How Far do Justices Go: The Limits of Judicial Decisions

Professor Gad Barzilai

Tel Aviv University

Staging the Setting

When one tells the political genealogy of Israel, since its formal inception in 1948 until 2003, a telling conceptual lesson may be drawn from the adjudication of Israel's hectic public and political life. The almost unparalleled prominence of its Supreme Court sitting as a High Court of Justice [hereafter- HCJ] is intriguing and fascinating from comparative perspective, as well since the number of cases debated before the Court is about several thousands every year beginning from the 1980s. Furthermore, in the outset of the 21st century there is almost no political public controversial affair in Israel that has not formally been named as a legalistic and litigious matter, and debated in the HCJ.

In most democratic regimes, e.g., Germany and the USA, such an extensive judicial engagement of the federal constitutional courts in public and political affairs is impossible due to structural constitutional barriers. Only several dozen cases are annually debated on docket in these courts following careful and some preliminary legalistic selective procedures. In other democratic political regimes, like Japan, cultural reasons of lack of belief in litigation as a major avenue for resolving sociopolitical and economic conflicts discourage massive judicial engagement of the Court in public life. Hence, while Israel is only one of many comparative examples

around the globe of extensive litigation, the judicial engagement of its HCJ, which has to discuss several thousands appeals every year, deserves a special conceptual attention in the junction of political science and law.

The purpose of this article is nor to document the emergence of the HCJ to its current public_dominant position, neither to describe series of its rulings. These topics have already been discussed and analyzed in the professional literature. Rather, in this article I would like to point to the main causes and analyze the main ramifications of the Court's judicial engagement in public life, within a theoretical framework.

Theoretical Framework: A Concept of Political Judicial Making

Until the beginning of the 20th century, once the realist approach to law and society was emerging, a prevailing concept among scholars of modern law held that justices solely rule on concrete disputes concerning specific controversial issues (*lis*). The rules of judicial engagement were largely perceived as based on autonomous set of external criteria that are transcendent to immediate sociopolitical interests. Liberal democratic theory for its part has perceived justices, in theory and in empirical research, as institutionally separate from governmental officials and legislatures. In different cultures around the globe, and in various languages, officials and legislatures have been perceived as policy makers, while justices have been perceived as messengers of normative justice as opposed to political praxis.

Some prominent trends in liberal political theory and in theories of law and society have generated that erroneous conception which has dichotomized between policy

making and judicial decisions. Apparently, whilst policy makers were supposed to navigate the polity, justices were aimed to resolve legalistic disputes. With the emergence of legal realism in the 20th century and later with the evolvement of critical political legal studies, such a dichotomy between law and policy making has gradually been demystified. Empirical studies concerning issues ranging from education, housing, racial relations, gender issues, health, abortion, transportation, religion, and national security, have demonstrated that justices formed and promoted public policy, above and through their functions in resolving distinct and concrete legal disputes (Fisher, Horwitz, and Reed: 1993). Even in countries like USA, England and Israel where there is in formal principle no *a-priori* judicial review by the courts, justices are policy makers who have abstracted concrete remedies and made them available for public policies.

Justices in state courts have special characteristics as policy makers. They are often nominated for life [as in the US Federal Supreme Court] or at least enjoy long terms of tenure before retirement [e.g., in Israel, where justices retire at the age of 70]. Hence, they are not subjected to electoral cycles to the degree that other politicians are subjected. Their decisions are not phrased in formal political language, but rather they are formulated in a legalistic language, often within the formal and even technical text, that may be seen in public as "objective" and as "politically neutral." The inclination of courts and justices to use myths of judicial supremacy and procedural justice, that surround their professional terminology enables them to objectify their institutional interests and the ideological and political meanings of their decisions and renders them a great deal of political power. In other words, justices

often hide under veil of myths as if they are never politically biased (Fitzpatrick: 1992; Glendon: 1991).

That public image of courts in democracies as being politically neutral is a double-edged political sword. On the one hand, it provides courts the ability to engage in political affairs, based on litigation and cases submitted to courts by various public agents, like Non Governmental Organizations (NGOs). The more a political setting is publicly viewed as segmented, polarized, fragmented and corrupted, the more appeals are submitted to courts that are perceived as detached from low politics and as reliable institutions of democratic supervision. On the other hand, it makes courts rather confined in their predilection to actually challenge the state, its power foci, and legal ideology, since such a systematic challenge may be publicly seen as biased and political.

Courts are facing three meaningful constraints as institutions of policy making. First, national narratives are constraints. State courts can not and would not incline to struggle with national narratives, i.e., with the most fundamental ideologies of the state. Accordingly, one would not expect the US Federal Supreme Court to directly challenge the value of the American Federation or to significantly criticize the essence of the capitalist system. The second constraint is public opinion, and the fact that only rarely courts rule against a specific and prevailing public mood as articulated by influential public organizations and communities (Barzilai and Sened: 1997; Mishler and Sheehan. 1993). In other words, courts are majoritarian and they incline to rule in compatibility to the usually perceived general public trend as reflected in political struggles and political pressures.

It does not mean that justices ignore the formal legal text. However, where the formal legal text is broad and vague enough (as legal texts usually are), a majoritarian interpretation by the justices is more plausible than an alternative challenging hermeneutics (Cover: 1992; Mishler and Sheehan: 1993). Courts would like to be supported by the general public, especially by those public segments that empower them as political institutions- the middle and the upper social classes and the professional legal community as law professors, lawyers and legalistic reporters. In this context, the attitudes of the professional community might have a special effect on justices. The third constraint is structural. Supreme Courts might sense less secure in altering a certain status quo whilst a certain significant political coalition, e.g., within the parliament and the executive, might overturn the court's ruling through counter-judicial legislation (Epstein and Knight: 1998). In other words, the strength of a political coalition outside the courtroom might well affect the tendency of justices to rule in a way that change a prevailing public policy (Barzilai and Sened: 1997).

Until now, I have posed the strategic political environment in which justices are operating as policy makers through judicial engagement in public issues. There are four variables that should be counted and expounded in any theoretical and empirical analysis: the relevant legal text, national narratives, majoritarian/counter-majoritarian mood in its relation to appeals submitted to court, and the political coalition/opposition outside the courtroom that may react to the judicial ruling. A fifth variable may be the judicial coalition within the courtroom, but this variable deserves a separate article by itself. Now, let us turn to justices as policy makers and judicial engagement in public issues in Israel.

So, How Far They Go: Justices as Policy Makers in Israel

Courts are agents of policy making in more than one political facet. They may generate legality to a prevailing public policy; they may disqualify a certain public policy as being unlawful, and they may impose new criteria for forming and revising a public policy. Through each one of these options justices may significantly influence political power either by preserving the status quo or by altering the configuration of political power. Let us see to what degree justices in Israel have offered new guidelines of public policy in the most prominent political dimensions. It will be expounded based upon the theoretical framework elaborated above.

National security—issues of war, peace, borders, terrorism, censorship, occupied territories, and military force--- has surely been the most prominent sphere of public policy in Israel since the state inception in 1948, despite a diversity of basic social problems. Issues narrated as 'national security' have dominated the political agenda, including the legal setting, whilst marginalizing crucial social issues. Thus, contribution to the Israeli militaristic culture has been the main criterion for promotion of politicians to influential positions in the public sphere. Furthermore, political parties have often gained electoral advantages over their partisan rivalries due to some particularistic and nationalistic attitudes in the sphere of national security. With the occupation of the West Bank and Gaza Strip in the 1967 war, the denotation of 'national security' to additional aspects of public life has expanded. Accordingly, especially after the 1970s, more and more appeals to the Supreme Court have dealt with issues of national security, largely defined.

Among others, the Supreme Court was asked to adjudicate appeals against the military censorship, military training programs, scope of compulsory military service, promotions in the military, equality for women in the military, military disobedience, land confiscation and house destruction and expulsions in the 1967 occupied territories, administrative detentions, prevention of terrorism acts, and interrogations (Kretzmer: 2002). In that context the question is how have the justices functioned as policy makers?

Until the 1990s, Israeli public opinion has largely been resentful to adjudication of national security affairs. In large, the public has attributed a great deal of faith in the HCJ. Even the Arab-Palestinian minority in Israel has considered the Court as a guardian of democracy. Yet, only a minority among the Jewish public has justified adjudication and intervention of the Court in the discretion of military and security officials (Barzilai, Yuchtman-Yaar and Segal: 1994, Barzilai: 2003). Furthermore, that public tendency of opposition to judicial engagement in national security affairs has reflected ruling elite and counter-elite, as well, with the exception of the Arab-Palestinian minority and some very dovish Jewish political groups.

Accordingly, the rate of judicial intervention against the discretion of military and security authorities has been very limited. Customarily, the justices have accepted the security arguments raised by governmental lawyers and enthusiastically supported by affidavits of chief military officers and commanders of the security services. Thus, almost all the appeals against the legality of the occupation and against the legality of military and security activities in the occupied territories, were dismissed, and similarly was the tendency in all other security-related issues (Kretzmer: 2002). A

sense of judicial uncertainty facing imagined and real security threats and the control of the military and security establishment over relevant information have significantly affected that tendency. Additionally, secrecy applied by the administration to evidence that might play in favor of the appellants has added to obedience of the justices in state courts to national narratives and to state power foci. The myths that surround security arguments as reflecting the 'general will' have made the probability of winning a case against the security establishment rather limited (Barzilai: 1998).

In legal cases in which Palestinians were involved, the chances of a Palestinian appellant to win a case in Court were small, since the Court was composed of Jewish justices that identified themselves as being at war with the Palestinians. Hence, the Court was not impartial in referring to severe conflicts between the Jewish state and Palestinians, especially those Palestinians residing in the occupied territories (Shamir: 1990). The Court was operating as a legalistic agent of the Jewish state and it significantly inclined towards the security arguments raised by the security establishment.

Furthermore, the ability of the Court to judicially intervene in the discretion of the political-security authorities without risking a counter-judicial legislation and anti-judiciary administrative sanctions was very confined. The legal text itself was articulating the militaristic character of the Israeli society, as a society in a warfare, and would assist the Court in excluding the possibility of such a judicial intervention. Thus, *inter alia*, the formal law enabled the authorities to impose censorship on evidence, and it confined judicial supervision in cases as tortures, house demolition, and administrative detentions. The situation in the 1990s onwards could have been

different since in the 1990s Israeli society has experienced some liberal cultural effects on its jurisprudence. Individual rights have been more salient in court rulings and in legislation, more than ever before. In 1992, the most symbolically important laws in Israel regarding civil rights were enacted: Basic Law- Human Dignity and Freedom; Basic Law- Freedom of Vocation. Especially the former should have affected court rulings concerning civil rights, and regarding human rights in the occupied territories.

Such alterations in the formal legal text have reflected broader cultural and sociopolitical proclivities. Israeli society has become more individualistic and bourgeoisie in its middle and upper classes' cycles, especially among Jews (Hirschl: 1997; Mautner: 1993; Shamir: 1994). Generally, liberalism should increase civilian supervision over the armed forces and the security organizations since these organizations may inflict severe damage on civil rights. Yet, the Court has chosen to legalize the prevailing public policy of the security-military establishment rather than to alter it. More Palestinians in the 1990s could have reached out-of-court settlements and gain at least some of their remedies (Dotan: 1999).

Those out-of-court settlements were very focused on very specific remedies for the Palestinian appellants, in a way that only part of their appeal was accepted. The settlements were often unpublished as formal court rulings. Hence, they had enabled the Court to articulate and implement a certain liberal discourse of individual rights, and yet to evade a possible institutional collision with the executive and the security-military establishment by not overtly challenging their policy goals.

Generally, the Supreme Court has legitimated and legalized the political and military-security establishment as far as the control over the occupied territories is concerned, and has inclined to prefer arguments of national security to contrary arguments concerning human rights. Notwithstanding, while core issues remained untouched by the Court, as the military occupation itself and the Jewish settlements, some reserved contribution of the HCJ to formation of public policy should be noted.

Three important examples are sufficient- A. the Court intervened in an exemption arrangement between the government and the ultra-Orthodox community, which had existed since 1948, which granted collective exemption from compulsory military service to Yeshiva students in the ultra-Orthodox sector. After a series of rulings beginning in 1970, along the 1980s, where the Court had dismissed appeals against that arrangement, it decided in 1998 to uphold a further appeal. That appeal reflected a majoritiarian public mood among the general public and most of the Jewish elite, which had resented the exemption given to ultra-Orthodox men.[1] The HCJ ruled that the arrangement was unlawful, since it was not based on legislation but on administrative regulation, and that it had created severe problems of discrimination. However, the Court was unwilling to be the final institutional forum to discuss that issue, and it ordered the Knesset to discuss it.

B. The Court intervened and ruled against several methods of tortures routinely used by the security authorities, primarily against Palestinians in the occupied territories.

[1] HCJ 3267/97, 715/98 *Ressler V. Minister of Defense, P.D. 52 (5) 481.*

The Court recognized those methods of tortures as unlawful.[2] C. The HCJ ruled that newspaper's articles, which publicly criticized the *MOSAD*, Israel's secret security service, and its leaders, did not constitute a *prima facia* clear and proximate danger to national security. Furthermore, the HCJ ruled that the onus of proof is on the defense establishment to demonstrate reliable claims why to impose censorship on a newspaper.[3]

In all these three instances the Supreme Court has changed its own previous rulings. In all the three- rather exceptional- instances the justices themselves articulated liberal arguments as the main motive for their change in the legal concepts and their ambition to somewhat alter the relevant public policy. Thus, equality in allocation of public burdens, human dignity in its individual sense, and freedom of expression were the rhetorical arguments propelled by the HCJ in its rulings. In all the three instances, no solid extra judicial political opposition, to the court's ruling, was expected.

State-religion affairs are another important dimension of public policy in Israel. Traditionally, the Israeli Supreme Court was involved in shaping the Jewish characteristics of the state, and it has legitimated its Jewish constitutional fundamentals. However, most of the justices are secular Jews, and none of the justices has ever been ultra-Orthodox religious Jew heretofore (March 2003). Most of the justices until the 1970s were with a German legal education, and afterwards, with

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[2] HCJ 5100/94 *The Public Committee for the Prevention of Tortures in Israel V. Israel Government and the Shabak* (September 6, 1999).

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

American or English or Israeli legal education (Edelman: 1994). Hence, traditionally, the justices have attempted to mitigate between the Jewish ethnicity of the state and some secular values of human rights and civil rights. Yet, in some salient legal cases the justices were overruled by a counter-judicial legislation, led by religious and observant MKs (members of *Knesset*) aimed to cancel court rulings that were perceived as too liberal.

The tensions between Jewishness in light of the Orthodox religion and liberal values were evident in the political legal field, especially since the mid-1980s. Again, let me suggest several examples: A. the Court has decided in 1986 and 1987 to enable women to be elected to religious councils in Israel, rejecting the arguments of the chief rabbinate against nominations of women to those positions according to Jewish *Halacha*.[4] In doing so the HCJ has preferred secular hermeneutics over a religious one. B. The Court ruled that religious conversions to Judaism, practiced outside and inside Israel, are valid for purposes of administrative national registrations, even if done according to non-Orthodox religious procedures.[5] C. The Court ruled that the Chief Rabbinate could not use its authority to supervise *Kashrut*, Jewish dietary law, in order to impose other religious prohibitions in public places.[6]

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[4] HCJ 153/97 *Shakdiel V. The Minister of Religious Affairs*, P.D. 42 (2) 221; HCJ 953/87 *Poraz V. The Mayor of Tel-Aviv-Jaffo. P.D. 44 (3) 317.*

[5] HCJ 1031/93 *Passaro and The Movement for Progressive Judaism V. Minister of Interior* P.D. 49 (4) 661.

[6] [6] HCJ 3872/93 *Metaral V. Prime Minister and Minister of Religion* P.D. 47 (5) 485.

In all these instances, as in others, the judicial elite has intervened in public policy whilst reflecting the more liberal secularized trends within the Jewish middle-upper class, and its organizations, as reflected also in the professional secular legalistic community (Mautner: 1993). However, due to structural and cultural constraints, mainly the non- separation of religion from state, and the political power of the ultra-Orthodox establishment, the Court has generally been careful not to incite a political opposition to its rulings. Therefore, in several prominent public issues of religious conversions, public transportation in *Shabat,* and the exemption of ultra-Orthodox *Yeshiva* students, the Court has preferred that other political bodies as the parliament and public committees will virtually resolve the conflicts. The justices- as policy makers- have faced the potentiality of severe political crises that might inflict damages on the Court's public status *vis-a-vis* other political institutions.

More generally, judicial engagement of the HCJ in public policy has often been confined in actuality to attempts to form for other authorities—especially the executive and its branches of control---- certain public limits that the Court encourages in light of political, socioeconomic and legal processes. Only rarely did the Court actually intervene directly in the parliamentarian and administrative discretion through the nullification and alteration of a certain public policy. When the HCJ has ruled and intervened in the executive discretion, however, it has done so without infringing on any major public policy, but rather through portraying democratic rules of the collective game. Thus, in enforcing 'affirmative action' for women in government companies, and enforcing the Air Force to admit women to entrance examinations of flight courses, the HCJ did not cancel a public policy. It

either followed Knesset's legislation, as in the case of 'affirmative action'[7], and enforced some confined gender equality within the military.[8] Yet, it has not generated overall reforms of public policies. What the Court has done, under the ideological, institutional, and cultural constraints, is to incite a somewhat more inclusiveness of the rules of the collective game, in ways that incite little more accessibility of deprived groups and communities to participate in the collective domain.

The Court has operated within the well- known and documented legal ideology of a 'Jewish and Democratic State', embedded in the Basic Laws of 1992 and 1994, and in various court rulings. Justices are organs of the state, and therefore can not and would not like to be active agents of major political reforms in major issues in the level of public policy. They can be only active actors of pluralization in the rules of the political game, and actors of generation of prevailing values and practices already embedded by liberal elite. 'Judicial activism' might be a very illusive rhetoric for studying courts unless taken within an analytical framework and carefully sorted, as was elaborated above.

Do Justices Bring about a Social Change?

Let me shortly expound my reserved response to that query. Gerald Rosenberg shows in his path- breaking book (Rosenberg: 1991) that contrary to conventional

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[7] HCJ 453/94 *The Israel's Women Network V. The Government of Israel*, P.D. 48 (3) 501, HCJ 2671/98 *The Israel's Women Network V. Minister of Labor,* P.D. 52 (3) 630.

[8] HCJ 4541/94, *Miller V. the Minister of Defense*, P.D. 49 (3) 94.

expectations, the US Federal Supreme Court has not generated significant social changes in the US, not even through utterly prominent court rulings. Rosenberg argues and empirically exhibits that whilst a few salient court rulings have shaped the legal rhetoric, court rulings could not and have not altered basic sociopolitical characteristics of the state and the public. Based on my own studies I share Rosenberg's main argument. Yet, his skeptical view of courts as agents of social changes should be contextualized and theorized within broader comparative fabrics.

Whilst pondering whether justices change sociopolitical aspects of political regimes we should distinguish between the following political dimensions: legalistic changes; social supra structural changes; social infra structural changes. The first dimension deals with rhetoric of court rulings and possible changes in legal interpretations (legal hermeneutics) rendered to the legal text, either legislation or previous court's rulings. The second dimension deals with minor or secondary social changes that might be considered as epiphenomena, as very confined in their overall scope; and the third dimension deals with major social alterations, that change the very basic sociopolitical structure of a society and some of its central characteristics. Let me analyze each one of these changes, pointed to on the conceptual level, in the Israeli context.

As was previously noted, the rhetoric of legalistic interpretations and its assorted legalistic ramifications has been liberalized since mid 1980s. Individual rights have been underscored in legislation and in court rulings more than ever before, as part of the growing imitation of American liberal culture. The rhetorical alteration in legal hermeneutics has evidently been prominent. Justices that have been involved in public policy issues have largely used terms as 'freedom of vocation', 'freedom of

religion', 'freedom of expression', and 'equality' citing largely American jurisprudence. Furthermore, a few social alterations could have been traced. *Inter alia*, following Court rulings there is an increase in the numbers of women in government companies and in combat and field unites in the military. There is more judicial supervision over allocations of government budgets to religious institutions of the Arab-Palestinian minority, more accessibility of homosexuals to the legal system, pluralization of Jewish religious ceremonies and heteroganization of religious councils and religious institutions of learning. Freedom of expression is much better embedded in the constitutional fabric then social rights, and there is some protection of the Arab language as long as it is within the boundaries of freedom of expression. The land regime in Israel may have been somewhat democratized, once the Court has ruled that allocation of state lands should be in principal subjected to equal competition among individuals.

Notwithstanding, the practical changes followed by such rhetoric were secondary and very confined to the Jewish elite groups. Prevalent public policies in Israel have remained largely intact. The military's autonomy and the autonomy of the security forces have largely remained unaltered. Whilst more appeals against the military establishment have been raised in Court, since the mid-1980s, the basic infra structural relations between the military and the government have not been altered. Appeals to the Supreme Court against gender discrimination in the military, as well as appeals against the legality of a few methods of interrogation, and against promotion of officers suspected in misbehavior could have incited more media attention and some public criticism.

However, due to the constraints analyzed above, the Court could not have functioned as an effective source of democratic supervision over the military, and security arguments have continued to prevail and to be dominant over other alternative civilian arguments. Thus, the ruling that made the exemption arrangement of *Haredi* students unlawful has not resulted heretofore in any significant social change and towards beginning of 2003 the figures of Yeshiva students who received exemption from compulsory military service remains high. Moreover, whilst the Court has ruled that cruel interrogations might be recognized as unlawful, the Attorney General has instructed the security authorities that under the doctrine of necessity if a clear danger to national security exists the inquisitor might enjoy the defense of necessity during criminal procedures. Hence, despite a few rulings that intervened in the discretion of the military and security forces the military core values have not been effected by Court rulings.

The same can be said about the possible sociopolitical ramifications of court rulings over state-religion relationships. The Court has taken a path of privatization of the Orthodox religion from the state, and has imposed more liberal values and constraints over ultra-Orthodox religious bodies. As a result, Jewish religious Orthodoxy has been subjected to more competition from non-Orthodox religious bodies, mainly the progressive movement. The latter has gradually taken more political strongholds in Israeli public life and has gained more influence in legal issues as conversions and marriages, and its members have gained more representation- however still very confined- in public bodies as the religious councils. Yet, no major change has taken place, heretofore, in the basic infra structural relations of non-separation of state from religion and in the domination of ultra-Orthodoxy and Orthodoxy in Israel public life.

In that respect, as well, the Court did not significantly challenged public policy of preservation of a Jewish state. Its assertive liberal rhetoric was subjected to the national narrative of a Jewish state, whilst its rulings somewhat confined state's Orthodox religiosity.

Hence, the HCJ's contribution was not through canceling a prevailing public policy. However, it created a more balanced political setting. Non-Orthodox hermeneutics could have been more accessible to compete on public consciousness and more non-Orthodox mobilization of ideas and human beings could have taken place, in a political fabric that before the HCJ's rulings in the mid-1980s was completely dominated by the Orthodox and ultra-Orthodox establishments. On the one hand, the Americanized processes of individualistic perceptions, and the massive immigration of non-Jews and secular Jews from the Soviet republics (1989-1993), had formed the cultural fabric that motivated the legalistic elite and NGOs to incite such reforms of more plurality in some religious practices. On the other hand, aware of its political status, the HCJ has not challenged public policy of non-separation of Orthodoxy from the state, in ways that could have incited substantial extra-judicial opposition.

Conclusion

Justices are policy makers, with unique characteristics, who operate within several cultural and institutional constraints. Usually, they do not abolish a certain prevailing policy; rather they affect the rules of the political game. Following a theoretical model, I offer how to analyze the dilemma to what degree justices in a specific comparative context may intervene in a concrete public policy. The dimension of

public policy, which is subjected to judicial intervention, should be conceptualized as well.

The variables of ideological, cultural, and institutional constraints that were discussed above illuminate not only the degree of adjudication and judicial intervention of justices as policy makers. They also clarify the degree to which judicial review may generate social changes. Whilst the ability and willingness of justices to alter infra structural sociopolitical trends and relations are very confined, courts may incite a process of mobilization. Justices can help in altering the legal text in ways, which offer some avenues to alter supra structural political practices, procedures, and allocation of goods. In Israel, justices have fostered, *inter alia*, legality of non-Orthodox religious practices, and enlarged the degree of freedom of expression regarding some aspects of national security, but they could not alter basic sociopolitical processes.

Hence, democracies would not be able to exist without justices as policy makers, but they would not be able to exist only based on the very confined and problematic ability of justices to rule and navigate the polity. To speak about judicial activism as a trend in policy-making is an oxymoron. Justices can not go too far, and often they would not like to proceed too far and that is in order to preserving a rather privileged public position in state power. Since Israel is often quoted as having a very active court, deconstructing such a myth is a good departure base for creating a theory of law and politics that portrays judges and justices as part of the political power foci, and not only as generators of political processes.

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