is 2. The Court's best strategy is to uphold the appeal. The Executive knows that if it acts, an appeal will follow which the Court will uphold to which its best response is evasion in which case it gets a utility of 0. Therefore,

the Executive acts only if the utility of no action is non-positive.

Note: The Subgame Perfect Nash Equilibrium (SPNE) result of the game is a Pareto Optimal outcome of the game, but the Court improves its status considerably vis-a-vis the Executive.

Environment 2: No Anti-judiciary Coalition and No Majoritarian Support

Figure 3 describes the Executive-Court game, in a political environment with no anti-judiciary coalition but with no majoritarian public support for the appeal.

Figure 3: The ExecuCourt G– Environment 2:

No Anti-Judiciary Coalition and No MajoritariaSupport

Proposition 2: In the absence of an anti-judiciary coalition but with no majoritarian support for the appeal, the Executive acts only if the cost of no action is non-negative, the Court adjudicates and the Executive evades any response to the Court's ruling.

Proof: By backward induction. Following the game tree in Figure 3, the Court knows that if it abdicates the Executive will counter the Court's authority in the matter (using the public mood against the appeal) and the Court gets a utility of -1. If the Court adjudicates, the Executive evades a response, and the Court gets 0. If the Court upholds the appeal, the Executive counters and the Court's payoff is -3. So, the Court's best strategy is adjudication. Thus, if the Executive acts, the Court adjudicates to which the Executive best response is evasion. In this case the Executive's utility is 0, so the Executive will act only if the utility of no action is non-positive.

Note: The Subgame Perfect Nash Equilibrium (SPNE) result of the game is weakly Pareto

inferior comparing to the result of Upholding-Evasion which would have made the Court better off without making the Executive worse off. The reason why the Court does not risk upholding as a strategy is that such a strategic choice would create a strong temptation for the Executive to counter the Court's ruling which would result in a major loss to the Court due to the public mood against the appeal.

Environment 3: Anti-Judiciary Coalition and No Majoritarian Support

Figure 4 describes the Executive-Court game in an environment where the Court expects an anti-judiciary coalition and no majoritarian public support for the appeal.

Figure 4: The Executive-Court Game --Environment 3:

An Anti-Judiciary Coalition and No Majoritarian Support

Proposition 3: In an environment with an anti-judiciary coalition and no majoritarian support, the Executive acts whenever the utility of no action is less than 1, the Court abdicates and the Executive complies with the Court's ruling.

Proof: By backward induction. Following the game tree in Figure 4, the Court knows that if it abdicates, the Executive will comply and the Court gets a utility of 1. If the Court adjudicates the Executive counters and the Court gets -2. If the Court upholds the appeal, the Executive counters and the Court's payoff is -3. Therefore, the Court's best strategy is abdication. The Executive knows that if it acts, the Court will abdicate to which the Executive's best response is compliance where it gets a utility of 1. So, the Executive will act only if the utility of no action is less than 1.

Note: The SPNE of the game is Pareto optimal. Both players improve their political status because they act in accordance with the mood of the public and the elite.

While neither player improves its position vis-a-vis the other, this result clearly illustrates the strong incentives for the Executive to break the law and for the Court to "look the other way" when populist sentiments back the government actions and oppose Court's intervention.

Environment 4: Anti-Judiciary Coalition and Majoritarian Support

Figure 5 describes the Executive-Court game assigning final payoffs assuming an environment with an anti-judiciary coalition but a majoritarian public support for the appeal.

Figure 5: The Executive-Court Game --Environment 4:

An Anti-Judiciary Coalition and Majoritarian Support

Proposition 4: In an environment with an anti-judiciary coalition and a majoritarian support for the appeal, the Executive acts whenever the cost of no action is non-negative, the Court adjudicates and the Executive evades responding to the court's ruling.

Proof: By backward induction. The Court knows that if it abdicates the Executive either complies or evades. In both cases the Court gets a utility of 0. If the Court adjudicates, the Executive evades and the Court gets 1. If the Court upholds the appeal, the Executive counters, and the Court's payoff is -1. So, if the Executive acts, the Court's best response is to adjudicate. The Executive knows that if it acts the Court will adjudicate to which the Executive's best response is evasion. In this case the Executive gets a utility of 0, so the Executive will act only if the utility of no action is non-positive.

Note: The SPNE result of the game is Pareto Optimal. This equilibrium is the same as in environment 2 with the only difference that the Court gets a slightly higher

payoff. This result is consistent with the literature about courts as majoritarian institutions (…….).

V. The Israeli Case

Two policy issues have dominated the political debate in Israel: national security, and state-religion relations (Sened, 1996). We illustrate the empirical relevance of our model by using it to explain the outcomes of a series of appeals that were brought to the Israeli Supreme Court, sitting as an High Court of Justice (hereafter- HCJ), over the five decades of Israel's independence in these two spheres of debate.

A. Security Policy

This is the dominant policy dimension in Israel (Barzilai: 1996, Sened 1996) and it is also the most frequently discussed in the HCJ (Barzilai 1996,1997; Hofnung, 1991). Many of the appeals to the HCJ are related to security issues. Many other cases are constructed by the justices as relating to 'security' issues for the purposes of dismissal (Barzilai 1997). A decisive share of the appeals against the executive is dismissed. Yet, as the process of liberalization in Israel precipitated since the 1980s, the dyadic executive-judiciary relations in this policy sphere became more compound. In the context of the security sphere, we distinguish between several types of issues submitted before the HCJ.

A1. ***The Occupied Territories***:

The trend in this domain has been clear: appeals by Palestinians are dismissed in Court, with few exceptions. In general, a majority among the Jewish public and a strong anti-judiciary coalition are against judicial intervention in the discretion of the security authorities (Barzilai, Yuchtman-Yaar and Segal 1994; Shamir 1990). ***Environment 3*** is

relevant and the judicial strategy was that of dismissal, as predicted by ***game 3***. The Palestinian appellants usually claimed that military acts in the West Bank and Gaza Strip are illegal, brutal and infringe on human rights and international law. The Executive has acknowledged the Court's jurisdiction over the territories. It has argued that its acts are due to its legal responsibilities as governor of the areas and they were aimed to fulfill 'security needs.' The Court dismissed most of the appeals.

Apparently, the Court presumed that as long as its jurisdiction was recognized the 'rule of law' was served. The Executive complied with that judicial policy that legalized its control over the occupied territories. As the logic of ***game 3*** demonstrates, were the Court to adjudicate those issues, such as land confiscation and the establishment of Jewish settlements in the territories, the Executive would have reacted negatively trying to restrain the Court. This would also have been the case if the Court were to uphold appeals against the Executive. The HCJ played this equilibrium strategy of abdication consistently, from the 70s to the 80s, in order to prevent the political status of the Court from declining.

In environment 3, the Court is unlikely to gain much power, but, if not careful, could be subjected to institutional attacks of the Executive on its status. More importantly, as we noticed earlier, in cases where both the public and elite feel strongly in favor of Executive action, however illegal, the Court is most likely to look the other way. Against strong populist sentiments and without an elite support, supreme courts are rather weak guardians of the rule of law.

Since mid 1980s the Court started adding to its rulings, warnings requiring the Executive to comply with administrative restraints before using of force and punishment against Palestinians. It was reflected primarily in cases of house demolition and

deportations. Due to the liberalization processes, since the 80s, and the peace process following the Oslo Accord (September 1993), Israeli governments became less opposed to a possible adjudication. The Court, on the other hand, was under pressures from liberal and leftist groups, supported mainly by the Israeli-Jewish middle class, to adjudicate issues concerning the territories. ***Environment 3*** gradually transformed into ***Environment 2*** and ***game 2*** became more relevant.

The judicial policy was to clarify that the Executive should comply with the 'rule of law'. The latter consistently acted according to its policy of evading the Court's rulings. For example- in the mid-80s the Court attempted to impose on the Executive few procedural restraints and ruled that deportations are legal if a judicial committee hears the deportee prior to the expulsion. [ii] The government clearly evaded that ruling in 1992 when it deported without due process about 415 Hamas activists. Interestingly, the Court dismissed the appeal against those deportations while repeating that deportations can not be conducted without proper procedures.[iii] On the one hand, the HCJ was reluctant to intervene in a countermajoritarian fashion, which could cost it a decline of legitimacy, and a severe governmental opposition. On the other hand, it was afraid to lose elite support of liberal and leftist groups that opposed the deportations.

The equilibrium result of **Game 2** does not make the Court more influential but it helps the Court avoid more loss of public support, on the one hand, and the loss of authority due to anti judiciary campaigns by other elite, on the other hand.

A2. ***War and Peace.***

Issues of war and peace initiatives are consistently abdicated by the HCJ as being political and therefore unjustifiable. It was reflected in dismissal of appeals against

government actions during the Lebanese War and the conclusion of the Oslo Accord. In both cases, an intervention of the Court could incite a severe anti-judiciary coalition within the elite and no majoritarian support was expected. Most Israeli public and the dominant elite groups consider judicial review by the HCJ in issues of war and peace as undesirable (Barzilai, Yuchtman-Yaar & Segal 1994). ***Environment 3*** and ***game 3*** are relevant.

The players end up in the abdication-compliance equilibrium as predicted by game 3. This equilibrium preserves their political status- the Court is neither intimidated nor attacked by the Executive, and the latter preserves its absolute authority in those issues, immune from a judicial review, and untouched by the judicial elite.

A3. *Israeli Arabs*

Cases concerning the Israeli-Arab minority are not directly security related, yet the Court often constructed them as such. The most illuminating cases are those affecting claims of Arabs to return to lands in Israel from where they were expelled during the 1948-49 War. Here the boundaries between Jewish ethnicity, Jewish hegemony and national security were blurred (Barzilai: 1997). The State was Jewish by its ethnic and national identity, and this formed the discourse of the Court rulings. Upholding of appeals would have raised legislative and Executive opposition, and a majority of the Jewish public would be resentful of any ruling in favor of such claims. Again, ***Environment 3*** and ***Game 3*** are relevant.

Since the 50s' the Court's policy was to dismiss appeals of Israeli-Arabs for land rights restoration. The common judicial justification for those rulings was 'national security', but the main motive for the HCJ's rulings was the desire to thwart any possibility of legitimization of the 'right of return.' An illuminating series of cases was that of Ikrit

and Biram. Israeli military forces deported the inhabitants of the two Palestinian villages during the 1948 war. Their appeals to the HCJ demanded the return of the refugees to their lands in Israel, and argued that no security reasons could justify the expulsions. Several appeals were submitted to the HCJ between the 50s' and 80s'. The Court consistently rejected them.[iv] The justices were afraid that any action other than abdication would incite anti-judiciary coalition. The Executive preferred not to grant permissions of return to the refugees of Ikrit and Biram, thus leaving the issue of the 1948 refugees off the national agenda.

The abdication-compliance equilibrium of Game 3 results. Again, this equilibrium preserves the Court's political status. The Court is not perceived as a possible menace to Jewish hegemony, it is not under threats of Executive's sanctions, and the Executive does not hold the risk of a judicial review over confiscation of Palestinian land in Israel.

A4. *Secret Services*

The Court was inclined not to intervene in the operations of the secret services and it often ended up legitimizing problematic activities of those organizations. Cases of appeals against tortures during secret service's interrogations are good example. The Court was using the following routine: temporary injunctions were issued, but when discussing the case on its merits, the HCJ dismissed the appeal. The overall tendency of the Court was to respect the autonomy of the secret services.

A notable case was the Shaback (Israeli Internal Secret Services) affair in 1984-1986. In 1984 a military action was initiated to release hostages held by three Palestinians in a civilian bus in Israel. Two of the guerrillas were taken alive by the Israeli security forces, and brutally executed during the interrogations. A governmental committee of

inquiry was established. Suspicions were raised that senior Shaback officers presented the committee with forged documents. The police started to investigate but while the investigation was still ongoing, the President of Israel, Haim Herzog, pardoned the Shaback officers accused in those serious crimes of fabricating evidence (Lahav 1993). An appeal against the presidential pardon was filed. The security services asserted that their future is at stake, the President endorsed the claim that the pardon is required for the well being of the services, and the political establishment aired similar arguments. [v] The public overwhelmingly supported the security services. ***Environment 3 and game 3 are relevant.***

A writ of pardon during a police investigation was legally severely problematic. Yet, adjudication, warning against the President and implicitly against the secret services would have cost the Court dearly. The cost would have been even greater were the appeal to be upheld: criminal accusations against the high command of the secret service might have been submitted, and a severe governmental crisis would erupt. A judicial intervention in the affair was too costly. Again, despite clear legal reasons to intervene, abdication-compliance was the result, as Game 3 predicts.

This equilibrium means that the Court does not intervene and avoids Executive's sanctions. The Executive accepts the Court's jurisdiction and avoids the 'risk' of a judicial review over operations of the security forces.

A5. *Compulsory Military Service*

The Court has not recognized an argument of conscientious objection as a legal basis that justifies disobeying military orders. In so doing, the Court was using security arguments.[vi] Few cases, however, involved appeals against the discriminatory nature of the arrangement between the defense ministry and the ultra-orthodox-religious political parties

according to which in addition to the exemption of religious female, ultra-orthodox men are exempted from military service. Here the judicial strategy of the Court has been compound. Let us outline the political environment: a majority of Israeli Jews, mainly seculars, support such appeals because they consider the uneven dispersion of the military burden as unfair. At the same time, the ultra-orthodox parties are pivotal in the formation of ruling coalitions and can form anti-judiciary coalitions. ***Environment 4 and game 4 are relevant.***

In 1986 another appeal against the exemption of ultra-orthodox men was filed in the HCJ. Given the opposition of the ultra-orthodox parties to change in the arrangement, the HCJ was expected to dismiss the appeal. Yet, its constituency is primarily secular and, with one exception, no ultra-orthodox justice has ever been nominated to serve on the Court's bench. Were the Court to dismiss the appeal against a discriminatory military service, it could lose its political status of legitimacy among its main group of support-secular Jews. While an upholding could damage the Court's jurisdiction, and subject it to anti-judiciary measures. The Court adjudicated the issue. It found the exemption arrangement unfair, but chose to evade upholding the appeal, claiming that the issue of exempting ultra-orthodox men from military service is 'political'. It has differentiated between its authority to judicially intervene in such a matter, and its unwillingness to do it.[vii]

The equilibrium result of Game 4 is adjudication-evasion. The government prefers the adjudication-evasion result because it is not under judicial pressures to alter the status quo. Yet, the Court gains the image of being the protector of justice and equality. That image is important to maintain its political status vis-a-vis other institutional agents and the

secular public.

A6. Freedom of Speech and National Security

This is the only domain of security policy, where the Court activated judicial review and intervened in the discretion of the authorities. The main ruling, given in 1989, came as the HCJ decided that publication of deliberate criticism of security authorities is permitted and whoever wants to censor it must raise the burden of proof, that a proximate danger to state security is involved.[viii] This ruling was granted in the midst of expanding spirit of liberalism in Israel, when civil rights among Jews (primarily secular) became a major issue. Other rulings by the HCJ during that period emphasized the judicial commitment to freedom of speech.*

While the Court rulings were within the sphere of national security, the spirit of liberalism significantly reduced the probability of an anti-judiciary coalition. Moreover, a growing influence of American values on the fabric of Israeli political culture manifested itself by a stronger liberal mood among the middle and upper echelons of the secular society. Hence, the Court perceived itself as an agent of the 'enlightened' majority.

Environment 1 and ***game 1*** are relevant. Abdication of the appeal when no concrete elite opposition existed, and while the dominant public discourse supported it, would inflict damage on the Court's political status. As game 1 shows, the costs of such a judicial strategy are high. The same is true for adjudication, but to a lesser degree. So, from the HCJ's point of view, the best strategy is upholding. This strategy leads the Court to improve its political status given the absence of anti-judiciary coalition, and given the majoritarian public support.

The equilibrium result of game 1 is upholding-evasion. The Court gained power

because it framed the issue of freedom of speech within a popular liberal justification supported by a majority of the public and the political elite.

B. State-Religion

This is the second most dominant dimension in Israeli politics (Sened: 1996, Schofield, Sened and Nixon: 1998) and a common subject to come before the HCJ. In cases raising the issue of the state's legitimacy as a Jewish state and in cases involving the dominance of the orthodox-religious institutions, the Court was careful not to intervene and was not inclined to be too critical. The same strategy was adopted regarding cases about the definition of 'who is a Jew.' The Court eased the procedures enforced on people who converted abroad. Yet, it emphasized the portray of Israel as a Jewish and democratic state, legitimized its national Jewish character and ruled that Jewishness is the most fundamental constitutional facet of Israel. [ix]

A change in the religious status quo established since 1937 would raise a political opposition to the Court. A majority of the Jews in Israel support the Jewish character of the state, despite severe rift over its religiosity. ***Environment 3 and Game 3 are relevant,*** predicting an equilibrium result of abdication-compliance**.** The HCJ legalized and legitimatized the Jewish character of the state, and the Executive conceived it as a proper judicial role, which does not contradict the Executive's interests for using religion as political power.

Yet, in several areas, the HCJ intervened and ruled in contradiction to the aspirations of the religious establishment. One issue in point is gender equality. In two rulings toward the end of the 80s' the Court decided that female can serve on religious municipal councils. The Court used the value of equality as the reason to establish its

ruling, asserting that in this issue the Rabbinical religious law should be subordinated to the Israeli secular law.[x]

At the time of the rulings (1986-7) a National Unity Government was in power. It included the two major parties, Labor and Likud, which reduced the bargaining power of the religious parties. By consequence, the likelihood of formation of an anti-judiciary coalition declined. The atmosphere of liberalism among important strata of Israeli society was prominent and the public support for appeals on gender equality was high. ***Environment 1 emerged. Game 1 is relevant,*** and the Subgame Perfect Nash Equilibrium of Game 1 is upholding-evasion.

The HCJ conceived gender equality as a means to become more influential, relying on the liberal aspirations of the main reference groups of the Court. The lack of an effective religious political opposition to the Court, in times of 'national unity government', made it more convenient for the Court to rule in this way.

Were the Court to abdicate or adjudicate it would have hampered a prospect to become a stronger political player in that context. The Executive could not comply with an upholding because it would de-legitimize the orthodox establishment. Counter-judicial measures, as another option, would have precipitated a constitutional crisis where the Court is majoritarian, and the Executive is perceived as disrespectful of gender equality. This is the logic behind the equilibrium result of upholding-evasion in game 1. The Executive has not attacked the Court for its rulings, but the religious establishment continued to prevent women from being elected to municipal religious councils, totally ignoring the Court's rulings.

In 1995 the Labor Party and Shas drafted a coalition agreement according to which

if the Court rules in contradiction to the 'secular-religious status-quo', Labor is committed to alter the results of such a ruling in special legislation. An appeal against this agreement was submitted.[xi] Thus, a clear anti-judiciary coalition was formed against any intervention of the Court in the religious status quo. Yet, a majority of the public supported the appeal, aimed not only to invalidate this coalition agreement and to ensure the Court's authority, but also to constrain the ultra-orthodox parties. ***Environment 4 and game 4 are relevant.*** The Court faced a real intimidation to its status. An abdication would have sent a sign of institutional weakness. An upholding, on the other hand, would have created a frontal collision with the Executive and anti-judiciary coalition that supported it in parliament. Such a collision could easily result in anti-judiciary measures.

A split ruling resulted. Three justices out of five supported the dismissal of the appeal using the rhetoric that upholding could jeopardize the Court authority and create an unprecedented institutional crisis. The minority opinion aspired to gain visibility to further improve the Court's status as hegemonic institution. The HCJ chose adjudication. All five justices warned of the immorality of such a coalition agreement, and recognized the HCJ's authority to declare its illegality. Nonetheless, the majority opinion dismissed the appeal.

Game4 is helpful in clarifying the incentives behind this . If the Courwere to uphold the appeal, the price could have been a confrontation with the Executive, and primarily the religious parties. An abdication would have resulted in a negative image of the Court, as shying away from any say about crucial public affairs. Adjudication made the Court stronger while reducing to minimum the risk of a

constitutional crisis. The Executive chose evasion because compliance would have meant a loss in political status. An attack on the Court could have caused public outrage among the liberal groups.

The equilibrium result of game 4 is adjudication-evasion. The Court becomes stronger due to its willingness to send signals of warning. The Executive evaded it without paying a heavy constitutional and political price.

VI. Conclusions

Our research question of how Courts improve their political status vis-a-vis other institutional players and, alternatively, may see this political status eroded, has not been sufficiently researched, as of yet. We have chosen to struggle with this crucial problem in the framework of institutional games, which are rarely used in comparative studies of courts and politics. Hence, we contribute a model, which suggests an analytical approach to the study of courts and politics in institutional comparative context of democracies. Yet, this game is sensitive to various environments. To do this we proceeded as follows:

1. We developed a comparative analytical framework, defining four environments relevant for the Executive-Court game. We use the nature of elite coalitions and the extent of public support for the appeal to define these environments.
2. We constructed a game to model the interaction between the Court and the Executive in order to explore the strategic maneuvering over relative status among them.
3. We deduced four different payoff matrices from three status variables for the four environments. In each environment we obtain a different equilibrium outcome to the Executive-Court game. This enabled us to formulate hypotheses about conditions under which supreme courts may gain, maintain or lose political status.

Our analysis shows that two conditions are sufficient for a Court to improve, via strategic response to appeals, its political status as an institution (**Environment 1)**:

1. Absence of anti-judiciary coalition opposing its expected rulings,
2. Majoritarian support for the appeal.

What happens if one or both of these conditions does not hold? We find that it depends on which condition is missing. The outcome of the Executive-Court game is contingent on the environment in which it is played. In Game 2 we analyze the case in which no anti-judiciary coalition exists, but the Court does not enjoy majoritarian public support for upholding the appeal. The equilibrium result, adjudication-evasion, is not Pareto-optimum (the Pareto optimum is upholding-evasion). The Court is not intervening, and its ability to impose norms is restricted. This suggests that if courts do not enjoy majoritarian support for upholding an appeal, their ability to be welfare improving agents is restricted. It also means that Courts are to a large extent captives of majoritarian trends.

In game 3 we explore how courts deal strategically with a countermajoritarian appeal, under the constraints of an anti-judiciary coalition. The Pareto optimal unique subgame perfect equilibrium is abdication-compliance. The Court prefers to avoid confrontation with the Executive and preserves its power for future appeals. Any other strategy by the Court would lead to counter-judiciary measures by the Executive. Paradoxically, abdication makes the Court gain some status due to its sensitivity to the public mood and to the anti-judiciary coalition, despite the non-intervention policy it takes.

Environment 4 completes the picture. The equilibrium in game 4 is adjudication-evasion. A comparison of games 2 and 4 reveals that majoritarian support is more important to the Court's power than the existence or non- existence of an anti-judiciary coalition. Supreme courts gain more from adjudicating a majoritarian appeal, when anti-judiciary coalition exists, and they gain little from adjudicating a countermajoritarian

appeal even when no anti-judiciary coalition exists.

The institutional game we suggest and analyze illuminates why Courts may gain or lose status as political actors. The game only covers one dyad (Executive-Court) and explains only one part of the picture. But we demonstrated the theoretical and empirical gains in conceptualizing supreme courts as constrained actors using the logic of strategic games. Paradoxically, in using this approach we recognize the importance of cultural settings as a significant part of the environmental configurations that are essential for the study of courts as political actors.

As a final point we wish to emphasize an important difference between the approach adopted here and the approach that is prevalent in the literature cited above. The majority of the studies that look into the strategic nature of the behavior of justices and courts model the Court's strategic decision in terms of an attempt to form or implement some policy position in some dominant policy space. The trend in this literature is to demonstrate that the median justice has clear policy preferences. Then, the literature emphasizes how the Court's decision is influenced by its desire to bring about the formation or implementation of the policy position which is the closest possible, sometimes given the actions of other institutional players, such as the President and Congress, to the most preferred policy position of the median justice.

This dominant trend in the literature is not surprising, given the well -established and independent status of the U.S. judicial system, which is the subject of most of these studies. However, in most democratic political systems the status of the Supreme Court cannot be taken for granted. Therefore, as we move from the study of American politics to a more comparative approach, we must make one step backwards and model the way in

which the Court establishes, maintains, improves or loses its status. This is the main focus of this article.

Put in other words, especially the literature about courts and justices in American politics inclines to model the strategic interaction between the Court and other institutional actors as concerning the struggle over the implementation of one or another policy position, taking the status of the Court, implicitly, as given. We model the struggle of the Court to establish, maintain, and improve its political status vis-a-vis other institutional actors and leave implicit (though present) the differences in preferences between the Court, the public, and institutional actors in the Court's immediate environment.

End Notes

[i] Game theorists often mention that the payoff distributions of games are determined by the environment in Which, the game is played. Our model demonstrates how this basic notion can be very useful for comparative studies of institutions.

[ii] HCJ 320/80 Kauseme V. Minister of Defense [1980] P.D. 35 (3) 113.

[iii] HCJ 5973/92 The Association for Civil Rights V. The Minister of Defense [1992] P.D. 47 (1) 267.

[iv] HCJ 64/51 Daud V. Minister of Defense [1951] P.D. 5, 1117; HCJ 239/51 Daud V. Committee of Appeals [1951] P.D. 6, 229; HCJ 141/81 The Committee for the Ikrit Refugees [1981] P.D. 36 (1) 129.

[v] HCJ 428/86 Barzilai V. The Israeli Government [1986] P.D. 40 (3) 505.

[vi] HCJ 734/83 Shain V. The defense Minister [1983] P.D. 38 (3) 393.

[vii] HCJ 910/86 Ressler V. The Minister of Defense [1986] P.D. 42 (2) 441.

[viii] HCJ 680/88 Schnizer V. The Chief Military Censor [1988] P.D. 42 (4) 617.

[ix] See for example: HCJ 58/68 Shalit V. Minister of Interior [1968] P.D. 23 (2) 477.

[x] HCJ 153/87 Shakdiel V. The Minister of Religion [1987] P.D. 42 (2) 221; HCJ 953/87 Poraz V. The mayor of Tel Aviv [1987] P.D. 42 (2) 309.

[xi] HCJ 5364/94 Velner V. Rabin, Labor and Shas [1994] P.D. 49 (1) 758.