

**A NEW LOOK AT PUBLIC LAW ADJUDICATION:  
A CRITICAL ORGANIZATIONAL ANALYSIS  
AND AN ISRAELI TEST CASE**

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*The enormous legal literature on courts largely disregards the basic fact that courts are organizations. This Article seeks to fill this void by uncovering and critically exploring vital organizational dimensions of adjudication. The Article argues that harnessing insights from organizational theory to the study of courts will not only render accuracy and conceptual depth to the description of courts, but will also offer a sounder normative prescription as to their operation. The Article discusses, in particular, a leading paradigm (the “social interaction” or “attitudinal” paradigm) of organizational theory that bears on the fundamental subject of hierarchical control within the judiciary. Within the framework of this analysis, the Article considers the test-case example of the High Court of Justice of Israel (“the HCJ”), a world-renowned but structurally perplexing common law public law court. The Article exposes and unpacks hierarchical, inter-court tensions that are endemic to public law adjudication, and argues that therein lies a novel explanation for the endurance of the HCJ’s peculiar configuration.*

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## I. INTRODUCTION

Courts are organizations. This seems to be a trivial statement. After all, one does not have to be well versed in organizational studies to observe that courts possess dominant features of commonplace organizations.<sup>1</sup> Yet, surprisingly enough, current legal scholarship is almost oblivious to this apparent fact.<sup>2</sup> Thus, a

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1. For definitions of “organizations,” see *infra* note 86 and accompanying text.

2. Exceptions to this generalization naturally exist. See, e.g., Salmon A. Shomade & Roger E. Hartley, *The Application of Network Analysis to the Study of Trial Courts*, 31 JUS. SYS. J. 144 (2010). However, as noted by Shomade & Hartley, there is no doubt that contemporary legal literature shows little interest in organizational studies and in the organizational facets of courts’ operation. The validity of this observation becomes particularly pronounced when we note an earlier generation’s line of studies examining the (American) judiciary through the lens of organization theory. See, e.g., Lawrence B. Mohr, *Organizations, Decisions, and Courts*, 10 LAW & SOC’Y REV. 621 (1976); Wolf V. Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW & SOC’Y REV. 759 (1977). For an attempt to redirect the scholarly attention to organizational-institutional factors in the analysis of present and past practices of courts, and for an explanation of the last generation’s declining interest in such factors, see Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1–12 (Cornell W. Clayton & Howard Gillman eds., 1999). Lastly, as superbly exemplified in the previous source, today we are witnessing an upsurge in the application of new-institutionalism to legal institutions. See, e.g., ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); SUPREME COURT DECISION-MAKING, *supra*; Assaf Meydani, *The Supreme Court as a Political Entrepreneur: The Case of Israel*, 27 ISR. STD. REV. 65 (2012). For new-institutionalism, see, for example, B. GUY PETERS, *INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE ‘NEW INSTITUTIONALISM’* (1999); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984); Philip Selznick, *Institutionalism ‘Old’ and ‘New’*, 41 ADMIN. SCI. Q. 270 (1996); Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC’Y 5 (1998); W. RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS* 26–46 (3d ed. 2008). In light of this rising trend it should be noted that, as a definitional matter, it is not uncommon for scholars to conflate “organizations” and “institutions,” to the extent that it has even been suggested that these two terms have become virtually identical. For a discussion and critique of this theoretical development, see Ove K. Pedersen, *Nine Questions to Neo-Institutional Theory in Political Science*, 14 SCANDINAVIAN POL. STUD. 125, 131–34 (1991); see also PETERS, *supra*, at 97–98, 105–06; Elias L. Khalil, *Organizations Versus Institutions*, 151 J. INSTITUTIONAL & THEORETICAL ECON. 445 (1995). Finally, it should also be noted that the distinction between “organizations” and “institutions,” to the extent that it

whole body of literature devoted to the study of a defining feature of modernity—the prevalence and dominance of organizations in our lives<sup>3</sup>—is generally absent from the study of law and legal institutions. Furthermore, even when jurists study courts and struggle with extraordinary judicial configurations, they commonly fail to consult organizational studies.<sup>4</sup> Consequently, jurists' understanding of courts, the very organizations that lie at the heart of the legal intellectual endeavor, is substantially impaired.

This Article's goal is to sensitize the legal academia's intellectual palate to an organizational perspective on courts. It aims to demonstrate how drawing in organizational studies to the legal conversation on courts enriches our grasp of courts by raising a new set of questions and answering longstanding puzzles. As a result, a more-realist description and conceptualization of courts will be produced, which will not only be richer in details and fuller in scope, but also yield, in turn, a sounder normative prescription for the operation of courts.

In order to meaningfully and concretely display the key benefits of the theoretical prism advanced in the Article, I will scrutinize below in detail one thoroughly researched yet perplexing common law court with a view to demonstrating how it may be innovatively approached via organizational studies.<sup>5</sup> Confining

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is of any importance, is not relevant to the current study, which, as we shall see (*infra* note 85 and accompanying text), revolves around what is clearly a formal, bureaucratic organization.

3. See, e.g., Michael Reed, *Organizational Theorizing: A Historically Contested Terrain*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES 19–24 (Stewart R. Clegg et al. eds., 2d ed. 2006); SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 315–84 (2006); STEWART CLEGG & DAVID DUNKERLEY, ORGANIZATION, CLASS AND CONTROL 33–135 (1980).

4. As we shall shortly see, the legal literature dedicated to the study of the court under review in this Article perfectly exemplifies this failure. See *infra* note 14 and accompanying text.

5. This seems to be the appropriate place to warn against a unitary, homogenous view of the vast files of organizational studies. Organizations have been studied for so many years and from such a diverse array of perspectives that it would be ludicrous to expect that such an intellectual endeavor would result in the emergence of a united and unified doctrine (in this respect, my references to “organizational theory” may be misleading). For an intellectual history of the field, see, for example, Reed, *supra* note 3; Philip Selznick, *Foundations of the Theory of Organizations*, 13 AM. SOC. REV. 25, 29–30 (1948); James G. March, *Introduction*, in HANDBOOK OF ORGANIZATIONS ix (James G. March ed., 1965); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493 (1987); Mitchell P. Koza & Jean-Claude Thoenig, *Organizational Theory at a Crossroads: Some Reflections on European and United States Approaches to Organizational Research*, 6 ORG. SCI. 1 (1995); SCOTT, *supra* note 2, at 1–26; Terry M. Moe, *The New Economics of Organizations*, 28 AM. J. POL. SCI. 739 (1984). See also Gerald F. Davis & Christopher Marquis, *Prospects for Organization Theory in the Early Twenty-First Century: Institutional Fields and Mechanisms*, 16 ORG. SCI. 332, 335 (2005) (“Organizations simply are not the kind of thing amenable to general theory.”); W. Richard Scott, *Institutions and Organizations: Toward a Theoretical Synthesis*, in INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS 55, 55–56 (W. R. Scott et al. eds., 1994). Indeed, as we shall see, the lion's

the demonstration to one court will also help to keep the discussion within manageable proportions.<sup>6</sup> This court is a common law oddity, which is the focal point of a truly atypical judicial arrangement. It has gained worldwide prominence, leaving one to wonder to what extent its peculiarity has been also noticed. The court is the High Court of Justice of Israel (“the HCJ”), which is highly respected throughout the world,<sup>7</sup> and whose justices (notably, Aharon Barak)<sup>8</sup> have acquired an international reputation and are renowned in the United States and elsewhere.

Prestigious as it is, as suggested, a shadow of doubt has always been cast over the HCJ’s unusual organizational position within the Israeli judiciary. While the HCJ is part of the Supreme

share of the organizational analysis conducted in this Article will rely on one paradigm among several to be found in the organizational literature. See *infra* Part III.

6. There is no doubt that the identity of the specific court selected for analysis in this Article will direct, at least to some extent, the discussion. Moreover, there is undoubtedly a degree of selectivity in the organizational aspects I chose to focus on in this study. See *infra* note 19 and accompanying text. As noted *supra*, these aspects concern a particularly neglected, yet vitally important one in the operation of the HCJ and other public law courts. See also *infra* notes 42, 132, 181 (briefly noting additional organizational dimensions of the practice of the HCJ and other common law public law courts in Israel and elsewhere).

7. Take, for example, Ran Hirschl’s impressive and influential work on the global trend of “new constitutionalism.” It relies heavily on the recent legal history of Israel (as well as Canada, New Zealand, and South Africa), and closely analyzes a long list of Israeli Supreme Court cases, almost all of which are HCJ cases. See RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM *passim* (2004) [hereinafter HIRSCHL, TOWARD JURISTOCRACY]. For additional references to the HCJ in the comparative literature, see, for example, Amnon Reichman, *Judicial Constitution Making in a Divided Society: The Israeli Case*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 233 (Diana Kapiszewski et al. eds., 2013); MICHAEL ROSENFELD & ANDRÁS SAJÓ, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 570–71 (2012); RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 139–51 (2010); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 852 (2d ed. 2006).

As illustrated in all the above-cited sources, because of the HCJ’s predominance over Israeli public law jurisprudence (as indicated in sources cited *infra* note 11), usually studies of Israeli public law and related topics are actually based on the HCJ case-law. Thus, even though such studies usually nonchalantly talk of “the [Israeli] Court/Supreme Court of Israel,” they are mostly referring to HCJ cases. For example, it is stated in MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 154 (2002) that “in Israel the Supreme Court has generated a constitutional law of rights and judicial review to enforce those rights . . .” Yet, again, I would emphasize, in the context of this Article, that to the extent the Supreme Court of Israel has done so, it has been done first and foremost in its HCJ capacity.

8. An excellent indication of Barak’s international stature was provided when he was unprecedentedly invited to write the opening essay for the volume 116 of the *Harvard Law Review*, an honor rarely, if ever, bestowed, on a non-American jurist. See Aharon Barak, *The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19 (2002); see also, ROSENFELD & SAJÓ, *supra* note 7, at 724–25, 779–82 (discussing Barak’s jurisprudence in the *The Oxford Handbook of Comparative Constitutional Law*); Eli Salzberger, *Judicial Activism in Israel*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217 (Brice Dickson ed., 2007) (“The Israeli judiciary is portrayed by both Israeli and non-Israeli scholars as one of the most activist judiciaries in the world[.] . . . [I]n the last 25 years Israeli judicial activism has been greatly influenced by the jurisprudence of Aharon Barak . . .”).

Court of Israel, it has plenary original jurisdiction, covering virtually all public law (i.e., constitutional and administrative law) controversies.<sup>9</sup> Consequently, the Supreme Court of Israel operates under two main modes: either as a “regular” ultimate court of appeal, which is mainly concerned with civil and criminal matters,<sup>10</sup> or as court of first instance, as the HCJ, which is *the* public law court of Israel.<sup>11</sup> Prosaically stated, the HCJ is peculiarly engrafted on the otherwise-regular-common law, three-tier judiciary of Israel.<sup>12</sup> It is a court of first and last resort, a seemingly self-sufficient, exceedingly-powerful judicial forum authorized to try public law cases not previously tried by lower courts, nor later reviewed by a higher instance.<sup>13</sup>

How are we to account for the HCJ’s splendid isolation at the apex of the Israeli judicial pyramid? This question has troubled a number of Israeli justices and jurists in the past, who have managed somehow to refrain from meaningfully engaging in organizational studies.<sup>14</sup> An excellent reason to reexamine it today is actually to be found in the current literature on the HCJ’s history. It has recently become apparent that Supreme Court justices have played a crucial role in setting the jurisdictional boundaries between the HCJ and lower courts and in maintaining the HCJ’s powers intact throughout several critical junctures in the HCJ’s history.<sup>15</sup> We know where this chain began—with the

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9. On the HCJ’s exceptionalism in this regard, see, for example, Yair Sagy, *For the Administration of Justice: On the Establishment of the High Court of Justice*, 28 TEL-AVIV U. L. REV. 225 (2004) (Hebrew). Cf. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1375–76 (1973) (“[A] crucial feature of the American system of judicial review [is] its decentralized character. Every court, high or low, state or federal, passes on the constitutional questions in cases properly before it.”).

10. *But see also infra* text accompanying note 58 (noting circumstances in which the Supreme Court deals, in its appellate capacity, with administrative law cases, especially after 2000).

11. *See generally* Itzhak Zamir, *Administrative Law*, in THE LAW OF ISRAEL: GENERAL SURVEYS 51, 77–83 (Itzhak Zamir & Sylviane Colombo eds., 1995); ASSAF MEYDANI, THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS 67–68 (2011) (noting that the Supreme Court is “viewed by the general public as the watchdog over the rule of law and the champion in the fight against corruption and the protection of human and civil rights”).

12. There are three hierarchical tiers to the Israeli judiciary, consisting of 28 Courts of the Peace, spread throughout the country; 6 District Courts, located in major cities; and one Supreme Court, situated in Jerusalem. For a general survey of the Israeli judiciary, see, for example, JACKSON & TUSHNET, *supra* note 7, at 603–06.

13. The only option available to the losing party post-HCJ litigation is to petition the Court to make use of its discretionary power to order a further hearing on the case. *See* Basic Law: The Judiciary, 38 LSI 101, §18 (1983–1984). Yet, the Court has always been very frugal in exercising this power.

14. *See* notably the very recent treatment of a retired justice and a leading public law scholar in 3 ITZHAK ZAMIR, ADMINISTRATIVE POWER 1597–1604 (2014) (Hebrew).

15. *See* Yair Sagy, *The Missing Link: Legal Historical Institutionalism & the Israeli High Court of Justice*, 31 ARIZ. J. OF INT’L & COMP. L. (forthcoming 2014).

very foundation of the HCJ<sup>16</sup>—and that it has uninterruptedly stretched into the present.<sup>17</sup> The recent recognition of this remarkable chain and the identification of several of its key links naturally raise new questions and calls for a rephrasing of familiar, old questions.

Specifically, in light of recent scholarship, the HCJ's organizational anomaly should be reformulated so that it includes different justices' relentless efforts to retain the HCJ's original configuration intact. Henceforth the role played by the justices in sustaining the HCJ's splendid isolation at the apex of the Israeli judiciary must be part of the conundrum. The difficulty is not simply to decipher the HCJ's unusual configuration but also to explicate the ongoing effort of separate justices, working in different eras, to maintain the HCJ as a division of the Supreme Court. Bluntly put, why can they not let it go?

This Article sets out to answer this latter question with the help of organizational theory.<sup>18</sup> The Article's reliance on

16. The HCJ was introduced by the British, not long after they had conquered the land (known then as "Palestine") in 1917, during the last stage of World War I. On the establishment of the HCJ, see Sagy, *supra* note 9. The British would rule Palestine until the establishment of the State of Israel in May 1948. Throughout most of the British occupation of Palestine they governed the land under an internally recognized form of government that was called "the Mandate." See, e.g., NORMAN BENTWICH & HELEN BENTWICH, MANDATE MEMORIES, 1918–48 (1965); ALBERT MONTEFIORE HYAMSON, PALESTINE UNDER THE MANDATE, 1920–48 (1976); TOM SEGEV, PALESTINE UNDER THE BRITISH (1999) (Hebrew).

The HCJ was officially established in Section 43 of the Palestine Order-in-Council, 1922. See The Palestine Order-in-Council, in 3 ROBERT HARRY DRAYTON, THE LAWS OF PALESTINE 2569–90 (1934). As we now know, the foundation of the HCJ (and the introduction of Section 43) was actively sponsored by the British Chief Justice of the time, Sir Thomas Haycraft. He should be considered the founding father of the HCJ, as it was he who conceived of the idea to introduce the HCJ to Palestine, an idea he aggressively pursued and oversaw to its fulfillment. On the establishment of the HCJ, see Sagy, *supra* note 9; Sagy, *supra* note 15.

17. See Sagy, *supra* note 15. It should be emphasized that the Article's analysis is most clearly directed at the current chapter in the history of the HCJ. But it will also illustrate how the contemporary policy of the HCJ with regard to the exercise of its jurisdiction is a continuation of the approach taken by past generations of Israeli justices. Still, even when the Article refers back to prior chapters in the HCJ's annals (especially *infra* Part II), it will *not* reach beyond the period preceding the establishment of the State of Israel. Space does not permit such elaboration, and the Article's "presentist" orientation does not necessitate it.

18. As will become apparent in the following Part, there is no doubt that the number of categories of cases actually dealt with by the HCJ (as a court of first and last resort) has declined over the years, inter alia, due to the reforms such as the one introduced in 2000, which is mentioned *infra* Part II. Yet, as will be also clarified, even in the face of such reforms, the HCJ has maintained and exercised (and is maintaining and exercising) original jurisdiction on a substantial—in numerical terms and even more so in terms of importance or weight—segment of public law disputes that make it to courts. For the caseload of the HCJ, the Supreme Court, and other Courts in Israel, see Assaf Meydani, *The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Perspective*, 16 ISR. STUD. 174 (2011); HIRSCHL, TOWARD JURISTOCRACY, *supra* note 7, at 23, 103–08. It would be fair to characterize the analysis conducted in this Article as essentially

organizational theory appears natural precisely because the phenomenon it canvasses is cross-generational. This fact alone suggests that structural, enduring aspects of the HCJ's operation—aspects of the sort commonly found in organizational theory—are highly relevant to the inquiry. In particular, as illustrated below, when applied to the court system, the organizational prism will focus our attention on the delicate and rarely discussed subject of hierarchical control *within* the judiciary and its possible influence on judges.<sup>19</sup> Taking such an internal point-of-view, the Article will offer a simple reply to the question it set out to answer. Succinctly put, it will be argued that the HCJ endures because it offers the justices a most valuable organizational benefit. The analysis below will highlight the fact that the HCJ's splendid isolation allows its justices to keep a firm grip on the public law jurisprudence of the land, without troubling themselves with potential reservations or sensitivities lower-court judges might have regarding a specific holding or in a particular line of cases. Given that (a) these judges are usually entrusted with the crucially important and often discretionary task of actualizing the Supreme-Court-made law and (b) the relevant branch of law (public law) is perceived as particularly sensitive,<sup>20</sup> the benefits offered by the HCJ's configuration are considerable.

The Article makes several important contributions to the literature. First and foremost, the Article uncovers and explores vital organizational dimensions of common law public law adjudication. Since the Article's inquiry into the HCJ will rely on universal organizational considerations, general observations regarding public law adjudication will be drawn throughout the discussion. Second, the Article's analysis is original in its *critical* organizational inquiry. Notably, the Article is the first to address the inter-judiciary aspects of a central common law court (the HCJ) and the global practice of public law adjudication. In shedding light on this charged subject, the Article offers a particularly valuable contribution to existing literature, which mostly focuses on judicial independence and the exterior threats it

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“a-historical,” a characterization which is rooted in the permanence of this segment in the operation of the HCJ and, of course, in the HCJ's very survival. Note, finally, that the Article's a-historical vantage point focuses our attention on a specific set of issues, yet it naturally does not allow for a discussion of a host of closely-related sets of (historiographical and other) questions, which are dealt with elsewhere. See Sagy, *supra* note 15.

19. For an attempt to introduce such an inter-organizational considerations into the legal analysis of courts, see Yair Sagy, *Orchestrating the Judiciary? Towards an Organizational Analysis of the Israeli Judiciary*, MISHPATUMIMSHAL—HAIFA U. L. REV. (forthcoming 2014) (Hebrew).

20. “Sensitive” from external and internal perspectives (namely, it is perceived to have a strong bearing on the judiciary's legitimacy as well as on inter-court dynamics). See *infra* Part IV.

faces from the executive and legislature,<sup>21</sup> without paying much attention to the potential internal threats posed to individual judges' independence by inter-judiciary organizational dynamics. Lastly, the Article presents a detailed description of a court, whose holdings are noted across the globe and whose stature within comparative literature is undisputed,<sup>22</sup> yet whose "mechanics" and organizational dimensions have rarely been discussed in literature which has been written both in Israel and abroad.

The Article proceeds as follows. Part II demonstrates the decisive role the justices have played over the years, on and off the bench, in maintaining the HCJ intact; it will also provide a synopsis of the current prevailing construction of the HCJ's jurisdiction. Next, in Parts III and IV, the Article will turn to a critical examination of the current HCJ approach to its own jurisdiction. This critique will be in many respects the Article's core. It will be generally argued that the justices' policy of retaining the HCJ in their hands is based on the following two structural arguments: (1) a conservative perception of public law, as being unique in its social policy orientation, and thus better left in the trusted hands of the select few judges sitting on the HCJ bench; and (2) a certain organizational calculus in which the benefits of the HCJ arrangement are judged by the justices to outweigh its costs. Overall, Parts III and IV will flesh out the central organizational ramifications of the extant HCJ arrangement and demonstrate why they must be included in the debate surrounding the HCJ—as well as other common law public law patterns of adjudication—for a realistic, full evaluation of them to emerge.

## II. THE JURISDICTION OF THE HCJ

This Part will briefly sketch the trajectory of the HCJ's jurisprudence concerning its own jurisdiction. Supplementing the

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21. See, e.g., John Dinan, *Independence and Accountability in State Judicial Selection*, 91 TEX. L. REV. 633 (2013) (reviewing JED H. SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012)); Mark S. Hurwitz, *The Relative Concept of Judicial Independence*, 91 TEX. L. REV. 651 (2013) (same); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 16–17, 19–125 (1981); Peter H. Russell, *Toward a General Theory of Judicial Independence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 1 (P.H. Russell & D.M. O'Brien eds., 2001); John Ferejohn & Larry Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); Charles G. Geyh, *Symposium: Judicial Independence and Judicial Accountability: Searching for the Right Balance: Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006); McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006).

22. See *supra* note 7.



doctrinal sketch, this Part will also outline several illustrative episodes where the justices openly opined, outside of the courtroom, that the HCJ must be kept in their possession. As we shall see, throughout the HCJ's history,<sup>23</sup> incumbent justices have had a controlling voice when setting and retaining its extensive jurisdiction. Encapsulated in the last statement is a cross-generational endeavor dedicated to keeping the HCJ's expansive and secluded jurisdiction unchanged. Essentially, this Part explores different manifestations of this enduring endeavor.

### A. On the Bench

According to accepted wisdom, the whole field of public law adjudication in Israel has been undergoing a "revolution" for a generation, best illustrated by the introduction in 2000 of "the District Court Sitting as Courts for Administrative Matters,"<sup>24</sup> sometimes referred to as "the Small HCJ."<sup>25</sup> As a trial court, it deals with a long list of categories of mainly administrative law disputes (e.g., public tenders and disputes regarding education and religious authorities' duties), which have traditionally been dealt with primarily by the HCJ but are today normally heard by the Supreme Court only in its appellate capacity (i.e., by the "Supreme Court Sitting as a Court of Appeal in Administrative Matters").<sup>26</sup> Further, it turns out that the "revolution" was heralded, even sponsored, by the HCJ in a series of cases decided during the 1990s in which the Court itself declared lower, "regular" courts<sup>27</sup> competent to try several categories of public law matters (such as public tenders and most urban planning matters).<sup>28</sup>

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23. *But see supra* note 17 (excluding the Mandatory HCJ from the discussion).

24. *See* Administrative Courts Law, 5760–2000, SH No. 1739.

25. *See, e.g.*, MEYDANI, *supra* note 11, at 8 n.1.

26. And there is more yet to come. As indicated by a bill, promulgated in 2013, the next phase of the revolution is likely to shortly reach the Courts of the Peace, which will be likewise empowered to try several sections of administrative law controversies. To recall, the Israeli judiciary is composed of three tiers: Courts of the Peace, the District Courts, and (one) Supreme Court.

27. *See* HCJ 991/91 Pasternak v. Minister of Constr. & Hous. 45(5) PD 50 [1991]; *see also, e.g.*, LCF 1287/92 Boskilla, Chief of the Tiberias Jewish Religious Comm. v. Tzemach 46(5) PD 159 [1992].

By "regular court(s)" I mean primarily the lower two tiers in the Israeli judiciary (Courts of the Peace and District Courts), and also the Supreme Court *in its appellate capacity*. For the Supreme Court's two divisions, the HCJ and the appellate branch, *see supra* text accompanying notes 10–11. *See also* Ashutosh Bhagwat, *Separate but Equal? The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 983–85 (2000) (discussing the term "inferior courts" in the American context).

28. *See* cases cited *supra* note 27; *see also* Itzhak Zamir, *Public Tenders in Civil Courts*, 1 MISHPATUMIMSHAL—HAIFA U. L. REV. 197 (1992) (Hebrew).

Crucially important to the present discussion, the Court was careful to make clear in its 1990s “transfer” decisions that the HCJ’s own jurisdiction in these matters would not be diminished in the least following the jurisdictional reshuffling of its own design.<sup>29</sup> In doing so, the Court declared “transferred” issues to fall within the ken of “concurrent jurisdiction.”<sup>30</sup> Accordingly, following the HCJ’s decisions “transferring” categories of cases to the lower courts, these latter courts became the first line of attack in most such cases; put differently, following the Court’s decisions, these courts came to normally constitute an “alternative remedy” in such cases. The alternative remedy doctrine enables the HCJ to preliminarily dismiss a case when it could be dealt with in a different forum.<sup>31</sup> It is one item on a list of doctrines that allow the HCJ, as a court of *justice*, to exercise discretion in deciding whether to handle cases that come before it.<sup>32</sup> Finally, a caveat included in the same court’s decisions must be mentioned: the HCJ could decide, based on the same line of reasoning, that a concurrent-jurisdiction case does merit its treatment as a court of first and last resort. After all, the HCJ’s construction has removed all doubt that it retains its own—concurrent—jurisdiction; what remained doubtful, however, was under what circumstances the HCJ would deem it necessary to make use of this power.<sup>33</sup>

The HCJ has always been able to direct public law cases to the lower courts, long before the 2000 “revolution,” provided their jurisdiction to try such cases had been established.<sup>34</sup> Generally, there are two thoroughfares whereby a “regular” court is considered competent to pass judgment on a public law cause of action. First, there is the avenue of collateral attack which allows, under quite broad conditions, for an “incidental”

29. See CA 9379/03 Czerni v. State of Israel 61(3) PD 822 [2006]; HCJ 2208/02 Salame v. Minister of the Interior 56(5) PD 950 [2002].

30. See, e.g., cases cited *supra* notes 27, 29.

31. On alternative remedy, see ZAMIR, *supra* note 14, at 2035–60.

32. As is well known, similar doctrines have long been firmly established in U.S. public law. See, e.g., Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Monaghan, *supra* note 9, at 1365–67, 1371–74.

On the HCJ’s discretion in hearing cases, see, for example, Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 IND. INT’L & COMP. L. REV. 311 (1997); ZAMIR, *supra* note 14, at 1602–04, 1640–41. As indicated in these sources, according to established doctrine, the analysis of the HCJ’s authority has two prongs: first, its jurisdiction is established according to the pertinent legislation, and in the second phase, the question is considered as to whether it is in its discretion to actually exercise that jurisdiction (and try the case under review). In that second level of analysis, preliminary doctrines such as alternative remedy, standing, and justiciability are considered.

33. See HCJ 1921/94 Soker v. Constr., Hous., & Indus. Comm., Dist. of Jerusalem 48(4) PD 237 [2004].

34. See, e.g., HCJ 991/91 Pasternak v. Minister of Constr. & Hous. 45(5) PD 50 [1991]; *supra* text accompanying note 31 (describing the doctrine of alternative remedy).

review of public law actions in any court of law as part of civil and criminal proceedings that fall within that court's jurisdiction.<sup>35</sup> It should be noted that in principle such public actions could certainly be reviewed also by the HCJ.<sup>36</sup> However, the HCJ would regularly refuse to make use of its jurisdiction when an alternative remedy could be found—in this case via collateral attack.

A collateral attack is readily contrasted with a direct attack, whereby an administrative action is disputed “head-on” in court. Paradigmatically, direct attack proceedings open with a petition “frontally” assaulting a certain administrative-agency action in reliance on public law doctrines.<sup>37</sup> The main problem with the avenue of direct attack is that neither the Court nor the Legislature has ably provided thus far a sufficient description of “regular” courts' jurisdiction over frontal-attack cases.<sup>38</sup> The Court has openly acknowledged its own failure in this regard.<sup>39</sup> Nevertheless, it made it abundantly clear that whenever such a direct-attack case might be brought to a “regular” court, it might also be brought in the HCJ.<sup>40</sup> It should be emphasized that this conclusion has actually been a *non sequitur*. The HCJ could have renounced those exact matters that in its judgment could be directly attacked in inferior courts (and handle them only in its appellate capacity). However, as lucidly pointed out by the then-eminent scholar and future justice, Itzhak Zamir,<sup>41</sup> this course of action could have led to the very end of the HCJ, whose services would become redundant as the lower courts took over—following the doctrines of the HCJ itself—the adjudication of all public law matters. The HCJ has refused, and still does, to follow this path to self-annihilation.<sup>42</sup>

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35. Thus, for example, a defendant in a criminal court may plea for the dismissal of her case, arguing that the state's indictment is based on an invalid piece of regulation (e.g., since it is *ultra vires*). See Zamir, *supra* note 11, at 76; see also HCJ 6090/08 Berger v. Minister of Justice (Nov. 11, 2008), Nevo Legal Database (by subscription) (Isr.).

36. When such a case is brought before the HCJ it normally comes in the form of a direct attack. See, e.g., HCJ 6090/08 Berger.

37. See *id.* (noting that, by and large, cases that come before the HCJ are directly attacked therein).

38. See, e.g., HCJ 991/91 Pasternak 45(5) PD, at 58; CA 256/70 Friedman v. Haifa 24(2) PD 577 [1970].

39. See, e.g., CA 256/70 Friedman 24(2) PD.

40. See, e.g., CA 9379/03 Czerni v. State of Israel 61(3) PD 822 [2006].

41. See ITZHAK ZAMIR, ADJUDICATION IN ADMINISTRATIVE CASES 169 (3d reprint. 1987) (Hebrew).

42. It could be noted in this Article's context that the HCJ's attitude in this regard certainly falls in line with the commonplace tendency of organizations to prolong their existence, preserve their authority, and avert policies that might lead to their extinction. See, e.g., Albert Breton, *Organizational Hierarchies and Bureaucracies: An Integrative Essay*, 11 EUR. J. POL. ECON. 411 (1995); WILLIAM A. NISKANEM, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); see also MEYDANI, *supra* note 11, at 142, 163. Similarly, the latter observation, and the justices' position of clinging to their HCJ

In sum, the HCJ is adamant that in principle its jurisdiction encompasses all cases that fall under the (concurrent) power of the “regular” courts following the analysis above.<sup>43</sup> Doctrinally, this policy of the HCJ is founded on the phraseology of Sections 15(c) and 15(d) of the Basic Law: The Judiciary (1984).<sup>44</sup> A full exposition on these Sections goes beyond the scope of this Article.<sup>45</sup> However, I do want to point out the following two observations regarding these Sections’ scope, as interpreted by the Court:

First, Section 15(c) reads as follows: “The Supreme Court shall sit . . . as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice *and which are not within the jurisdiction of another court.*”<sup>46</sup> The Court was faced on several occasions with the question of how to interpret the Section’s last few words, which seemed to bar it completely from dealing with cases that fall within the jurisdiction of another court; indeed, these words appear to exclude its very *jurisdiction* in such cases.<sup>47</sup> The Court grappled for a long time with the wording of that Section,<sup>48</sup> settling on the approach that, despite its explicit terms, the Section does *not* set any real limit on the HCJ’s jurisdiction.<sup>49</sup> Overall, the HCJ’s interpretation of Section 15(c) gives the impression of a

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jurisdiction, could be conceptualized as a manifestation of “the endowment effect,” which refers to “the additional disproportionate value individuals attach to assets they possess or own.” Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 LAW & CONTEMP. PROBS. 63, 77 (2011). It may be worthwhile to emphasize again that organizational studies may indeed shed an interesting light on many aspects of the practice of the HCJ and other public law courts from around the common law world. *See supra* note 6 (noting the selectivity of this study); *see also infra* notes 132, 181 (describing additional organizational dimensions of the HCJ).

43. To illustrate, according to settled doctrines, even if a specific law entrusted the judicial review over an administrative agency into the hands of (say) the District Court, the HCJ would still be allowed in principle to take the matter into its own hands—as a court of first instance, namely, over the head of the District Court. Moreover, this analysis applies even when a specific piece of legislation authorizes a “regular” court to try a sector of cases in which there is a public law issue (e.g., labor law disputes where the employer is a state organ). In such cases the HCJ’s jurisdiction relies on that public law side of the dispute. *See* HCJ 6163/92 Eisenberg v. Minister of Constr. & Hous. 47(2) PD 229 [1993].

44. Throughout the history of the HCJ, its enabling legislation has been broadly phrased. *See* Yitzhak Zamir, *The High Court of Justice Authority*, in LEGAL STUDIES IN MEMORY OF AVRAHAM ROSENTHAL 225 (Gad Tadeschi ed., 1964) (Hebrew). For a review of the legislation, *see* Yair Sagy, *Supreme Authority: On the Establishment of the Supreme Court of Israel*, 33 MISHPATIM—HEBREW U. L. REV. 7, 12–17 (2013) (Hebrew).

45. *See* Zamir, *supra* note 44.

46. Basic Law: The Judiciary, 38 LSI 101, §15(c) (1983–1984) (emphasis added). Actually, in the Hebrew version the Section’s end reads: “not within the jurisdiction of another court *nor in the jurisdiction of other tribunal.*” Usually “tribunals” denote administrative judicial panels.

47. *See supra* note 32 (noting the jurisdictional/discretionary divide in the analysis of the HCJ’s authority).

48. *See, e.g.*, CA 256/70 Friedman 24(2) PD.

49. HCJ 6163/92 Eisenberg 47(2) PD.

boundless jurisdictional provision, as if it were a *carte blanche* authorization to be molded at the Court's discretion.

Second, under the terms of the "Constitutional Revolution," which was declared by the Court in 1995 (based on the 1992 Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation<sup>50</sup>), all Basic Law provisions belonged to a higher normative stratum than "regular" legislation.<sup>51</sup> Consequently, as a rule, the latter could not contradict the former.<sup>52</sup> The normative superiority, which was thus accorded to Basic Laws, applied naturally to all the provisions of Basic Law: The Judiciary, Section 15(c) included.<sup>53</sup>

It may be argued that, taken together, these two observations outline the Court's jurisprudential pincer movement toward fortifying its exclusive control over its own authority. As just noted, that jurisprudence both advanced an almost limitless interpretation of Section 15 and pronounced that same Section as standing on a constitutional plane.<sup>54</sup>

From a broader perspective, it should be noted that in enlisting the "Constitutional Revolution" in defense of the normative superiority of Section 15, the Court further entrenched its tendency to strictly and adversely interpret all legislation that may appear to restrict its authority.<sup>55</sup> In general, the HCJ's approach to provisions relating to the scope of its own jurisdiction had been unequivocally restrictive years before the "Constitutional Revolution,"<sup>56</sup> which merely provided the Court

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50. For a short introduction on Israeli Basic Laws, see JACKSON & TUSHNET, *supra* note 7, at 461–63, 607–11.

51. See CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221 [1995]. On the Israeli "Constitutional Revolution" and the role played by the Court in introducing it, see, for example, Reichman, *supra* note 7; HIRSCHL, TOWARD JURISTOCRACY, *supra* note 7, at 51–54; JACKSON & TUSHNET, *supra* note 7, at 600–11.

52. This most basic of principle in American constitutional law is most identified with *Marbury v. Madison*, 5 (1 Cranch) 137 (1803), whose centrality has been forcefully argued, for example, in PAUL KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997). For illustrations of the principle of constitutional "supremacy" in a comparative context, see ROSENFELD & SAJÓ, *supra* note 7, at 109–10.

53. See, e.g., HCJ 212/03 *Herut v. Chairman of the Cent. Election Comm.* 57(1) PD 750 [2003].

54. This statement calls for two clarifications: First, it does not argue, nor does it need to show, that it had taken the conscious effort of generations of justices to bring about this state of affairs. New Institutionalism (mentioned *supra* note 2), to cite one pertinent and influential school of thought, wholly embraces this form of reasoning. See Sagy, *supra* note 15.

Second, note that the statement relies solely on the Court's case law. Justices' off-the-bench interventions in the same direction, which will be outlined below (see *infra* notes 64–84 and text accompanying), add credence to the argument.

55. See, e.g., HCJ 212/03 *Herut* 57(1) PD.

56. See, e.g., HCJ 294/89 *Nat'l Ins. Inst. v. Section 11 of the Comp. for Victims of Hostilities Law* (1970) Appeal Comm. 45(5) PD 445 [1991]; HCJ 6163/92 *Eisenberg v. Minister of Constr. & Hous.* 47(2) PD 229 [1993].

with additional means to define and defend its self-proclaimed purview of command.

Going back to the adjudication “revolution,” it should be noted that it has not been greeted differently by the HCJ. Unwaveringly pursuing the same policy and “sticking to its guns,” as it were, the HCJ reaffirmed its discretionary jurisdiction over matters included in the 2000 Law.<sup>57</sup> The HCJ’s staunch position with regard to the bounds of its authority is particularly telling in this case since the 2000 Law made sure the Supreme Court, albeit in its appellate capacity, would remain at the helm of public law adjudication: it naturally retained the Supreme Court’s role as a court of appeal, and today the Supreme Court (as a Court of Appeal in Administrative Matters) hears as a matter of course appeals filed against the decisions of the various District Courts Sitting as Courts for Administrative Matters.<sup>58</sup> Moreover, the 2000 Law puts in place a unique mechanism whereby “the Small HCJ”<sup>59</sup> can pass on a case filed with it to the treatment of the “big” HCJ if, in the judgment of the former court, that case “raises an exceptionally important, sensitive, or urgent matter.”<sup>60</sup> It has always been clear, therefore, that also in the post-adjudication-reform era, the Supreme Court would still have its share of public law litigation, even in the absence of its HCJ jurisdiction. Still, according to the settled precedents of the Court, the adjudication “revolution” has not, and will not have, altered the HCJ’s jurisdiction, which has all along been concurrent with that of the lower courts.<sup>61</sup>

Where do all the above-mentioned doctrines leave us when we try to outline the HCJ model of adjudication as it relates to the “ordinary” courts? In what respect is it, as I label it, a splendid isolation model? The HCJ model of adjudication is that of plenary, exceptionally discretionary jurisdiction. It is plenary in the sense that it has been proclaimed (again, by the HCJ itself) to cover essentially all public law matters. It is exceptionally discretionary, since the HCJ has persistently proclaimed its own power to decide whether and to what extent it would allow the other, “regular”

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57. See, e.g., HCJ 2208/02 Salame v. Minister of the Interior 56(5) PD 950 [2002].

58. In accordance with Administrative Courts Law, 5760–2000, SH No. 1739 §§ 11–12.

59. See *supra* note 25.

60. Administrative Courts Law § 6.

61. It should further be noted that over the years the Court has come to the understanding that the same public law doctrines should be applied in all courts—namely, in the HCJ and “ordinary” courts alike—irrespective of the question of whether a public law cause of action is raised directly or collaterally, on a petition or on appeal. See, e.g., HCJ 731/86 Micro Daf v. Elec. Co. of Isr. 41(2) PD 449 [1987].

courts to directly tackle public law controversies.<sup>62</sup> Yet, the HCJ has not only announced its plenary public law jurisdiction and its power to decide when “regular” courts would also be allowed to handle categories of public law cases (where the legislator has not specifically authorized them to do so and, in any event, almost always in parallel to the HCJ). The HCJ has also been reluctant to permit the lower, “regular” courts to engage in the regulation of the judiciary’s division of labor of public law cases. The HCJ has made it crystal clear that the business of such regulation belongs exclusively in the Supreme Court.<sup>63</sup> It is for the Court alone to decide what categories of cases should be denied from the other courts and reserved for its own exclusive treatment—to be carried out in the splendid isolation of the HCJ.

### *B. Off the Bench*

As suggested, Israeli justices serving on the HCJ have not confined themselves to pronouncing *ex cathedra* their views on the HCJ’s place within the Israeli judiciary. Rather, on several occasions they have voiced their clear views, outside of the courtroom, against stripping the Supreme Court of the HCJ.<sup>64</sup> The following paragraphs describe several such incidents. This anthology of incidents is hardly exhaustive, but it is surely indicative of the justices’ ongoing, off-the-bench efforts in this direction.

The first is in many respects the most significant example in the anthology. It has been recently revealed that during the days leading up to the independence of the State of Israel, as well as post-independence, a major transformation in the Supreme Court’s structure had been proposed by leading jurists.<sup>65</sup> The proposal, which in early 1950 materialized into an official bill of the Justice Ministry of Israel, consisted of two elements: the complete transfer of the HCJ from the Supreme Court to the various District Courts spread across Israel, and turning the Supreme Court into the only court of appeal in Israel, so that it would be directly appealed to not only from the District Courts but also from the Courts of the Peace. The incumbent justices, who were the first seven Israelis to

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62. See CA 9379/03 Czerni v. State of Israel 61(3) PD 822 [2006].

63. *Id.*

64. The most dramatic example of that course of action, which is beyond the historical scope of the discussion (as explained *supra* note 17), was provided by Chief Justice Haycraft. See *supra* note 16.

65. See Sagy, *supra* note 44.

be elected to the Supreme Court of the independent State of Israel, were asked to review and comment upon the bill, which they did.<sup>66</sup>

The justices did not balk at the official bill, which they strongly opposed. Rather, they moved swiftly to making known their adverse opinion on its projected reform in their jurisdiction. The justices launched a campaign against the bill in which they presented three main counterarguments in opposition to the HCJ-removal scheme. First, they maintained that the HCJ's treatment of cases was uniquely efficient, as seen from the perspectives of both litigants (who were provided by the HCJ with an expeditious, non-appealable resolution) and the judiciary as a whole (as a division of the Supreme Court, the HCJ set precedents to the whole judiciary in a particularly unsettled body of law).<sup>67</sup> Second, the justices argued that the HCJ enjoyed an especially high level of the general public's confidence<sup>68</sup> at least in part because it was a branch of the Supreme Court;<sup>69</sup> in so arguing, the justices cited several features of the Court, such as the high caliber of its members. Third, according to the justices, the HCJ had to play the crucial role of instilling rule-of-law norms among the heterogeneous Israeli population in the fledgling State; in that context, it was asserted that this role would be less effectively performed by the less-respected District Courts.<sup>70</sup>

The justices emerged triumphant in their campaign. Thus, the justices, who belonged to the privileged group of the founding fathers of the Supreme Court of Israel, retained the HCJ in their possession.<sup>71</sup> Their achievement in the early 1950s would prove to be momentous. At the outset, the bill's propositions were

66. *See id.* at 17–39.

67. *Id.* at 45–46. *See also infra* Part II (describing common traits of public law).

68. Clearly, this argument is about the complex subject of “courts’ legitimacy.” As I note below (*see infra* note 154 and text accompanying notes 203–11), several of the issues discussed in this Article touch upon this sensitive subject. I will refrain for the most part from raising it, since it has been discussed so extensively in the literature on the HCJ and on courts generally. *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 131–66 (1989); Gad Barzilai, *Courts as Hegemonic Institutions: The Israeli Supreme Court in Comparative Perspective*, 5 ISR. AFF. 15 (1998); Ronen Shamir, “Landmark Cases” and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice, 24 LAW & SOC’Y REV. 781 (1990); MEYDANI, *supra* note 11, at 108–13.

Additionally, we are accustomed to analyzing courts’ legitimacy from an “exterior” perspective (*cf. supra* text accompanying note 21 (making a similar argument regarding the debate about judicial independence)), usually having the general public’s perception of courts in mind. However, as noted, this is not the perspective that guides this Article.

69. Sagy, *supra* note 44, at 12–17.

70. It is doubtful whether these arguments hold water, but it goes beyond the scope of this paper to critically examine them. *See* Sagy, *supra* note 9, at 253–57 (critiquing the arguments). Following *supra* note 68, notice that only the first argument concerns internal aspects in the operation of the HCJ.

71. Sagy, *supra* note 44.



abandoned following the justices' intervention. The first major Israeli legislation dealing with the organization of the judiciary in the sovereign State of Israel, the 1957 Israeli Courts Law, did not introduce the proposed reform in the Supreme Court's jurisdiction. Nor has later legislation "transferred" the HCJ to the lower courts (nor has it allowed for a direct appeal from a Court of the Peace to the Supreme Court). It is worth noting that the justices' assured analysis of the HCJ question was certainly not beyond doubt, as the Justice Ministry bill alone indicated. It was not even consensual within the judiciary. Notably, District Court judges were among those who put forward at the time several reform schemes for the transfer of all or substantial parts of the HCJ business to the lower courts.<sup>72</sup> None of these schemes gained momentum mainly due to the justices' opposition.<sup>73</sup>

The next example of off-the-bench justices' interjections aimed at cementing the HCJ structure is taken from the report of the Committee for the Examination of the Structure and Powers of Courts (known as the Landau Committee), which handed down its recommendations in November 1980.<sup>74</sup> Two justices served on the Committee: its chairman (and the President of the Supreme Court at the time, i.e., the Israeli Chief Justice), Justice Moshe Landau, and Justice Aharon Barak. The other (three) Committee members were prominent jurists.

The Landau Committee identified in its report's very first paragraph the thorny issue which had occupied central stage in its overall endeavor: the severe caseload of the Supreme Court (and that of the Tel-Aviv Jaffa District Court). As part of its exposé, the Committee presented statistics concerning the caseload faced by the HCJ, emphasizing the onerous burden carried by the HCJ.<sup>75</sup>

The Landau Committee set forth a clear proposal to help the Court cope with the flood of petitions filed with the HCJ.<sup>76</sup> The proposal was premised on the Committee's objection to the

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72. *Id.* at 55.

73. *Id.* at 65–67.

74. See *The Report of Committee for the Examination of the Structure and Powers of Courts*, in *THE LANDAU BOOK: WRITINGS 205* (Elinor Mazuz & Aharon Barak eds., 1995) [hereinafter *The Landau Report*].

75. *Id.* On the caseload of Israeli courts, see *supra* note 18.

76. Additional possible means to tackle the problem at issue were also considered by the Committee, yet were rejected. Hence, for example, the Committee cast aside the option of appointing additional justices to the Supreme Court, based on the arguments that a larger bench would not allow for an intimate association among the justices and justices' individual, signature contribution to the Court would be lost if it became a larger institution. The Committee also dismissed the suggestion that the HCJ try only matters of the utmost importance involving difficult legal questions, inter alia, to remain in close contact with the daily reality of society. *Id.* at 217. Cf. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1987).

“transfer” of the HCJ jurisdiction to the District Court,<sup>77</sup> which meant that the Committee recommended that in the future the HCJ should still be the addressee of all the petitions brought in front of it at the time. Yet, the Committee outlined a new procedure whereby all petitions to the HCJ would be preliminarily screened by a single justice, who would decide, based on a petition’s “substance and importance,” whether the HCJ or rather a District Court should handle it.<sup>78</sup>

My next example is taken from an interview given by the then-President of the Supreme Court, Meir Shamgar, in 1991—i.e., a decade later, on the eve of the Israeli “Constitution Revolution.”<sup>79</sup> In that interview, Shamgar openly proclaimed that the justices believed they should not dispense with the HCJ, which they thought belonged in the highest court, “since this is our main substitution for a written constitution.”<sup>80</sup> Shamgar went on to comment that although “we preserve” the HCJ at the Supreme Court “and are not willing to let it go,” several categories of cases should be transferred to the “ordinary” courts and handled therein in accordance with regular civil procedure, such as public tenders, urban planning, and business licensing.<sup>81</sup>

The last example is taken from the recommendation of the Or Committee, officially known as the Committee for the Examination of the Structure of Regular Courts in Israel, whose report was handed down in 1997.<sup>82</sup> The Or Committee’s recommendations, which were fully endorsed by President Barak of the Supreme Court, were far-reaching.<sup>83</sup> Notably, it proposed that the Supreme Court would have a much tighter control over the cases it chose to hear, so that its caseload would be substantially decreased. In spite of the suggested overhaul in the position occupied by the Court in the Israeli judiciary, the Or

77. *The Landau Report*, *supra* note 74, at 218–19. Note that this proposal is premised on the acknowledgment that the District Courts have a sweeping direct-attack jurisdiction on public law causes of action. On direct attack, *see supra* note 37 and accompanying text.

78. *The Landau Report*, *supra* note 74, at 219–20.

79. *See supra* note 51.

80. Shlomo Avni et al., *The President of the Supreme Court, Justice Meir Shamgar in a Special Interview to ‘Din-ve-Omer’*, 5 DIN-VE-OMER 2 (1991) (Hebrew).

81. Apparently, the interview took place in the aftermath of the *Pasternak* case, whose holding was mentioned by Shamgar on that occasion. The three categories of cases mentioned by Shamgar had been indeed transferred by the HCJ to the “regular” courts during the 1990s, and would be included in the reform of the Administrative Courts Law.

82. Two of the Committee’s members were justices (including the Chairman, Justice Theodore Or), and the other four members were prominent jurists. *See THE OR COMM., THE REPORT OF THE COMMITTEE FOR THE EXAMINATION OF THE STRUCTURE OF REGULAR COURTS IN ISRAEL* (1997).

83. The Or Committee proposed a sweeping reshuffling of the jurisdiction of the two lower courts, so that the Court of the Peace would become the main trial court in Israel, while the District Court would become the main court of appeal. *See id.*

Committee did not recommend the abolishment of the HCJ. Although it opined that the general trend should be to limit the number of matters tried by the Supreme Court as a court of first instance, it maintained that the Court, as the HCJ, should still handle “publicly and legally sensitive disputes.”<sup>84</sup>

### *C. Conclusion*

The administrative law adjudication “revolution” naturally raised the difficulty with which this Article opened and made it more intense, namely, how to account for the HCJ’s unusual configuration. It stands to reason that however justified that configuration might have been prior to the “revolution,” it is less so in its aftermath, with the entrusting of lower courts to try a wide range of administrative law disputes. What may justify the unbreakable persistence of the HCJ’s original jurisdiction over public law? The next Part will straightforwardly approach this question with the help of organizational studies.

As we have seen in this Part, the Supreme Court has played a pivotal role in assuring that the HCJ’s jurisdiction would be plenary and in preserving the HCJ as a division of the Supreme Court. The justices serving on the Court have relentlessly pursued this policy on and off the bench, in its case law as well as in other forums. Several justices have, in different junctures in the HCJ’s annals, taken part in this effort, although we have good reason to believe that most of them have been ignorant of their predecessors’ interventions. This cross-generational persistence may serve as an indication that the HCJ configuration, which is to a large extent the justices’ brainchild, is supported by (or rather, held to support) structural considerations of the sort addressed in the next Part.

## III. INSIDE THE ORGANIZATION: THE JUDICIARY

### *A. Introduction*

Once again, we ask: how are we to account for the HCJ’s lasting and relentless determination not to let go of its full jurisdiction? Why have the justices been so resolute not to surrender any portion of the HCJ’s jurisdiction, which they themselves have painted with broad strokes? As noted in the previous Part, over the years HCJ justices have steadfastly adhered to, and advanced, a sweeping grasp of their authority even as they have sponsored an increase in the lower courts’

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84. *Id.* at 86.

power to directly review public law cases. This seemingly contradictory policy is puzzling. As suggested at various points along the way, the investigation conducted in this Article could be penetratingly couched in terms of organizational theory. This Part (in fact, the Article's remainder) will illustrate how the injection of organizational theory into the HCJ debate, and more broadly to the study of public law adjudication, provides us with a more rounded understanding of the dilemmas involved in the Court's distinctive formation and in the mechanism at work in common law public law adjudication. This is expected given the fact that—as we shall now see—organizational theory has been occupying itself for decades with the very issue that, according to this Article, lies at the heart of the anomaly: organizational hierarchical control. Running themes in the voluminous organizational theory literature explore the means whereby the higher echelons of an organization attempt to control the conduct of its subordinates, the hurdles the former face in pursuing that end, and the manners in which the latter may resist such attempts. In approaching the questions at issue in terms of the latter theory, this Article breaks new ground in the study of the Israeli judiciary and the HCJ, and altogether advances our understanding of common law court systems and public law litigation.

Specifically with regard to the HCJ, this Part will explore several organizational consequences of its structure of adjudication. It will conduct an organizational cost/benefit analysis of sorts, as seen from the Supreme Court's vantage point. The aim is first and foremost to emphasize that the HCJ's configuration comes at a price organizationally, even when restricting the analysis to the Court's perspective. We will see that the HCJ's perpetuation evinces a preference on the justices' part for the related advantages over the burdens thus incurred. Moreover, taking the investigation a few steps further, one additional organizational cost will be highlighted in an effort to ensure its future inclusion in HCJ's (and comparable courts') appraisals: the disruptive dynamic it may entrench within the judiciary. It will be maintained that the HCJ supports divisive, centrifugal tendencies that, according to the organizational literature, reside (in tandem with centripetal tendencies) within organizations. Thus conceived, the HCJ is revealed to counteract integrative impulses at work within the Israeli judiciary. Since the Supreme Court is reasonably assumed to pursue the cultivation of such integrative tendencies, its HCJ policy, which cuts in the other

direction, is detrimental—again, even as seen only through the prism of the Supreme Court.

### B. Preliminary Issues

Several preliminary quick comments are in order before plunging into organization theory. As suggested at the outset, it can hardly be disputed that the Israeli judiciary squarely falls under accepted organizational studies' definitions of "organizations."<sup>85</sup> Elsewhere I discuss at great length this point, and I need not rehash the discussion here.<sup>86</sup>

A more difficult issue within this framework is which unit in the Israeli judiciary should be regarded as the organization's "management." One reason for the difficulty is the fact that the judiciary is "directed" by a myriad of officeholders. Here is a non-exhaustive list: the Minister of Justice,<sup>87</sup> the Ministry of Finance,<sup>88</sup>

85. See, e.g., Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 211 (1978) ("The relationship between the [U.S.] Supreme Court and lower courts can be understood in organizational terms.")

86. See Sagy, *supra* note 18. For leading examples of such definitions, see, for example, Mohr, *supra* note 2, at 623–27; Heydebrand, *supra* note 2, at 765–71; RICHARD H. HALL & PAMELA S. TOLBERT, ORGANIZATIONS: STRUCTURES, PROCESS AND OUTCOMES 28–33 (5th ed. 1991). Again, the Israeli judiciary clearly meets the standards set in these definitions.

Note that the discussion in this Article assumes that, to the extent there are differences between private and public organizations, these differences are marginally consequential to the current analysis, and could be set aside in this introductory study. For analyses supporting this approach, see, for example, Susan J. Miller & David C. Wilson, *Perspectives on Organizational Decision-Making*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES, *supra* note 3, at 467, 474–77; Breton, *supra* note 42, at 425. But see the literature on "public service motivation," which explores an area where distinctions between different kinds of organizations may be present: James L. Perry & Lois R. Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367 (1990); Sangmook Kim, *Public Service Motivation and Organizational Citizenship in Korea*, 27 INT'L J. MANPOWER 722 (2006); Bradley E. Wright & Robert K. Christensen, *Public Service Motivation: A Test of the Job-Attraction-Selection-Attrition Model*, 13 INT'L PUB. MGMT J. 155 (2010).

Lastly, it would be interesting to study the judiciary (in Israel and elsewhere) through the lens of the literature dedicated to professional organizations in general and to legal-professional organizations in particular. See, e.g., Roy Suddaby et al., *Introduction to the Journal of Organizational Behavior's Special Issue on Professional Service Firms: Where Organization Theory and Organizational Behavior Might Meet*, 29 J. ORG. BEHAV. 989 (2008); see also Jean E. Wallace & Fiona M. Kay, *The Professionalism of Practising Law: A Comparison Across Work Contexts*, 29 J. ORG. BEHAV. 1021 (2008); David J. Teece, *Expert Talent and the Design of (Professional) Firms*, 12 INDUS. & CORP. CHANGE 895 (2003).

87. Here is one notable example of the Justice Minister's wide powers in the administration of the Israeli judiciary: according to Section 82 of the 1984 Courts Law, she is put in charge of the administration of courts. See, e.g., Shimon Shetreet, *Strengthening the Judiciary and Limiting the Powers of the Justice Minister*, 6 MISHPATIM—HEBREW U. L. REV. 154 (1975) (Hebrew).

88. On the Director of Courts in Israel, see Guy Laurie, Amnon Reichman & Yair Sagy, *Indicators of Agencification and the Director of Courts in Israel* (Univ. of Haifa Law Faculty, Working Paper No. 1, 2015).

the Director of Court<sup>89</sup> (on the Executive side), and the Israeli parliament and several of its sub-committees (on the Legislature side).<sup>90</sup> However, upon reflection it turns out that the difficulty at issue may quite easily be explained.<sup>91</sup> The organization called “the Israeli judiciary” is devoted to the singular occupation of “adjudication.” Elusive as the definition of “adjudication” may be,<sup>92</sup> one can hardly question the fact that the Israeli judiciary is premised on the Supreme Court’s considerable ability and duty to direct the other courts in the organization in their conduct of that occupation.<sup>93</sup> In other words, when regarded as a law-giving (or “law-handling”) organization, it becomes apparent that the Israeli judiciary is headed by the Supreme Court in the exercise of this organization’s staple handicraft, i.e., adjudication.<sup>94</sup> In sum, the Israeli judiciary shares a norm known in other common law jurisdictions by firmly placing the highest court of the land in a

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89. See Kramer & Ferejohn, *supra* note 21, at 984–86; Heydebrand, *supra* note 2, at 767–68.

90. Cf. Kevin T. McGuire, *The Institutionalization of the U.S. Supreme Court*, 12 POL. ANALYSIS 128, 130–31 (2004).

91. For a much fuller discussion, see Sagy, *supra* note 18.

92. An excellent starting point for the exploration of this subject is provided in SHAPIRO, *supra* note 21. See also Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); Monaghan, *supra* note 9; Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

93. See Baum, *supra* note 85, at 211 (“We may view the [U.S.] Supreme Court as the director of an organization that includes several levels of subordinates, both within its own federal judicial system and within the separate state system”).

Once the debate is confined to the Supreme Court’s role as a court of law, it becomes clear that the Chief Justice (styled as “the President of the Supreme Court of Israel”) should not be regarded as the head of the organization at issue (i.e., the Israeli judiciary). True, various pieces of legislation authorize the Israeli Chief Justice to perform administrative functions in the operation of the judiciary. See Courts Law, 5744–1984, 38 LSI 271, §16A (1983–1984) (authorizing the Chief Justice to formulate an ethical judicial code, with the approval of her peers and after consulting with the Justice Minister). However, as a justice, she is—certainly formally—*equal inter pares*. Still, the Chief Justice may in effect assume, as a judge, the position of a *primus inter pares*, but this does not have to be the case. See Frank B. Cross & Stefanie Lindquist, *Doctrinal and Strategic Influences of the Chief Justice: The Decisive Influence of the Chief Justice*, 154 U. PA. L. REV. 1665 (2006).

I should note once again that the analysis’s focus on adjudication excludes others from “heading” the Israeli judiciary. This approach applies even to the Justice Minister (see *supra* note 87), and the Israeli Parliament (the Knesset), although both may deeply affect the judiciary’s daily operation.

94. The Supreme Court of Israel has reiterated its claim to doctrinal superiority on several occasions. See, e.g., HCJ 306/81 Flatto-Sharon v. Knesset Comm. 38(4) PD 118, 141 [1981]. A different issue is whether lower courts *actually* follow the Supreme Court’s precedents. For debates on that issue, see, for example, Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL L. STUD. 369, 398–405 (2005); Donald R. Songer et al., *The Hierarchy of Justice: Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007). For a preliminary look into the situation in Israel, see Theodore Eisenberg et al., *Israel’s Supreme Court Appellate Jurisdiction: An Empirical Study*, 96 CORNELL L. REV. 693, 720 (2011).

position of *doctrinal* leadership.<sup>95</sup> Once the parameters of this Article are thus defined, it should be apparent that its analysis is confined to the Court's role as a court of law, bracketing off the role it may play in other sides of the judiciary's operation, e.g., in the vast and necessary domain of court administration<sup>96</sup> or in the much-debated and obviously central processes of judges' appointment and promotion.<sup>97</sup>

### *C. Introducing the Attitudinal Paradigm*

This Section will first provide a kind of shorthand version of those chapters of organization theory that will be most heavily relied upon in the analysis below. Only a few chapters in the immense organization studies corpus can be addressed here. Accordingly, I have chosen to concentrate on a significant organizational paradigm with a distinctive focus that is truly absent from the HCJ scholarship: the inter-hierarchical focus. Thus far, the HCJ has not been examined through such an internal outlook (nor, more broadly, has the institution of public law adjudication), not even by the HCJ itself in its numerous elaborations of the HCJ's place in the Israeli judiciary.<sup>98</sup>

The paradigm in point, the contribution of which to the theory and practice of public and private organizations can hardly be overstated, may be termed "the social-interaction paradigm," or (in parallel to the discussion below concerning judges' motivations)<sup>99</sup> "the attitudinal paradigm." Generally, the attitudinal paradigm may be best captured when contrasted with the "classical"<sup>100</sup> paradigm in organization theory, which is essentially a mechanical

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95. For this role of a supreme court heading a judicial pyramid in the common law system, see *infra* note 135. It should be clarified further that regarding the Supreme Court as the director of the organization known as "the Israeli judiciary" is *not* tantamount to "assum[ing] absolute command by the highest court." Baum, *supra* note 85, at 211.

96. For this reason, the Article hardly relies on the literature strictly dedicated to the administration of various courts (such as the various publications in the *International Journal for Court Administration*). That literature may invoke organizational theory, but its focus is generally different than the focus of this study.

97. In Israel, judges to all courts are elected by a nine-member committee, consisting of three justices (the President of the Supreme Court and two additional justices), two members of the government, two members of the parliament, and three members of the Israeli Bar. See HIRSCHL, *TOWARD JURISTOCRACY*, *supra* note 7, at 66–67.

98. *Cf.*, e.g., HCJ 1921/94 Soker v. Constr., Hous., & Indus. Comm., Dist. of Jerusalem 48(4) PD 237 [2004]; HCJ 991/91 Pasternak v. Minister of Constr. & Hous. 45(5) PD 50 [1991].

99. See *infra* notes 158–59.

100. JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 31 (2d ed. 1993); see also CLEGG & DUNKERLEY, *supra* note 3, at 33–105 (where essentially the same paradigm is regarded as "formal," or as the "machine model of organization."); Selznick, *supra* note 5; John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 342–43, 353 (1977).

perception of public and business bureaucratic organizations. It is outlined in the work of Max Weber (on the bureaucratic form of organization),<sup>101</sup> Frederick Taylor (on business organizations),<sup>102</sup> Ernest Freund, Luther Gulick et al. (on public administration), as well as the work of many others.<sup>103</sup> The three primary elements in the mechanical paradigm are as follows: First, as most famously detailed by Weber, the bureaucratic organization is a *rational* device—it is rational because it is “capable of attaining the highest degree of efficiency . . . .”<sup>104</sup> Second, as most explicitly found in Taylor’s writing, the classical paradigm’s view of the worker/bureaucrat is one dimensional—she is a tool in the service of the organization’s management.<sup>105</sup> Third, as emphasized in the elaborate work of Gulick and other social scientists, this paradigm is acutely

101. See 2 MAX WEBER, *ECONOMY AND SOCIETY* 956–1003 (Ephraim Fischhoff et al. trans., Guenther Roth & Clauss Wittich eds., 1978). For Weber on bureaucracy, see, for example, ANTHONY T. KRONMAN, *MAX WEBER: JURISTS: PROFILES IN LEGAL THEORY* 176–82 (1983); REINHARD BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 385–457 (1977); Talcott Parsons, *Introduction*, in MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 56–86 (A. M. Henderson & Talcott Parsons trans., 1947). As is well known, Weber has not been only one of the first to theorize on bureaucracy but has also been one of its earliest critics. See, e.g., ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 149–57 (1992).

102. See, e.g., FREDERICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1912). Taylorism greatly contributed to the professionalization of management in American industry, an intense process that started in the mid-nineteenth century. See ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 272–83, 415–18, 464–68 (1977); see also YEHOUDA SHENHAV, *MANUFACTURING RATIONALITY: THE ENGINEERING FOUNDATIONS OF THE MANAGERIAL REVOLUTION* 10–36 (1999).

103. On Gulick and other members of “the science of administration” school, see Yair Sagy, *The Manager, The Judge, and the Empiricist: American Administrative Law as a Theory of Expertise* (2006) (unpublished JSD Dissertation, NYU) (on file with the NYU Law School Library); DWIGHT WALDO, *THE ADMINISTRATIVE STATE* (1984); Dwight Waldo, *Politics and Administration: On Thinking about a Complex Relationship*, in *A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE* 89 (Ralph C. Chandler ed., 1987); BARRY D. KARL, *EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT 1900–1939* (1963); see also *THE PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* (1937).

104. 2 WEBER, *supra* note 101, at 223; see also Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1299 (1984) (stating that the bureaucratic machine “is the very essence of modern efficiency”); ROGER COTTERRELL, *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 143–46 (1995).

105. See, e.g., TAYLOR, *supra* note 102, at 37 (“One of the very first requirements for a man who is fit to handle pig iron as a regular occupation is that he shall be so stupid and so phlegmatic that he more nearly resembles in his mental make-up the ox than any other type.”). The sharp division of organizations into two classes of organizational members (e.g., management/worker) may not be expressed in quite the same way as Taylor’s harsh words, but it is just as foundational in the work of other thinkers in his camp. See, e.g., 2 WEBER, *supra* note 101, at 1393–1405; Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 95 (H. H. Gerth & C. Wright Mills trans., 1958); Luther H. Gulick, *Notes on the Theory of Organization*, in *PAPERS ON THE SCIENCE OF ADMINISTRATION* 1 (Luther H. Gulick & Lyndall Urwick eds., 1937).



concerned with issues of hierarchical coordination and departmentalization.<sup>106</sup>

To be sure, in light of these three emphases, the problem of coordination takes a managerial outlook, since—under the classical framework—it is the head of the organization that has to ensure the efficient allocation of tasks among the organization's different units and coordinate among them. The automatic full compliance of the personnel of these units is taken for granted.<sup>107</sup>

The attitudinal paradigm's description of the organizational reality is in many respects diametrically opposed to that of the classical paradigm. An authoritative summary of several of its key tenets is provided by two of the most influential organization theorists to date, James March and Herbert Simon. March and Simon explain that the relevant class of propositions about organizational behavior is made on the basis of these assumptions:<sup>108</sup>

[T]hat members bring to their organizations *attitudes, values, and goals*; that they have to be motivated or induced to participate in the system of organization behavior; that there is incomplete parallelism between their personal goal and organization goals; and that actual or potential goal conflicts make power phenomena, attitudes, and morale centrally important in the explanation of organizational behavior.<sup>109</sup>

What comes henceforth is in many respects no more than an exegesis of this summary, as I unpack several themes that run through it.

Ordinarily, organizationalists belonging to the attitudinal group perceive organizations to be in a constant struggle between centrifugal and centripetal internal forces. Examples of divisive

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106. See sources cited *supra* note 103; Andrew H. Van De Ven et al., *Determinants of Coordination Modes Within Organizations*, 41 AM. SOC. REV. 322 (1976). On hierarchy in the classical paradigm, see also Rita Gunther McGrath, *Beyond Contingency: From Structure to Structuring in the Design of the Contemporary Organization*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES, *supra* note 3, at 577, 577–79.

107. See, e.g., Selznick, *supra* note 5, at 25; Meyer & Rowan, *supra* note 100, at 342 (“*Prevailing theories assume that the coordination and control of activity are the critical dimensions on which formal organizations have succeeded in the modern world. This assumption is based on the view that organizations function according to their blueprints: coordination is routine, rules and procedures are followed, and actual activities conform to prescriptions of formal structure.*”).

108. The talk of “assumptions” may be misleading. It should be made clear that generally research done in this tradition tends to be rooted in empirical methodologies. See, e.g., sources cited *infra* notes 111, 184.

109. MARCH & SIMON, *supra* note 100, at 25.

forces abound, and they are likely to be felt within the organization both on an individual level (i.e., that of the organization member) as well as on collective levels (e.g., among various subsections of the organization, between the separate echelons in the organizational hierarchy, or in the overall organizational culture).<sup>110</sup>

On the personal level, it is stipulated that “individual members of an organization come to it with a prior structure of preferences—a personality, if you like—on the basis of which they make decisions while in the organization.”<sup>111</sup> No wonder, then, that researchers underscore the fact that organization members’ personal preferences might obstruct the realization of the management’s policies.<sup>112</sup> It would be an exaggeration to suggest that under this heading the bureaucrat/worker is not treated as an instrument of production—this school’s pretensions notwithstanding—and yet here she is viewed as an active agent, having the ability to get in the way of the process of production.<sup>113</sup> Clearly, the participation of such an agent in the organization’s policies may not be simply assumed but rather has to be sought and gained by management.<sup>114</sup> As aptly and authoritatively put by the prominent scholar Philip Selznick, “control and consent cannot be divorced even within formally authoritarian structures.”<sup>115</sup>

Moving to the collective level of analysis, researchers emphatically assert that “[h]ardly anyone would doubt that social relationships are an important aspect of working life and can have far reaching consequences both for people in an

110. For organizational culture, see *infra* note 117.

111. MARCH & SIMON, *supra* note 100, at 83. It is important to emphasize anew that such propositions are often made in reliance upon empirical studies. See, e.g., Ross Stagner, *Corporate Decision Making: An Empirical Study*, 53 J. APPLIED PSYCHOL. 1 (1969) (“[S]trong divisions within the company may get their way without regard to the welfare of the whole.”). For a comparable study of an administrative agency, see ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1981).

112. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 66 (4th ed. 1997) (“[The administrator] may (and usually will) have his own very definite set of personal values that he would like to see implemented by his administrative organization . . .”).

113. See, e.g., Selznick, *supra* note 5; see also Stephen L. Wasby, *The Communication of the Supreme Court’s Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086, 1104, 1116–17 (1973).

114. See, e.g., Chien-Cheng Chen & Su-Fen Chiu, *An Integrative Model Linking Supervisor Support and Organizational Citizenship Behavior*, 23 J. BUS. PSYCHOL. 1, 7–8 (2008); Charles A. O’Reiley III et al., *People and Organizational Culture: A Profile Comparison Approach to Assessing Person-Organization Fit*, 34 ACAD. MGMT J. 487 (1991).

115. Selznick, *supra* note 5, at 26.

organization and for the organization as a whole.”<sup>116</sup> It should be noted that underlying this assertion is a deep realization: organizational formal bylaws cannot and do not fully regulate members’ conduct, because their “social relationships” are not, and can never be, fully regulated by such formal rules. Students of organizations must therefore attend to the informal side of the organizational reality if they aspire to truly capture it, and leaders of organizations must do the same if they aspire to have a better grip over their respective jurisdictions.<sup>117</sup>

However, it would be wrong to assume that organizations’ analysis could suffice itself with the binary between management and other organizational members.<sup>118</sup> Since social interaction is the essence of organizations, it is to be expected that all organizational members meaningfully bond and identify with other individuals within the organizations (for example, with co-workers in their unit, members of the same profession scattered across the organization, people with similar ideology regardless of their position within the organization, and so on), and thus form various social groups therein. Complicated group dynamics are likely to ensue; turf wars are likely to take place. The threat of organizational balkanization may consequently loom large, especially given the nature of many organizational decisions. Simply stated, “organizations are also small polities in part, because many organizational decisions readily evoke the competition of interests—pay, carpeting the office, promotion, and so on . . . .”<sup>119</sup> The important point from our perspective is that herein surely lies another obstacle to inner-organizational integration. So much so that it is flatly said that “[i]nternal friction or drag is thus an inherent part of the executive process . . . .”<sup>120</sup> Accordingly, conflicts among individuals in the organization and

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116. Franziska Tschan et al., *Work Related and “Private” Social Interactions at Work*, 67 SOC. INDICATORS RES. 145, 145 (2004); see also, e.g., KARL E. WEICK, *THE SOCIAL PSYCHOLOGY OF ORGANIZING* 3–4 (2d ed. 1979); RICHARD DAFT, *ORGANIZATIONS: THEORY AND DESIGN* 11 (2011).

117. See, e.g., PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* 251–52 (Harper & Row 1966) (1949); Breton, *supra* note 42, at 415–18. The concept of “organizational culture” is particularly important in this context. See, e.g., Edgar H. Schein, *Organizational Culture*, 45 AM. PSYCHOLOGIST 109 (1990); O’Reiley et al., *supra* note 114; see also Brian J. Ostrom & Roger A. Hanson, *Understanding and Diagnosing Court Culture*, 45 CT. REV. 104 (2009). For a critical discussion of “organizational culture,” see JOANNE MARTIN, *CULTURES IN ORGANIZATIONS: THREE PERSPECTIVES* (1992).

118. Cf. *supra* note 105 and accompanying text (noting the centrality of this division in the classical paradigm).

119. Mohr, *supra* note 2, at 61; see also Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359, 375, 384–85 (1972).

120. Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1017 (1959).

among organizational subunits, as well as factors that impact members' motivation to abide by their superior's directives are closely examined.<sup>121</sup> Great emphasis is placed also on extra-organizational factors (e.g., general economic conditions)—obviously out of the reach of the organization—that also bear on the worker's motivation.<sup>122</sup>

At the same time, it is crucial to emphasize that under this same paradigm, much attention is given to forces that preserve the integrity of the organization.<sup>123</sup> For instance, "contagion" within the group is one such factor; identification of members of the organization with it is another.<sup>124</sup> Similarly, Weber argues that in modern bureaucracy "entrance into office . . . is considered an acceptance of a specific duty of fealty to the purpose of the office . . . in return for the grant of a secured existence."<sup>125</sup> Others underscore the importance attached to cultivating members' identification with the organization and discuss factors that affect their level of internalization of organizational norms and mores.<sup>126</sup>

To recapitulate, according to the precepts of the attitudinal paradigm, one—if not *the*—major challenge facing an organization's leaders is how to make sure their subordinates follow their lead. The mechanical, automatic adherence of organizational members to the directives of the higher echelons in the organization is fundamentally challenged and becomes a mission to be actively and persistently pursued by those heading the organization. Expectedly, in the wake of the attitudinal paradigm organizational scholars busy themselves with exploring, *inter alia*, various strategies of control available

121. See, e.g., James G. March, *The Business Firm as a Political Coalition*, 24 J. POL. 662 (1962); Jeffrey Pfeffer & Gerald R. Salancik, *Organizational Decision Making as a Political Process: The Case of University Budget*, 19 ADMIN. SCI. Q. 135 (1974); Schein, *supra* note 117.

122. See generally MARCH & SIMON, *supra* note 100, at chs. 4, 5.

123. See, e.g., John W. Meyer et al., *Institutional and Technical Sources of Organizational Structure: Explaining the Structure of Educational Organizations*, in ORGANIZATION AND THE HUMAN SERVICES: CROSS-DISCIPLINARY REFLECTIONS 151 (Herman D. Stein ed., 1981).

124. See, e.g., MARCH & SIMON, *supra* note 100, at 76 ("Norms for production rates evoked in an individual worker tend to reflect the *behavior of adjacent individuals* . . . doing the same work.").

125. 2 WEBER, *supra* note 101, at 959. This theme runs through Weber's writing on modern bureaucracy. "An official who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction." *Id.* at 1404; see also Weber, *supra* note 105, at 95.

126. See generally MARCH & SIMON, *supra* note 100, at 65–81, 150–58 (arguing, for example, that the longer one remained in the organization and/or the more prestigious it was, the more he would identify with the organization).

to organizations' chiefs,<sup>127</sup> and generally with means whereby such chiefs could co-opt the enthusiastic participation of members of the organizations in the pursuit of what the same chiefs regard as desirable policies.<sup>128</sup> Likewise, an emphasis is placed not only on the formal side of the organization's operation (e.g., its official regulations) but also, and even more so, on informal organizational practices (e.g., its "culture"), which have been found to influence the level of internal compliance with managerial directives and policies.<sup>129</sup>

The literature written in the attitudinal-paradigm vein is enormous, and the previous few paragraphs do not pretend to encompass it. Yet, they should establish a broad enough basis to support the analysis conducted in the next Sections, which will outline key inter-organizational aspects of the HCJ structure of adjudication.

#### *D. The Supreme Court's Calculus*

##### 1. Introduction and Synopsis: The HCJ's Exclusionary Rule

Viewed through an inter-organizational (i.e., inter-court) prism, the HCJ arrangement appears to be predicated on an organizational calculus, which is quite clear when conducted from the perspective of the Supreme Court.<sup>130</sup> In principle, there are costs and benefits to adopting and holding fast to the HCJ's exclusive and expansive jurisdiction, as the justices have done over the years. One major cost, which has already been noted by the Court and scholars, is the burden the HCJ setup places on the shoulders of a chronically over-burdened court.<sup>131</sup> The HCJ has to singlehandedly process a considerable number of petitions. In so doing, it cannot rely on the prior work done by a lower court, as the Court in its appellate capacity regularly does.<sup>132</sup>

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127. See, e.g., John Child, *Strategies of Control and Organizational Behavior*, 18 ADMIN. SCI. Q. 1 (1973); John Child, *Organizational Structures and Strategies of Control: A Replication of the Aston Study*, 17 ADMIN. SCI. Q. 163 (1972).

128. See SELZNICK, *supra* note 117, at 13–16, 259–61; Sagy, *supra* note 18.

129. See *supra* note 117.

130. For the removal of doubt, this Part's analysis will not be confined to the arguments made by the justices (see, e.g., *The Landau Report*, *supra* note 74; *supra* text accompanying notes 67–70 (discussing the justices' reaction to depriving them of the HCJ in the early 1950s)) but will rather flesh out several additional pertinent considerations, which have thus far not been figured into the assessments of that policy.

131. On the Supreme Court's workload, see *supra* note 18.

132. This discrepancy between the Court's *modi operandi* as the HCJ and as the ultimate court of appeal has a number of organizational consequences. For example, the Court's splendid isolation as the HCJ turns it into the sole target of public criticism in most contested public law cases. See, e.g., ROSENFELD & SAJÓ, *supra* note 7, at 571 (noting that the Court's activism "has generated a significant backlash against the Court"); Daphne

Moving to the benefit side of the equation, the HCJ flowchart is advantageous to the Court because it sidelines lower courts from meddling with the business of the HCJ and sabotaging its policies. The common law provides all judges with a lengthy menu of legal “exit strategies,” that is, legitimate routes to shun the application of a valid Court precedent.<sup>133</sup> In light of common law adjudication’s fundamental structural constrains—above all, the fact that it meanders from one case, which makes its way to a court of law, to another case that happens to be filed with a competent court<sup>134</sup>—staving off lower courts from a group of questions makes it more likely that the course taken by the Court with regard to these questions would be pursued by the justice system.

Further, it will be argued that the justices’ construction of the HCJ’s authority may have another advantage: it places the Court in the elevated position of being the only “true” public law court of the land. The meaning of this construction of the HCJ is brought into sharp relief when set against the backdrop of the common law’s enduring tradition of constituting a hierarchical, pyramidal court system.<sup>135</sup> The Israeli judiciary is founded on that tradition.<sup>136</sup> The HCJ’s construction obviously does not sit well

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Barak-Erez, *Judicial Review of Politics: The Israeli Case*, 29 J.L. & SOC’Y 611, 631 (2002); Meydani, *supra* note 18, at 186; see also Barzilai, *supra* note 68, at 29–30; Emanuele Ottolenghi, *Carl Schmitt and the Jewish Leviathan*, 6 ISR. STUD. 101 (2001).

I am limiting the discussion to the internal-organizational point of view, and emphasize above all the fact that the HCJ’s *modus operandi* expects only the justices to take part in the judicial deliberations on some of the more central public law questions of the day. I will just note here that this arrangement is particularly problematic if we subscribe to the view that the judiciary’s standing may be dependent on the manner in which it resolves this cadre of cases. In other words, what the justices decide in such cases may have an impact on the whole judiciary. See *infra* note 154 and text accompanying notes 203–11 (elaborating on this argument).

133. See *infra* text accompanying note 163.

134. Notably, the common law system subscribes to the maxim *nemo iudex sine actore* (“no judge without a petitioner”). MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 32 (1989). Given this constrain, there may be a degree of haphazardness to the manner in which legal doctrines develop in the common law universe. More noteworthy is the fact that as a result, litigants and (even more so) their attorneys may have a real influence on the direction of that development. See, e.g., Jacobi & Tiller, *supra* note 94, at 340; Wasby, *supra* note 113, at 1091–92, 1100–01.

135. See, e.g., JOHN HENRY MARRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 86 (3d ed. 2007) (“The typical common law country has a unified court system that might be represented as a pyramid with a single supreme court at the apex. . . . It seems entirely natural to us that the ultimate power to review the legality of administrative action and the constitutionality of legislative action, as well as to hear and finally decide the great range of appeals in civil and criminal disputes, should be lodged in a supreme Court.”).

136. It may be more accurate to say that the Israeli judiciary is founded, *inter alia*, on the common law tradition, owing to its complex history—although no one seriously doubts the centrality of that tradition, particularly in the construction of the Israeli judiciary, its practices, and generally its *modus operandi*. On the historical roots of the Israeli judiciary, see, for example, GAD FRUMKIN, *JUDGE OF JERUSALEM* (1954) (Hebrew); ROBERT H. EISENMANN, *ISLAMIC LAW IN PALESTINE AND ISRAEL: A HISTORY OF THE SURVIVAL OF*

with this characterization. It is tantamount to declaring the Supreme Court in its HCJ capacity as the only expert court on the substance of Israeli public law.<sup>137</sup> The fact that no appeal may be lodged against HCJ's decisions adds considerable weight to this "declaration."

Claims of expertise are clearly exclusionary in nature.<sup>138</sup> So is the case with the HCJ, the endurance of which has relied on the exclusion of "regular" courts and "ordinary" judges from the HCJ's business, or their inclusion only when, where, and to the extent it suits the HCJ. From this viewpoint, the HCJ adds a distinction to the Supreme Court—a distinction bestowed on a privileged court which already occupies the upper-most level in the judicial hierarchy. Thus, an insurmountable barrier is erected by the HCJ between the Supreme Courts and the other courts. Not only does the former review the decisions of the latter in civil and criminal cases (as well as in several categories of administrative law cases deemed by the HCJ<sup>139</sup> to be appropriate for the lower courts), but the former also decides which public law cases befit the treatment of the latter, and which go beyond the capacity of the latter (and therefore could only be handled by itself). So viewed, the HCJ model relies on what may be termed the HCJ's "rule by exclusion" or, more loosely, the HCJ's "exclusionary rule."

## 2. Some Advantages of Appeals<sup>140</sup>

Surprisingly, it seems that from the perspective of the Supreme Court the fact that the HCJ is a court of first and last resort is

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TANZIMAT AND SHARI'A IN THE BRITISH MANDATE AND THE JEWISH STATE (1978); Assaf Likhovski, *Between Two Worlds: The Legacy of the Mandatory Legal System and the Early Israeli Legal System*, in JERUSALEM AND THE BRITISH MANDATE 253 (Yehoshua Ben Arie ed., 2003) (Hebrew); NATHAN BRUN, JUDGES AND LAWYERS IN ERETZ ISRAEL: BETWEEN CONSTANTINOPLE AND JERUSALEM 1900–30 (2008) (Hebrew).

137. Actually, the HCJ may be regarded as doubly expert, not only in the substance of public law but also in the regulation of public law adjudication within the judiciary. For a development of this argument, see Yair Sagy, *Courts as Courts Regulators* (Oct. 15, 2014) (unpublished manuscript) (on file with author) (Hebrew).

138. See, e.g., Harold J. Laski, *The Limitations of the Expert*, HARPER'S MONTHLY, Dec. 1930, at 101, 105 ("The expert, in short, remains expert upon the condition that he does not seek to coordinate his specialism with the total sum of human knowledge. The moment that he seeks that coordination, he ceases to be an expert."); see also Yair Sagy, *A Better Defense of Big Waiver: From James Landis to Louis Jaffe*, 98 MARQ. L. REV. (forthcoming 2014–2015) (discussing further expertise's exclusionary tendencies).

139. Or by the Legislature, prodded by the Court, as in the case of the Administrative Courts Law. See *supra* text accompanying note 27.

140. Note that the following discussion brackets off for a while the subject matter which occupies the HCJ, i.e., public law. For an analysis of organizational repercussions of public law adjudication, in light of this Part's inquiry, see *infra* Part IV.

hardly optimal.<sup>141</sup> It deprives the Court of all the benefits that come with bureaucratic, hierarchical mode of decisionmaking, namely, of all the input that may originate in lower courts' treatment of the cases that eventually come before it.

By way of illustration, it may be useful to contrast the manner in which the HCJ, as opposed to a regular (common law) appellate court, handles legal disputes. The advantages of the appellate configuration become apparent even when conducting a two-tier analysis<sup>142</sup> in which, as a general rule, a case comes to the upper court only after a lower court digested the facts of the case, laid out a menu of the legal questions in need of resolution, and rendered its judgment on the matter. While not controlling, the abundance of information provided by the trial court to the court of appeals should usually prove to be tremendously helpful to the latter in processing the case at hand. The upper court "meets" the case when its facts have already been sorted out.<sup>143</sup> Even though the parties may still contest the facts as established by the lower court, according to settled doctrine laid down by the Supreme Court, courts of appeals are highly deferential to such factual findings and are unlikely to meddle with them.<sup>144</sup> As things now stand, on appeal, the Supreme Court has the luxury of immediately analyzing the relevant legal questions, on the basis of authoritatively established facts. In so doing, the Supreme Court may certainly stand to gain from an earlier court's legal analysis<sup>145</sup>—especially the more astute a

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141. It is difficult to determine whether this holds true also from the perspective of the judiciary as a whole, as opposed to the perspective of only the Supreme Court: while the HCJ configuration burdens the Supreme Court, it relieves other courts from dealing with its cases, and the fact that it is a stand-alone instance means that such cases trouble only one court (although it is the Supreme Court). Thus, it seems that such judiciary-wide assessment of the pros and cons of the HCJ arrangement requires, in the minimum, a qualitative comparison between the resources available to different courts and the organizational costs of their handling of cases. Relevant in this context are such difficult questions as what function each court should provide, and whether the Supreme Court in particular should serve a different role in the judiciary than any other regular court. For pertinent discussion and further literature, see sources cited *supra* notes 91–92.

142. This is a common approach in the literature. See, e.g., Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 757 (2002); McNollgast, *supra* note 21, at 1637.

143. On the treatment of facts on appeal, see generally SHAPIRO, *supra* note 21, at 37–49.

144. See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988).

145. Obviously, arguments commonly made in the United States on the merits of "percolation" are particularly relevant at this point. See, e.g., Bhagwat, *supra* note 27, at 979–81; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 331–32 (2006); see also Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 572–75 (2011). But see Evan H. Caminker, *Precedent and Prediction: The*



legalist (in the vein of Learned Hand<sup>146</sup>) the presiding judge is—as well as from the fact that the parties have already gone through the potentially chastening and always revealing process of arguing the case.<sup>147</sup>

The HCJ's splendid isolation dispossesses the Supreme Court of all these benefits. Consequently, the Court's workload (as the HCJ) becomes heavier than in its appellate capacity: as the HCJ, it alone bears the onus of ascertaining the facts of controversies<sup>148</sup> and digesting the relevant legal sources. It may be further argued that the HCJ's loss is not only "quantitative" (i.e., in adding to its workload) but also "qualitative": because of the HCJ's isolation, it is liable to churn out decisions of lower quality than in the Court's appellate jurisdiction. This might happen for a simple reason that pervades organizational studies: the general scheme of cases progressing up the judicial ladder has the advantage of allowing for the accumulation of information at every stop along the way.<sup>149</sup> Moreover, the same familiar scheme may be reasonably said to establish in effect a functional division of labor, which is conducive to the cultivation of diverse expertise between the different tiers of the judiciary. The trial court's expertise is in the determination of controversies' facts, whereas the upper court's is in the analysis of

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*Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 57 (1994–1995) ("Overall, the claim that inferior court percolation is essential to provide a comprehensive array of analyses and approaches available to the Supreme Court seems to inflate its contribution significantly.").

146. On Hand's outstanding stature, see, for example, Michael Boudin, *The Master Craftsman*, 47 STAN. L. REV. 363 (1994–1995).

147. See, e.g., Joseph W. Hatchett & Robert J. Teifer, III, *The Importance of Oral Argument*, 33 STETSON L. REV. 139, 143 (2003) (quoting John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955) ("[T]he oral argument gives an opportunity for interchange between court and counsel which the briefs do not give.").

148. This problem is particularly acute in the case of the HCJ. By all accounts this court's fact-finding abilities are lacking due to its unique procedures, which rely primarily on written testimonies. Consequently, oral testimonies are rarely heard and cross-examinations are virtually never conducted in the HCJ. For the HCJ procedure, see Itzhak Zamir, *Evidence in the High Court of Justice*, 1 MISHPATUMIMSHAL—HAIFA U. L. REV. 295 (1992) (Hebrew).

149. See, e.g., Bueno de Mesquita & Stephenson, *supra* note 142, at 757; Carolyn Shapiro, *supra* note 145, at 321–24; Bradley C. Canon, *Organizational Contumacy in the Transmission of Judicial Policies: The Mapp, Escobedo, Miranda, and Gault Cases*, 20 VILL. L. REV. 50, 54–55 (1975). See generally Selznick, *supra* note 5, at 29.

Indeed, as pointed out in the literature, the interface between the lower and upper courts, in this context of information distribution and analysis within the judiciary, as well as in other contexts, could be insightfully perceived through the principal-agent perspective. See Pauline Kim, *supra* note 145; see also, e.g., Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819 (2003); Songer et al., *supra* note 94; Charles M. Cameron et al., *Strategic Auditing in Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000).

norms.<sup>150</sup> If this is indeed the case, then the HCJ—as an arm of the upper court—suffers a particularly heavy loss by being denied the outstanding and adept fact-finding services of the lower courts.

Another consideration, which zooms in on the sequence in time between the legal proceedings in the differently positioned courts, appears to pull in the same direction. The lapse in time between the proceedings gives the higher court the benefits of an afterthought or hindsight, since its decision is more informed than that of the trial court. As a practical matter, not only may the upper court know how the inferior court's decision was greeted by the parties and the public at large (and decide accordingly), but it can also directly respond to criticism leveled at the judgment under appeal. Such criticism may take many forms—it can come, for example, in the form of a public outcry or academic analyses exposing its fallacies—to which the appellate tribunal may respond in diverse ways, from shoring up the trial court's conclusion to publicly joining the chorus of its critics.<sup>151</sup> The important point is this: because it comes second in time, the upper court may often have a better sense of whether its decision would be greeted with boos and hisses or hailed. Even from a formalistic (or "orthodox") perspective,<sup>152</sup> such information may be valuable to the upper court<sup>153</sup> in deciding, for example, on the manner in which it presents its ruling (its phraseology, the sources it relies upon, etc.) and perhaps on the timing of handing down its decision. It goes without saying that the less persuasive one finds "orthodox" descriptions of adjudication, the more one is inclined to appreciate the leverage accrued by the later decision-maker.<sup>154</sup>

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150. Sagy, *supra* note 18; *see also* Chayes, *supra* note 68, at 2386 (noting "the sharp distinction that Anglo-American law draws between factfinding and law declaration[,] to the extent that "each was assigned to a different tribunal for performance").

151. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519 (1978). *See generally* H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE SUPREME COURT 267–77 (1991); Murphy, *supra* note 2, at 1030–31.

152. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9–31 (1992).

153. In fact, it may present an advantage to the entire judiciary: as the process of appeal unfurls, the judiciary's different courts are provided with ample opportunities to respond to, in an attempt to contain, adverse reaction to an inferior court's decision(s) that may be detrimental to its legitimacy. On this account, appellate courts (not only the Supreme Court) could be viewed also as a guardian of the judiciary and as a protector of its legitimacy, and processes of appeals should be considered as venues for them to engage, *inter alia*, in damage corrections. For this argument, *see* Sagy, *supra* note 9; *infra* note 154. On the judiciary's legitimacy, *see supra* note 68.

154. For example, as noted *supra* note 153, it may be argued that it could enhance courts' legitimacy, and thus increase the degree to which their decisions are executed. Moreover, if one subscribes to the idea that courts pay attention to the general public's view on the issues raised in cases that come to their consideration, then surely the process of

### 3. The Advantages of Solipsistic Adjudication

We will now consider under what circumstances processes of appeal may not be beneficial from the Supreme Court's perspective—assuming that it deems it important that lower courts adhere to its precedents<sup>155</sup> following *stare decisis*<sup>156</sup> and the provisions of Basic Law: The Judiciary.<sup>157</sup> What separates the following inquiry from the previous one is that up to this point the discussion did not seriously take into account divisions that may open up between lower and upper courts. Thus far, the discussion proceeded on the assumption that the various tiers of the judiciary are pretty much of the same mind regarding the jurisprudential, ideological, and even epistemological foundations of their (communal) vocation, let alone the underlying mission of the judiciary.<sup>158</sup> In contrast, the following paragraphs

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appeal offers them another opportunity to “get it right” in that respect. *See, e.g.*, Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 455–56 (2010) (“[S]tate justices—especially those subject to contested elections—are likely to take into account the views of campaign contributors and interest groups that run television ads.”). *See generally* MARSHALL, *supra* note 68 (examining the relationship between the United States Supreme Court decision making and the American public opinion). Additionally, the fact that in the regular scheme at least two courts review a case allows for the first court's decision to herald, or prepare the way, for a dramatic, authoritative Supreme Court decision, whose seeds are planted in the decision of the lower courts. For the latter argument (termed “the preparation of the heart”), see STEPHEN T. EARLY, *CONSTITUTIONAL COURTS OF THE UNITED STATES: THE FORMAL AND INFORMAL RELATIONSHIP BETWEEN THE DISTRICT COURTS, THE COURTS OF APPEALS, AND THE SUPREME COURT OF THE U.S.* 144 (1977).

155. The current President of the Supreme Court of Israel recently made it abundantly clear that his court expects lower courts to diligently follow valid precedents. *See* RCA 3749/12 Bar-Oz v. Star (Aug. 1, 2013), Nevo Legal Database (by subscription) (Isr.); *see also* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 42 (1990) (criticizing the U.S. Supreme Court for “focusing so narrowly on an inflexible rule of *stare decisis*”).

Note that a supreme court may be at fault, at least in part, for its failure to close the ranks among lower courts. This may happen for reasons such as the following: the supreme court in question may be torn apart and therefore unable to issue coherent decisions (*see* Murphy, *supra* note 2, at 1018 n.3); it may issue unclear holdings or be otherwise unclear with regards to the direction of its jurisprudence (*see* Canon, *supra* note 149, at 63–65; Wasby, *supra* note 113, at 1087, 1101–03); and a supreme court may not follow its own precedents on a regular basis (*see* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996); Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SCI. 1036, 1045 (1996)).

Lastly, we should also bear in mind that there may be cases where precedents are not followed regardless of the manner in which the Supreme Court conducts itself. For relevant discussions, *see* Wasby, *supra* note 113. *See generally* EARLY, *supra* note 154, at 169–174.

156. *See* Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 396–401 (2014).

157. *See* Basic Law: The Judiciary, 38 LSI 101, §20 (1983–1984).

158. A leading proponent of such a “legalist” view is Aharon Barak. *See* Barak, *supra* note 8; *see also* Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project*

will highlight dynamics that might evolve in a foundationally heterogeneous judiciary, and illustrate why a rift among judges of hierarchically different courts makes it less likely that lower courts would walk in the footsteps of their seniors. This discussion will touch upon the fundamental question of what motivates judges as they decide cases that come before them. Let me give you a spoiler alert (with an intended pun): the jury is still out.<sup>159</sup>

From the outset, the common law tradition is founded on techniques to identify when an established precedent should—and when it should not—be applied in subsequent cases. Outstanding examples include the technique of distinguishing one case from another, not to mention the common law’s staunch adherence to the rule that upper courts should normally defer to lower courts’ treatment of facts.<sup>160</sup> These examples show why the Supreme Court’s doctrinal hold over the entire judiciary should not be taken for granted.<sup>161</sup> Adjudication practiced in the common law tradition presents lower-court judges, even when faced with an undeniable upper-court precedent,<sup>162</sup> with ample *lawful* escape routes

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*of the Israel Judiciary*, 31 SETON HALL L. REV. 760 (2001). However, Barak’s explanation of the manner in which judicial decisionmaking proceeds—and in particular his premises regarding judges’ “neutral,” professional, even scientific motivations in judging—is highly controversial, as illustrated *infra* note 159.

159. Very broadly speaking, the Barak camp’s Legalist Approach (*see supra* note 158) to judicial decisionmaking is today confronted by two main adversaries: The Attitudinal Camp, which thinks judges seek, and do, advance their personal ideological preferences (*see sources cited infra* note 166); and a cluster of theories forming the Strategic Camp, which believes judges behave more strategically with a view to advancing ends considered important in their eyes (e.g., personal ends, such as a promotion, or other a certain policy agenda). For examples of the latter position, *see*, for example, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); McNollgast, *supra* note 21; LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998). Heed well that the two camps opposing the Legalistic Camp stand on a broad common ground. They share the assumption that judges aim to achieve certain results, which they favor, and may surely make instrumental use of legal doctrines in the pursuit of these results. Namely, the two latter camps reject the proposition that judges “simply” pursue the professional vocation, and apply correctly and skillfully the relevant legal doctrines. *See* Bueno de Mesquita & Stephenson, *supra* note 142, at 757; Hugo M. Mialon et al., *Judicial Hierarchies and the Rule-Individual Tradeoff*, 15 SUP. CT. ECON. REV. 3, 4–7 (2007); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155–59 (1998); Keren Weinsall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL L. STUD. 556, 557–61 (2011).

160. *See sources cited supra* note 144; *see also* JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 75 (1973) (“[I]n most cases the trial judges have an amazingly wide ‘discretion’ in finding the facts, a discretion with which upper courts, on appeals, seldom interfere, so that, in most instances this ‘fact discretion’ is almost boundless.”).

161. *See* EARLY, *supra* note 154.

162. *See, e.g., supra* note 39 and accompanying text (noting the failure of the Supreme Court of Israel to provide courts and litigants with clear precedential guidelines regarding its HCJ jurisdiction).

from following such a precedent.<sup>163</sup> Therefore, we have every reason to believe the following statement is valid and relevant to this study, even though it was made almost forty years ago in reference to the American federal system: “A Supreme Court precedent, perhaps more often than is popularly realized, means to no little degree only what a lower-court judge is willing to concede that it means.”<sup>164</sup>

One<sup>165</sup> explanation for judges’ reluctance to apply a precedent originated in the *attitudinal* approach to judging, which has captivated the political science literature in the past two decades and ignited a spirited debate,<sup>166</sup> places the emphasis on the degree to which the legal policy embodied in a given precedent is compatible with the ideology of the decisionmaking judge.<sup>167</sup> We do not need to dwell on the intricacies of the vast literature dedicated to the study of judges’ motivation as they decide cases. Suffice it to say that its several branches lay out various theoretical frameworks, some of which even lay claim to substantiating them with empirical data,<sup>168</sup> which challenge any homogenous view of the jurisprudence and role perception of the many judges serving in a given (common law) judiciary. As illustrated in this diverse literature, different courts and judges may often differ on legal questions on account of conflicting personal aspirations, divergent political ideologies, or dissimilar understandings of the judiciary’s role in a democratic society or of the requirements of legal professionalism.<sup>169</sup> While it would be a mistake to assume that under this broad framework wherever a lower-court judge opposes a settled precedent, she would not

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163. Murphy, *supra* note 2, at 1081 (“The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior judges may materially modify the High Court’s determinations.”). *C.f.* Shapiro, *supra* note 145.

164. EARLY, *supra* note 154, at 57; *see also* Kim, *supra* note 145, at 556. It should be emphasized that it does not follow from this statement that “on the ground” American and Israeli courts do not adhere to the precedents of their respective supreme courts. For relevant discussion, see sources cited *supra* note 94. The importance of the latter statement to the current discussion is in highlighting the organizational difficulty faced by common law supreme courts—a difficulty generally shared *mutatis mutandis* by the management of every organization—in preserving their normative hegemony throughout the judicial pyramid.

165. As noted, there is a variety of such explanations. *See supra* note 159.

166. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2000); *see also, e.g.*, Michael Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1740–41, 1748 (2003) (reviewing SEGAL & SPAETH, *supra*); Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601 (2000); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903 (1996).

167. *Supra* note 159.

168. *See, e.g.*, sources cited *supra* note 166.

169. *Supra* note 159.

follow it (she might still follow it, for example, out of an overriding belief in the importance of legal stability and predictability),<sup>170</sup> it seems that a divergence of dispositions among differently positioned judges generally increases judges' motivation *not* to abide by it. The potential disagreement between lower and upper courts along with the fact that the common law supplies lower-court judges with a host of escape techniques gives rise to the phenomenon known in a growing body of literature as lower-courts' "underrule."<sup>171</sup>

#### 4. The Attitudinal Paradigm

Thus far, the analysis has been essentially conducted in terms of the classical paradigm of organization theory, as the judiciary's hierarchical structure has occupied central stage.<sup>172</sup> Moving now to the attitudinal paradigm, it should be noted that it considerably buttresses the argument that supreme courts in common law jurisdictions face a real difficulty in assuring and sustaining doctrinal conformity among the lower courts. The attitudinal paradigm complicates the jurisprudentially oriented description of the options available to lower-court judges faced with an upper-courts' precedent<sup>173</sup>—if only as it warrants caution in assuming that such a judge, being an adept organization member, would simply (be inclined to) follow suit.<sup>174</sup> The same paradigm also adds theoretical depth to the attitudinal models of courts' decisionmaking<sup>175</sup>—if only as it demonstrates how central personal dispositions are in guiding the conduct of organization members.<sup>176</sup>

In short, the attitudinal paradigm turns the issue of a supreme court's doctrinal hegemonic control within a judiciary from a taken-for-granted premise to a real challenge. It underscores how severe the disintegrative tendencies embedded in the

170. See Posner, *supra* note 159, at 26–29; EPSTEIN & KNIGHT, *supra* note 159, at 163–64.

171. On "underrule," see, for example, Bhagwat, *supra* note 27, at 969–73.

Notice that the foregoing discussion proceeded on the assumption that the degree to which lower courts "follow" a given precedent is fairly easily discerned. This is, of course, rarely the case. However, space does not permit me to expand on this point. For a relevant discussion, see McNollgast, *supra* note 21, at 1639; Jacobi & Tiller, *supra* note 94; Kim, *supra* note 145, at 559–61.

172. See *supra* note 106 and accompanying text (highlighting the centrality of hierarchy in the classical paradigm).

173. See *supra* note 160 (mentioning, *inter alia*, the common law technique of distinguishing cases).

174. See *supra* note 107.

175. *Supra* notes 159, 166.

176. See *supra* note 116.

organization referred to as “the Israeli (common law) judiciary” may be. Given the risk involved, the HCJ’s extraordinary structure may seem easily defensible, especially given the nature of the body of law reserved to this judicial forum.<sup>177</sup> In other words, being the director of the Israeli judiciary, the Court is confronted with the dilemma of which *modi operandi* to endorse, in its different capacities, with a view to maximizing lower courts’ propensity to conform to its policies. It is in this context that the HCJ, as structured throughout the years by HCJ justices, presents one sensible solution to the dilemma. To be sure, that solution parallels comparable solutions detailed in the organizational literature.<sup>178</sup>

Thus far, the paradigm’s contribution has been to the upside part of the Court’s ledger. But the attitudinal paradigm also adds to the downside part of the ledger.

The attitudinal paradigm turns a spotlight on the dispersive repercussions of the HCJ’s splendid isolation and the manner in which it has been—and is—upheld by the justices. To begin with, the HCJ’s unusual configuration may be persuasively regarded as the manifestation of one strategy of control adopted by the Supreme Court. Why the Supreme Court needs to employ such strategies in the first place should be evident by now. What needs to be fleshed out at this point is the fact that as a method aimed at fostering the Court’s hegemony, the strategy of control ingrained in the HCJ naturally involves an exercise of power.<sup>179</sup> Surely, there is nothing noteworthy in the fact that the organization under review (the Israeli judiciary) is saturated in power, as the exercise of—and the resistance to—power is the core of organizational life.<sup>180</sup> What is noteworthy are the specific guises in which the Court’s power *vis-à-vis* the lower courts has taken form. As indicated before, one<sup>181</sup> central expression of that power in this case is the HCJ’s “exclusionary rule.”<sup>182</sup> Under this “rule,”

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177. See *infra* Part IV.

178. See, e.g., John Child, *More Myths of Management Organization?*, 7 J. MGMT. STUD. 376, 377–78 (1970).

179. See *supra* text accompanying note 109 (quoting March and Simon’s contours of the attitudinal paradigm).

180. For an elaborate discussion on power in organizations, see CLEGG & DUNKERLEY, *supra* note 3, at 433–82; see also Cynthia Hardy & Stewart Clegg, *Some Dare Call it Power*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES, *supra* note 3, at 754, 754–75.

181. There are surely others—notably, the HCJ’s ability to define the terms of the discussion surrounding the HCJ to the extent that its own identification with public law adjudication is proverbially taken as a given, even within the judiciary. See CLEGG & DUNKERLEY, *supra* note 3, at 452–53 (“[A] very significant form of power will be the [organization] members’ inability to see beyond the actuality of the presence . . .”); see also STEVEN LUKES, *POWER: A RADICAL VIEW* (2d ed. 2005). As we have seen, this had not been the case before. See *supra* text accompanying note 72.

182. See *supra* note 139.

lower-court judges are precluded from taking part in the demanding intellectual effort needed to resolve public law questions of grave magnitude.<sup>183</sup> It is as if they were blacklisted by the HCJ. The next step in the argument appears even more straightforward, as we notice that such centralist, exclusionary strategies are likely to be inimical to organizational directors' efforts to enlist the loyalty of subordinates in order to increase their tendency of abiding by organizational policies. This proposition is borne out in the organizational literature. As pointed out by one extensive empirical research project, "[d]ecentralization . . . can procure the kind of broad managerial involvement in analysis, planning, and scanning that increases the appropriateness of decisions and marshals a political commitment facilitating their implementation."<sup>184</sup>

### 5. Putting It All Together

The fact that several generations of justices have unflinchingly ensconced themselves under the current HCJ configuration suggests that they have favored their perceived advantages associated with it over the disadvantages. This is the underlying premise of my analysis weighing inter-organizational costs and benefits of that configuration. The analysis's findings demonstrate that keeping the HCJ exclusively in the hands of the Supreme Court created a legal universe maintained by the justices alone. The justices could design it as they saw fit and were largely relieved of the need to take other judges' perspectives or reservations into account. They were thus absolved of the requirement to "procure [the lower courts'] cooperation in applying its precedents to create a coherent body of rules."<sup>185</sup> The HCJ's monopolistic jurisdiction allowed the Court to uninterruptedly speak on issues the justices kept to themselves.<sup>186</sup>

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183. See Hardy & Clegg, *supra* note 180, at 769 ("When organization theory was conceived as the sociology of organizations, the point was to address the question, 'what are the consequences of the existence of organizations?' The question has two elements: 'First, how organizations affect the pattern of privilege and disadvantage in society; second, how privilege and disadvantage are distributed within organizations' . . . Both refer to central issues of power in relation to organizations.")

184. Danny Miller, *Strategy Making and Structure: Analysis and Implications for Performance*, 30 ACAD. MGMT. J. 7, 24 (1987); see also Richard M. Zeffane, *Centralization or Formalization? Indifference Curves for Strategies of Control*, 10 ORG. STUD. 327 (1989); CLEGG & DUNKERLEY, *supra* note 3, at 363-64.

185. Kim, *supra* note 145, at 573. I would like to note that Professor Kim's wonderful analysis proceeds on a different course than the one taken in this Article. Therefore, while we share several themes, the theoretical frameworks in the two pieces are obviously different.

186. See Amnon Reichman, *Criminalizing Religiously Offensive Satire: Free Speech, Human Dignity, and Comparative Law*, in EXTREME SPEECH AND DEMOCRACY 331, 348



At the same time, the HCJ's configuration deprived the Court of several of the key benefits that come with hearing cases as appellate courts, mainly the benefit of hearing most of them after lower courts had laid down the factual and legal parameters of the disputes. Consequently, the Supreme Court in its HCJ capacity alone had to do all the heavy lifting of processing a considerable part of litigated public law disputes. It has been further demonstrated that key arguments of the attitudinal paradigm lend credence to the Israeli Supreme Court's manifest belief that the HCJ's arrangement is indeed grounded on a cost/benefit analysis as the one conducted above. Yet, other arguments of the attitudinal paradigm complicate the picture. Thus, we arrive at the dialectic conclusion that the HCJ is a double-edged sword: it relieves the Court of the frustrating duty of bothering with lower courts' adherence to its precedents in what it itself regards as the most valuable sections in Israeli public law. At the same time, this peace of mind may come at a price. It may disincentivize lower courts from following the Court's jurisprudential lead in the vast ocean lying outside the purview of the HCJ, that is, when it comes to the many other branches of law in which the Court does not wish to engage in solipsistic adjudication.

To repeat and clarify, this Part's argument is not that the latter cost really outweighs the former benefit, nor that the Supreme Court's approach in structuring the HCJ's jurisdiction is (ir)rational; rather, the argument is simply that this last inter-organizational consideration as well as other related considerations should figure into the conceptualization of the HCJ problem. There can be hardly any doubt that the HCJ's entrenchment (by the justices) may have inter-organizational, inter-court effects.<sup>187</sup> Such effects should be included in the discourse surrounding the HCJ. This Part exemplifies a more realist and comprehensive scrutiny of the HCJ, as a common law, public law court of law. Its scrutiny has taken into account previously noticed and thus-far-unnoticed costs and benefits of this court's structural makeup as molded in its jurisprudence. Still, expansive as it has been, that scrutiny has surely not encompassed the full gamut of relevant organizational<sup>188</sup> and

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(Ivan Hare & James Weinstein eds., 2009) ("[T]he application of the [HCJ's] balancing doctrine [for freedom of expression cases] in lower courts in Israel is likely to raise serious issues of uniformity.").

187. At least on one momentous occasion the Court's steadfast approach in this regard did not gain the universal support of lower courts' judges. See *supra* note 72 (describing District Courts' divergent views on the question of the HCJ).

188. See, e.g., *supra* note 42 (noting organizations' general inclination to preserve their authority and the endowment effect); see also *supra* notes 132, 181.

jurisprudential<sup>189</sup> considerations. The principal aim of this Part has been to point out a whole body of considerations which are completely absent from the current discussion, rather than to offer a conclusive list thereof. Research done following this Article will have to include in its analysis those additional costs and benefits that will be identified in future elaborations of the organizational and jurisprudential facets of the HCJ arrangement.

#### IV. WHY PUBLIC LAW?

##### *A. General Introduction*

This Part will engage in a critical assessment of the concept of public law undergirding the HCJ organizational formation. Following the discussion in the previous Part, this critical assessment will expose possible hidden advantages, as far as the Supreme Court is concerned, in the endurance of the HCJ “exclusionary rule.” Still, this Part will be particularly relevant to courts far beyond the HCJ and other Israeli courts. It will revolve around one, universal issue: the organizational dimensions of (common law) public law adjudication. The inquiry into this issue will draw on the previous Part’s analysis, which centered on “general” organizational dynamics and related dilemmas associated with common law courts. Similarly, the ensuing discussion will be based on a perception of public law in the United States and Israel. We have good reasons to assume that this perception transcends the two jurisdictions and is found in other common law legal systems as well. In any event, it is not a distinctive Israeli perception. As before, the discussion will begin by inquiring into the Israeli test-case example of the HCJ and suggest what insights into the general matters at hand—in this case, unfamiliar organizational dimensions of public law adjudication—may be gained.

What, then, may justify the unbreakable persistence of the HCJ’s original jurisdiction over public law<sup>190</sup> and of justices’ equally relentless persistence in maintaining it, even after the introduction of the “Small HCJ”?<sup>191</sup> It is one thing to allocate and retain a well-defined, limited original jurisdiction to the highest court of a land (e.g., “in all cases affecting ambassadors . . .” as prescribed in the U.S. Constitution<sup>192</sup>), but it is another to endow

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189. *See also infra* Part IV.

190. It should be also noted again that to this day in Israel, most applicable public law standards are the handiwork of the HCJ’s jurisprudence. *See supra* note 11.

191. *Supra* note 25.

192. U.S. CONST. art III, § 2.

such a court with the far-reaching, broad original jurisdiction of the HCJ.<sup>193</sup>

This Part maintains that the HCJ policy concerning its jurisdiction is premised on the conceptualization of public law as such a unique body of law that only the highest court of the land could adequately deal with it. Namely, the policy is twofold. It declares that (1) public law—and *a fortiori* that part of public law judged by the HCJ to merit its exclusive doctoring—is a special kind of law; and (2) in principle public law must be kept for the exclusive regulation of the Supreme Court in its HCJ capacity. The fact that the Supreme Court reserves it for its own treatment<sup>194</sup> amounts to categorizing public law as a different species than all other branches of law. The following Sections explicate the justices' position vis-à-vis this one branch of law.

### B. A Proverbial Vision of Public Law

Here is a list of characterizations of public law, which seems to be ingrained in the HCJ's "exclusionary rule": Public law litigation traditionally places an individual ("the petitioner") against an administrative organ (e.g., a body of the state government or a municipality) or even the state itself.<sup>195</sup> Public law disputes are often public, in the simple sense that they touch—or potentially touch—on the lives of many; they may even put two throngs of people in deep conflict.<sup>196</sup> Of course, there is a third party to the duet of contending parties, i.e., the court itself. Indeed, public law litigation turns courts, themselves state organs, into a party—albeit a party serving as the umpire—in a controversy in which one of the contending litigants is another public organ, if not the state itself.<sup>197</sup> Further, public law sources are frequently cast in the mode of open-ended, abstract standards, rather than detailed, tangible rules.<sup>198</sup> As such, they provide (relatively) limited

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193. See Part II. It may even be suggested (following the discussion *supra* notes 159, 166, and text accompanying notes 165–71 (on the attitudinal model of adjudication)), that public law disputes frequently carry certain characteristics that directly bear on the likelihood of lower-courts' defiant holding, if not of outright underrule on their part. For "underrule," see *supra* note 171.

194. Either in its judicial or its regulatory capacity. See *supra* note 137. The focus in this Part is on the HCJ's role as a judicial—rather than regulatory—organ. See Sagy, *supra* note 137.

195. For vivid illustrations of relevant HCJ cases, see Gila Stopler, *The Israeli Supreme Court—Between Law and Politics*, 48 TULSA L. REV. 257 (2012).

196. The list of relevant HCJ cases is beyond counting. *Id.*; see also, e.g., MEYDANI, *supra* note 11.

197. SHAPIRO, *supra* note 21, at 26–27.

198. On the standards/rules distinction, see the classic Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

guidance to the decision-maker as to how she should decide a concrete case that comes before her; they are readily open to different, even conflicting, interpretations.<sup>199</sup> Generally, public law centers on public legislation (notably, statutes and regulations), which routinely distributes public goods in one form or another.<sup>200</sup> Such legislation's distributive policies are therefore often contested.<sup>201</sup> Consequently, it is not uncommon for them to provoke unusually passionate controversies among different decision-makers. Indeed, public law disputes are regularly associated, in the most direct and immediate manner, with questions of public policy and "political" issues—namely, issues that are often openly debated in "political" fora prior to, or in tandem with, the relevant court.<sup>202</sup>

Taken together, these characteristics support the common approach that public law disputes often pertain to extraordinarily sensitive, contested, potentially even fiery issues, and that relatedly they prominently figure in the public's perception of the judiciary.<sup>203</sup> Hence, public law disputes may be said to form one distinct category of cases that are especially and naturally prone to touching upon delicate and even explosive public concerns that may directly bear on the judiciary's public standing, or legitimacy.<sup>204</sup> Furthermore, by their very nature, these disputes are predisposed to putting the judiciary in conflict with other public organs,<sup>205</sup> and are especially liable to mar the courts with "doing politics."<sup>206</sup> It should be emphasized that such accusations might go to the core of courts' legitimacy in two separate ways: first, it may draw a question mark on

199. See Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 10–11 (1983).

200. See, e.g., Monaghan, *supra* note 9, at 1370 (stating that constitutional adjudication "calls for judgments dealing with the distribution of political power").

201. See, for example, the landmark HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441 [1986], which revolved around mandatory conscription to the Israeli Army of most Jewish men and the exemption given to ultra-religious Jews. See also *infra* note 206.

202. See, e.g., Monaghan, *supra* note 9, at 1369–70 ("[C]onstitutional adjudication is, fundamentally, a 'political-legal' undertaking only loosely analogous to 'ordinary' judicial litigation."); see also Barak-Erez, *supra* note 132, at 614 (noting "the growing involvement of Israel's Supreme Court in political domains that were previously considered non-justiciable[]") and citing in support *Ressler v. Minister of Defense*).

203. The regular media coverage of major public law cases is often cited in support of this perception. See the analysis in Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 LAW & SOC. INQUIRY 53 (2008), which also points out benefits that the HCJ may draw from such intense media coverage.

204. On courts' legitimacy, see *supra* note 68.

205. *Supra* note 195.

206. A dramatic example of such a dispute that was dealt with in 1979 by the HCJ was the *Elon Moreh* affair, which concerned a Jewish settler's initiative to establish a settlement in the West Bank. HCJ 390/79 Dweikat v. Gov't of Israel 34(1) PD 1 [1979]. The case is extensively discussed in JACKSON & TUSHNET, *supra* note 7.

the judiciary's alleged (unique) role among the three branches of government; and second, it calls to question judges' alleged (unique) professionalism.<sup>207</sup> Both challenges are foundational. Both dispute much of courts' and judges' claim to fame, that is, their case for occupying a separate, distinct, and monopolistic position within the democratic constitutional constellation and the professional, civil society matrix.<sup>208</sup> This appraisal of public law disputes highlights serious difficulties associated with the HCJ structure of adjudication: notably, the fact that the HCJ serves as a prime target for criticism, which can be scathing, leveled at the manner in which it (alone) resolves charged, "political" disputes. Such attacks in turn may clearly erode the Court's legitimacy.<sup>209</sup>

It may actually be argued that from this perspective, courts would be wise not to adjudicate most public law controversies, certainly if their public perception is of such great import as held by the canons of liberal-democratic political philosophy.<sup>210</sup> However, this is not the road taken by the present analysis.<sup>211</sup>

### *C. Critical Assessments/Possible Benefits*

I wish now to point out inter-organizational consequences that may result from the abovementioned vision of public law. In a nutshell, it may be argued that, given this vision of public law, two major dangers lurk in unguardedly unleashing it to the treatment of the "regular" courts in the ordinary common law hierarchical mode:

(1) Since it is (allegedly) in its nature to touch upon the exposed nerves of society and incite heated controversies, there is a clear and present danger in allowing different courts to freely deal with public law, since it might introduce passionate wrangles

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207. See Rosen-Zvi, *supra* note 158; MEYDANI, *supra* note 11, at 142 ("[I]ts public and professional legitimacy are the central sources of the Supreme Court's power . . .").

208. See SHAPIRO, *supra* note 21, at 5–8; see also Anna-Maria Marshall, *Social Movements Strategies and the Participatory Potential Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164 (Austin Sarat & Stuart A. Scheingold eds., 2006).

209. See *supra* note 132. This effect may be extenuated by the fact that, as noted *supra* text accompanying notes 148, the HCJ cannot benefit from the advantages normally available to upper courts which make their decision in the wake of the lower court's judgment, so that the former may factor in the public reaction to the judgment of the latter.

210. This position is best captured in the Hamiltonian depiction of the judiciary as the least dangerous branch of government having "neither FORCE nor WILL but merely judgment[.]" THE FEDERALIST NO. 78, at 433 (Alexander Hamilton). For an introductory discussion on the legitimacy of organizations, see Joel A.C. Baum & Andrew V. Shipilov, *Ecological Approaches to Organizations*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES, *supra* note 3, at 55, 88–90.

211. See *supra* note 68 (clarifying that this Article does not seriously engage with the issue of courts' legitimacy).

into the judiciary. At the very least, it might open the door for the proliferation of intense inter-judicial disputes. In other words, public law adjudication is liable to become a breeding ground for organizational division, thereby strengthening divisive organizational tendencies. Therefore, unfettered, universal public law adjudication in all courts of law is dangerous from an organizational perspective and should not be adopted.<sup>212</sup>

(2) In general, public law is (allegedly) a unique body of law because there is an undeniable dominant ideological essence to it. This essence sets it apart from other branches of law, which, when handled by skilled jurists, can and should be reduced to strictly “neutral,” “scientific” formulations. Not so, the argument goes, when it comes to public law, which is always already tainted by non-scientific, subjective predispositions. Here the emphasis is less on public law’s intensely divisive nature and more on its comingling of “purely” legal reasoning with clearly non-legal considerations. Public law might therefore inject non-legal discourse into the courtrooms. It would be inclined to adulterate pure, professional legal discourse. Put in organizational terms, public law might import into the judiciary elements that counteract its pronounced professional culture, a culture which relies on professed and assured assertions of neutral, scientific judicial professionalism. In short, dispersed public law litigation is inimical to, and might subvert, the Israeli judiciary’s ethos of legal professionalism, whose most ardent panegyric has been the Supreme Court.<sup>213</sup>

In keeping with the general tenor of this Article’s analysis, both of these arguments regarding the negative organizational ramifications of “free-range” public law litigation throughout the Israeli judiciary are most lucidly articulated from the perspective of the Supreme Court.

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212. The fact that the HCJ arrangement is exceptional within the common law universe (*see supra* note 9) does not seem to sufficiently reply this argument if only due to the fact that Israeli society, which has been engaged throughout most of its existence in warfare, has always been deeply divided. *See Sagy, supra* note 9, at 225–62.

213. *See Rosen-Zvi, supra* note 158.

## 1. Supporting Centripetal Tendencies?

According to the first argument, the HCJ would be wise to permit lower courts to try only those public law causes of actions that may not provoke unusually fervent disputes between different courts. Such cautious policy may support centripetal tendencies at work within the judiciary,<sup>214</sup> whereas adopting a liberal, permissive counter-policy is likely to invite unnecessary internal skirmishes.

On the face of it, and in the absence of further elaboration, this argument does not seem to be particularly strong; it would be extremely difficult to devise a judiciary in its light. It seems to advise against the involvement of different courts in the adjudication of endless categories of contested issues (e.g., collective labor law disputes, tear-jerking family disputes, and so on), which are impossible to be grouped in a helpful manner. Perhaps this argument would carry weight if we accepted the view that public law's disruptive tendencies considerably exceed other legal disputes' similar tendencies. In other words, this first argument becomes particularly effective if it is shown that on average public law is much more inclined to wreak (organizational) havoc than, say, class actions.

## 2. Public Law As Opposed to Other Law?<sup>215</sup>

Going back to the analysis of the discipline of public law, it is worth noting that public law has always been intimately connected to the state and its sprawling organs.<sup>216</sup> Moreover, in the Anglo-American tradition, the administrative law section of public law has generally, and only grudgingly, gained acceptance merely after the rise of the administrative state could not be denied.<sup>217</sup> As a result, compared to common law's staple doctrinal, private-law branches of law (i.e., property, contract, and torts), administrative law came to its own late in the game, and with it the understanding that modern public law included administrative law and other related branches of law (e.g., municipal law). Furthermore, as persuasively argued by Duncan Kennedy, even after it had made it to the list of acknowledged bodies of law as well as into law school curricula, public law has been kept apart, in the periphery of doctrinal law. The core was reserved to hardcore,

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214. On inter-organizational centrifugal and centripetal tendencies, see *supra* note 110 and accompanying text.

215. The argument in this subsection is based on Kennedy, *supra* note 199.

216. See Sagy, *supra* note 103.

217. See, e.g., Chayes, *supra* note 68, at 1288–89, 1304.

common law private-law doctrines. The two (private versus public law) were deemed to have different orientations: individualist versus collective. Consequently, only the latter was seen as political; the former was regarded as strictly logic-based. The former, held to be coherent, prided itself with fine analytic distinctions, and thus (allegedly) readily lent itself to “rigorous” and “rational” analysis, which produced “necessary” outcomes. Put differently, private-law doctrines were treated as “scientific” and “objective.” Contrarily, public law was commonly seen as “dispersed, disintegrated, and chaotic[.]”<sup>218</sup>

Kennedy’s last step is presenting the prevalent opposition between law’s “periphery” (public law) and the “core” (private law) as false. Making the now-familiar Critical Legal Studies argument that both private and public laws—rather than just the latter—lack coherence and are internally fractured, he goes on to argue that private law doctrines’ internal contradictions “[are] simply incomprehensible and unintelligible without reference to those things that are supposed to be on the periphery[.]” notably public law.<sup>219</sup>

One does not have to buy into Kennedy’s entire analysis to realize that herein may lie a profound observation regarding public law adjudication. I suggest that we take his analysis of law schools’ curricula and apply it to the realm of the Israeli judicial division of labor. Read in this light, Justice Shamgar’s comment that the justices “are not willing to let go” of the HCJ<sup>220</sup> may be regarded as a self-cautionary note. Namely, it may be suggested that the HCJ’s policy of “sticking to its guns” reveals a similar intuition at play to the one outlined by Kennedy: the less “regular” courts are exposed to undisciplined, peripheral, non-scientific sections of law—if it is “law” at all—the better. This intuition may explain the justices’ ongoing, active opposition to the tendency to normalize all public law by turning it into a “regular” branch of law circulating in the Israeli judiciary. The justices’ fear appears to be that if the flood gates are opened and public law is regularly handled by regular courts, chaos would ensue:<sup>221</sup> non-professional, non-objective, unnecessary elements would be flushed into the justice machinery. This fear may account for the painstaking process whereby the HCJ has carefully parceled out those segments of “HCJ law” that

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218. Kennedy, *supra* note 199, at 10–11. No wonder, then, that traditionally public law was considered in academic circles to be intellectually inferior—if not simply unimportant compared—to private law. *See id.* at 12.

219. *Id.* at 15.

220. *Supra* note 81.

221. *See supra* note 218 and accompanying text.



may be safely trickled down to the general, regular courts<sup>222</sup>—*but only after they had been carefully digested*, for a long period of time, *exclusively by the HCJ*.<sup>223</sup> Essentially, this has been a long process of “scientification,” or better still, disciplining a “dispersed, disintegrated, and chaotic”<sup>224</sup> branch of law, thereby severely limiting the degree of discretion that lower courts’ judges would need to exercise.<sup>225</sup> Only those chapters of public law that have been thus treated by the HCJ may be considered as candidates for a transfer to the regular system—under the watchful eye of the HCJ’s (concurrent) jurisdiction.<sup>226</sup>

#### *D. Conclusion: A Controlling Perception*

As we have seen, the HCJ configuration seems to rest on the questionable perception that public law is such a unique branch of law that it may not be freely introduced to the “regular” courts, but rather only following the mediation by the Supreme Court. Remember that from the perspective of this Article, the important point is that the latter perception is a theoretical-jurisprudential construct built to support an existing structure of adjudication—an existing organizational configuration. Therefore, this Part has focused on, and uncovered, the inter-judiciary dimension of a pervasive perception of public law.

Thus, it appears that the HCJ’s “exclusionary rule” reflects a certain perception of public law, which plays a part in the Supreme Court’s strategy of controlling the entire judicial pyramid. That perception of public law is closely linked to the approach as if “non-HCJ” branches of law are coherent and apolitical. While critically unsound, this approach may assist the Court in advancing a professional and seemingly apolitical culture within the judiciary. In other words, it may assist the Court in reining in the lower courts, by shunning not-strictly-“legal” elements of which the

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222. *Supra* note 28.

223. *See* Sagy, *supra* note 15 (describing the long process whereby the justices “transferred” categories of cases to the realm of concurrent jurisdiction).

224. Kennedy, *supra* note 200, at 10; *see also supra* text accompanying note 80.

225. *Cf.* CLEGG & DUNKERLEY, *supra* note 3, at 357–60 (describing a historical organizational development in the West, as a result of which “a considerable proportion of white-collar occupations has shifted from being medium-discretion to low-discretion work roles”).

226. Lastly, it may be argued that Kennedy’s penetrating analysis (in Kennedy, *supra* note 199) is relevant in the context of the HCJ for yet another reason: as noted, the HCJ takes great pride in the (relatively) swift manner in which it resolves disputes. *See supra* note 67. Advantageous as this may be for the litigants, it seems that the HCJ’s expeditious procedures offer a clear advantage to the Supreme Court. They allow it to quickly discard, within the isolated environment of the HCJ, matters that belong in the “periphery” of law. As it is deemed dangerous to expose the organization to such matters, the ability to adjudicate them rapidly out of the system is a real boon for its well-being.

Court has limited control,<sup>227</sup> or at least screening and disciplining them prior to exposing lower courts to such elements.

## V. CONCLUSION

This Article was written in response to the legal literature's failure to take into account the basic fact that courts are organizations. Out of the vast amount of literature dedicated to organizational studies, the Article discussed, in particular, the attitudinal paradigm in organizational theory because it bears on the fundamental though overlooked subjects of hierarchical control within the judiciary and related inter-organizational (i.e., inter-judiciary) dynamics that might surely influence judges' decisionmaking. Building on this analysis, the Article has considered the test-case example of the HCJ.

At first blush, the Article's inter-organizational analysis seems to lend support to the Israeli Supreme Court's "exclusionary rule" in public law adjudication, provided that one subscribes to the public law perception underlying it.<sup>228</sup> Public law adjudication may be found to enhance centrifugal organizational tendencies for a number of reasons: it may disrupt the scientific-professional ethos pervading the judiciary, introduce ideological clashes among different courts, and spell doctrinal disarray. From this perspective, it may be suggested that, to a large extent, the HCJ anomaly is a testament to the fact that the Israeli judiciary exhibits its own organizational control-related dynamics, or at least that the Supreme Court deems such dynamics relevant to the Israeli judiciary. Put bluntly, the HCJ may thus be perceived as a symptom of the Supreme Court's wider and permanent organizational concern about maintaining internal doctrinal cohesion among the judiciary's various courts. However, the Article's overall analysis should also give one pause. Notably, it may be argued, following the Article's discussion, that the HCJ's restrictive policy might actually be counterproductive, as it seems to *intensify* inter-court divisional tendencies.<sup>229</sup> That is, the HCJ's "exclusionary rule" may surely be adversely viewed by the other courts. They may regard it as a "segregationist," elitist, or paternalistic policy. As a result, it might enhance disruptive, and counteract unitary, forces at work within the judiciary.

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227. See *supra* note 122 and accompanying text (discussing the disruptive influence exterior constituents may have on organizations).

228. See *supra* Part IV.

229. Likewise, it was suggested that it is founded on a precarious perception of public law. See *supra* Part IV.

The aim of the Article has not been to weigh the various costs and benefits of the HCJ model, but rather to reignite an informed debate concerning the HCJ and public law adjudication in general. Specifically, it has sought to reveal that there are costs and benefits to the HCJ configuration; to expose significant such costs, which belong in the domain of (inter-)organizational studies; and above all to place the HCJ's cost/benefit calculus within the broader context of organizational studies (for example, by revealing that the HCJ's "rule by exclusion" is one out of several strategies of control available to organizations' directors).<sup>230</sup>

Generally, as emphasized throughout the discussion, my main goal in this Article has been to show why inter-organizational—and, more broadly, a great many other organizational considerations—must be made part of the discussion regarding the universal practice of public law adjudication. The Article has accordingly displayed and unpacked inter-judiciary tensions that arise in public law adjudication. Surely, it has demonstrated that the attitudinal paradigm provides a new theoretical framework with which we can insightfully re-examine age-old puzzles, such as the one surrounding the HCJ arrangement, and pose a series of new, fascinating questions.<sup>231</sup>

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230. On strategies of organizational control, see *supra* note 127.

231. Thus, for example, it would be interesting to look into the different strategies of control employed by other supreme courts as they confront the organizational challenges embedded in public law as well as in other branches of law. On the face of it, doctrines such as justiciability and standing (mentioned *supra* note 32) certainly seem relevant to such an inquiry.