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The Israeli Supreme Court and the Israeli Public

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TABLE OF CONTENTS

Chapter One: Introduction 11

Chapter Two: Outlines of the Israeli High Court of Justice's (HCJ) Rulings 17
A. The Legal System and the Supreme Court 17
B. The Uniqueness of the Israeli Supreme Court in the Israeli Legal System 19

Chapter Three: The HCJ and Socio-Political Changes 29
A. The Institutional Status of the HCJ 29
B. Judicial Review and Judicial Involvement in Public Issues 36

Chapter Four: Public Attitudes Towards Supreme Courts: 49
The Research Field and the Comparative Scientific Literature 49

Chapter Five: Research Hypotheses and Research Design 59
A. Research Hypotheses 59
B. Research Design 62

Chapter Six: Analysis of General Public Trends 67
A. State, Democracy and the HCJ 67
B. Images Towards the HCJ and the Symbolic Discourse . . . 71
C. Public Expectations of the Judicial Review 73
D. Public Reactions to HCJ's Decisions in Special Issues: . . . 77
(1). The Right of Standing: The Right to Appeal in Public Issues 78
(2). The Judicial Review in the West Bank and the Gaza Strip 80
(3). The Judicative Power of the HCJ and Judicable Matters 84
(4). The Exclusion of Radical Political Parties from Participation in the National Elections 85
(5). Freedom of Expression and Military Censorship . . 89
(6). Review over the Security Authorities 94
(7). Conscientious Objectors and Disobedience to the Military Draft 107

Chapter Seven: Characteristics of Public Consensus and Public Dissensus towards the Israeli Supreme Court 113

Chapter Eight: Dimensions of the Israeli Public's Attitudes towards the Supreme Court and its' Judicial Decisions 123

Chapter Nine: Social Effects on the Formation of Public Attitudes Towards the Supreme Court 135
A. Criteria for the Analysis of Social Effects 135
B. The Empirical Findings 139
C. Nomination of Judges to a Position at the Supreme Court: The Nomination of an Israeli-Arab Judge 155

Chapter Ten: Political Parties and Attitudes towards the Supreme Court . . 163

Chapter Eleven: Summary and Conclusions 175
A. Concluding Empirical Remarks: The Research Hypotheses in Light of the Empirical Findings 175
B. Supreme Courts: An Alternative Conceptual Viewpoint . . 186
(1). Definitions of the Nation-State and Autonomy of Supreme Courts 187
(2). Dimensions of Courts' Legitimacy 188
(3). Supreme Courts and Social Classes 189
(4). Are Supreme Courts Countermajoritarian? 190

Chapter Twelve: Epilogue 193

Appendices: 207

Appendix A: The Research Questionnaire 207

Appendix B: Table of Factor Analysis 223

Subject Index 225

Table of Cases (Supreme Court's Decisions) 229

English Abstract V

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Abstract

This book is the first study about the attitudes of the Israeli public towards the Israeli Supreme Court (sitting as an High Court of Justice-hereinafter-HCJ). Based on extensive review of the theoretical and comparative literature, which has dealt with the subject of judicial review in democracies, the book relies on a scientific poll which was conducted by the authors (in July 1991) among a representative sample of the adult Jewish population in Israel. The primary purpose of this book is to illuminate and to conceptualize the interactions between the Supreme Court, especially the HCJ, and the public.

The expanding judicial involvement of the HCJ in political life, including its engagement in crucial issues such as security problems and issues directly connected to the Arab-Israeli conflict, has been one of the most prominent phenomenon in the Israeli political setting. That extensive judicial review has become a significant and intriguing public phenomenon from a comparative perspective. Political motives of supreme courts (either institutional or individual aspirations), the political repercussions of their growing judicial involvement and the public processes engendered by judicial decisions, are becoming one of the most crucial scholarly subjects in political science, political sociology and constitutional law. Accordingly, this study has been interdisciplinary; and it has been based on a socio-political and legal analysis. It has utilized the knowledge and the methodology of political science and sociology, in addition to an analysis of constitutional law and administrative law.

The lack of interdisciplinary studies as avenues to pursue a better understanding of law and politics has been illuminated in the first chapter. We have explained why a socio-political examination of supreme courts is

primarily beneficial. We have explored diversity of cultural, behavioral and structural approaches to the study of law and politics; including the Weberian tradition, on the one hand, and the critical legal studies (CLS) approach, on the other hand. Analyzing interactions between supreme courts and their public environments, in specific socio-political fabrics, will significantly contribute to the study of supreme courts, and that beyond the Israeli case-study, which has been the main subject of our empirical investigation.

The second chapter has been aimed to clarify the constitutional posture and the institutional status of the Israeli Supreme Court, especially as HCJ. Despite the absence of a written constitution in Israel, the Supreme Court has been constitutionally equipped with a broad judicial power. It has been empowered (explicitly or implicitly) to supervise all other state's ruling branches and its' agencies — including the government, the army, the police, and the security forces. Despite the parliamentary nature of the Israeli political regime (a constitutional and political fact that might be changed in a few years) the HCJ has formed its judicial power to intervene in some legislative procedures. In the absence of a written constitution, and facing severe social and political rifts, the HCJ has created civil rights (like: freedom of expression and freedom of religion) and thus has generated democratic procedures and democratic values. We have explained why in contradiction to some high courts in Western societies, the Israeli Supreme Court has not been only an administrative court but it has decided in various constitutional issues. The main legal constraint, imposed by the nature of the political regime, has been the inability of the HCJ to nullify laws, enacted by the Knesset, unless a procedural error has occurred in the legislative processes.

Nevertheless, the judges have not faced merely legal constraints. The socio-political constraints on the Supreme Court's judicial review have been essential. The third chapter has been devoted to an explorative analysis of such limitations. We have elucidated the drives beyond the growing judicial involvement of the HCJ in public life and its increasing importance as an agent which decides on crucial political issues (e.g., governmental political nominations in the public administration, freedom of expression, military censorship, supervision on the military and the security forces, privatization of the national economy). Yet, the HCJ has inclined to operate within the socio-political boundaries of two fundamental state's cultural narratives: the Jewish narrative and the security narrative. In this manner, e.g., the HCJ's judicial review over security issues has tended to become prominently restrained, especially considering Israeli security activities and Palestinian individual rights in the West Bank and Gaza Strip.

In chapters four and five we have explicated the theoretical literature

dealing with the subject of public attitudes towards supreme courts and then we have posed the main research hypotheses. Our main goal has been to analyze the scope of the public legitimacy towards the HCJ. Following a series of statistical tests, including factor analysis and regression analysis of multi-variate models, we have come to several empirical findings and conceptual conclusions about public legitimacy towards the Israeli Supreme Court.

As far as the legitimacy's scope is concerned we have discovered that public consensual trends have been prominent, while dissensual propensities, towards the HCJ and its' rulings, have only rarely prevailed. We have detailed our findings in chapters six and seven. Commonly the Supreme Court has been supported by a limited public consensus (namely — a support of at least 65% of the public) or a broad consensus (namely — a support of at least 75% of the public). Only when it was seemed that the Supreme Court ruled or might have ruled in contrast to the socio-political logic of the national narratives, dissent has been detected. Accordingly, e.g., the public has inclined to reject the court's judicial intervention in activities of the security forces in the territories. The Supreme Court's decision to confirm the legal exclusion of the radical right-wing Kaana group from the 1988 national elections to the Knesset has been rejected by a rather great portion (around one third) of the Israeli public. Yet, even in those cases the extent of the public opposition to the court's decisions has not exceeded 50%, and regarding none of the cases could we conclude that a public consensus of opposition, against a Supreme Court's ruling, has been engendered. The legitimacy provided by the public to the HCJ has not been significantly eroded even in those rare cases when the HCJ apparently ruled in some contradiction to the security narrative or the Jewish narrative.

The sources of such a legitimacy have been another crucial issue. Chapter eight has focused in our effort to define attitudinal dimensions which have produced the public reactions to the Supreme Court and its judicial decisions. We have detected that the legitimacy towards the court has been based on two types of socio-political sources: public myths*, according to which the HCJ has been publicly defined as non-political; as one of the most trustworthy public institution in the country and as being "objective", "professional" and a "representative of the common citizen". The HCJ, in much similarity to the

* The term "myth" or "mythical", as used in this study, signifies a common social belief that gives events, institutions and actions a particular symbolic and idealized meaning. Myths are essential element of collective identities, including nations. They are typically based on social perceptions which combine facts and fiction.
For usages of this term in discussions about legitimacy and myths, see:
M. Edelman, Politics as Symbolic Action (New-York: Academic Press, 1971).

army, has been publicly defined as a non-partisan institution, which operates in favor of the general will and "contribute to the nation-state" and to "the democracy in Israel". Clearly, those findings should be underscored, especially when the extensive judicial involvement of the court in public life, is being taken into account.

A second source of public legitimacy towards the HCJ has been the public supportive reactions to specific court's decisions, regarding specific debated issues. While rulings of the Supreme Court in favor of freedom of expression, supervision over the executive, and more judicial control over religious institutions have engendered most of the public support, court's decisions aimed to oversee state's activities in the territories, have fostered much lesser degree of public approval.

Based on the empirical findings we have concluded that the mythical dimension has been more significant for the formation of public legitimacy towards ths HCJ. Public images towards the court have been related to the nature of the court as an institution and to its judicial output. These images have not been necessarily based on specific information about the court and its decisions but on symbols that the public has attributed to the Supreme Court. Mythical symbols have reflected public inclinations to articulate basic appraisals of admiration of judicial institutions. Such admiration has overshadowed the political nature of the extensive judicial review of the HCJ in public affairs. Specific supportive reactions to specific judicial decisions have been an imporant source of legitimacy. Yet, this public source has been only secondary in its value and not as stable as the mythical source.

In chapter nine we have examined whether social independent variables, and the independent variable of political ortientation, have effected public dispositions towards the HCJ and its decisions. Following an analysis of multi-variate models, we have concluded that in general the social effects of age, education, sex, ethnic origion, religiosity — without or in addition to political orientation — have had only a very limited influence on public attitudes towards the HCJ, and especially on the prevalence of public myths. Accordingly, the broad scope of the court's legitimacy and its sources have prevailed — almost to the same degree — among various social sectors of the Israeli public. The HCJ's public status has been only marginally effected by the severe social rifts which have characterized the Israeli society.

Nevertheless, some exceptions to that conclusion have been detected and illuminated. The HCJ's judicial review over religious institutions has been under contention between seculars (that have inclined to support judicial intervention) and religious (that have tended to be more suspicious towards intervention of the HCJ in matters of state-religion). We have explained the

contention between Hawks and Doves in reaction to the HCJ's decisions regarding the military activities in the West Bank and Gaza Strip. In this context, Hawks have tended to oppose, more than Doves, judicial decisions of the HCJ against the security authorities. Another interesting issue — in this context — has been the nomination of an Israeli-Arab as a judge at the Supreme Court (until nowadays no Israeli-Arab has been appointed to that position). We have illuminated why some segments within the public (Hawks and the less educated) have tended to oppose such a nomination.

The political structure and the partisan setting in Israel have been polarized, especially since the end of the 70s'. In chapter ten we have investigated whether adherents of different political parties in Israel have differed in their views of the Supreme Court. Based on the poll we have arrived at the conclusion that in contrast to other state's organs in Israel the public status of the HCJ has not been significantly influenced or significantly eroded by the fragmentation of the political power and the polarization between parties. However, we have detected that in specific debated instances, especially those connected to security affairs and the territories, some differences occurred between supporters of right wing parties (right to the Likud) and supporters of left wing parties (left to Labor). In general, followers of right wing parties have tended to be less supportive of judicial review over the government and the military.

In chapter eleven we have summarized the empirical findings and accordingly have suggested an alternative conceptual viewpoint. It seems that mythical aspects of supreme courts' legitimacy should be underscored. We have falsified the illusion (that has expressed itself in scientific publications) as if rational and informative reactions of the general public to specific judicial decisions have been the primary cause of the creation of court's legitimacy. Without ignoring or evading the institutional importance of supreme courts and the limited significance of public reactions to specific judicial decisions, legitimacy should be understood and analyzed, primarily, as a product of basic mythical approach towards supreme courts. Thus, courts' legitimacy is primarily a symbolic product, subjected to discursive processes.

In chapter twelve of the book we have demonstrated to what degree our empirical and conceptual conclusions might be helpful for future studies. We have dealt with public reactions to HCJ's decisions that were given after July 1991 (when our survey was conducted). Special attention has been given to the HCJ's decision regarding the deportations of the Hamas activists (December 1992). The court has confirmed the deportations because of two main reasons that have been exposed in our study: the nature of the national

narratives (Jewishness and security) that have tended to confine the judicial power of the court, and the nature of the public reactions to the deportations (decisive majority supported the governmental decision to deport the Palestinians). In its decision in the case of the deportations the HCJ has consciously operated within the limits of the public mythical approach towards the court.