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Introduction

In recent decades, the role of supreme courts in designing and determining institutional changes has been studied from various angles (Schubert, 1965; Jabbari, 1992; Tate and Vallinder, 1995; Gilman, 1996–1997; Baum, 1997; Flemming and Wood, 1997; Feeley and Rubin, 1998; Cornell and Gillman, 1999). The variety of research includes sociological explanations (Parsons, 1962; Nonet, 1976), strategic interactions (Landes and Posner, 1975; Mishler and Sheehan, 1993; Kilwein and Brisbin, 1997; Voight and Salzberger, 2002), and static game models (Gely and Spiller, 1990; Eskridge and Ferejohn, 1992; Segal and Spaeth, 1993; Epstein and Walker, 1995; Epstein and Knight, 1998; Segal, 1997).

In his book, *The Hollow Hope – Can Courts Bring about a Social Change?* Gerald Rosenberg (1991) questions the validity of the commonly accepted axiom that the Supreme Court of the United States is able to affect widespread social change. Critics maintain that Rosenberg's argument ignores the implications of court decisions for future actions that created more direct change (see, for example, Lawrence, 1992; Viscusi, 2002; Gavison, 2009). Such critics have rarely created a dynamic model that illuminates the impact of supreme courts on policy or institutional changes from a historical perspective. However, in *Towards Juristocracy*, Ran Hirschl (2004) shows that the trend toward constitutionalization is not really driven by politicians' genuine commitment to democracy, social justice, or universal rights. Rather, it is best understood as the product of a strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders. This self-interested coalition of legal innovators determines the timing, extent, and nature of constitutional reforms. Hirschl demonstrates that whereas judicial empowerment through constitutionalization has a limited impact on advancing progressive notions of distributive justice, it

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has a transformative effect on political discourse. The global trend toward juristocracy, Hirschl argues, is part of a broader process whereby political and economic elites, while professing support for democracy and sustained development, attempt to insulate policy making from the vicissitudes of democratic politics. However, Hirschl pays less attention to the role of the supreme court in this process.

In this book, we develop such a dynamic model using the concepts of shared mental models and policy entrepreneurship. In a similar vein, Powell and DiMaggio (1991) claim that motives of power and interest have received insufficient attention in neo-institutional sociology. They note that little attention has been paid to the question: How do key workers (actors or players) preserve their dominance or respond to threats in times of crisis or instability? The manner in which gifted entrepreneurs implement a multi-institutional strategy has also been neglected.

This book adopts hypotheses and concepts taken from the institutional literature to develop a procedural model for the analysis of formal political rule change in a democratic system. The analysis also stresses the role of supreme courts as political entrepreneurs in designing institutional changes. The model is then applied to a path-dependent analysis of the role of the Supreme Court in Israel between 1948 and 2007. Thus, we integrate rational choice institutionalism and historical institutionalism (Katzelson and Weingast, 2005; Weingast, 2005).

These analytical tools will be applied to the explanation of the role of the Israeli Supreme Court in matters of “who governs?” vis-à-vis the Israeli parliament. Following Rosenberg, Gad Barzilai (2002) distinguished between several political dimensions: the rhetoric of court rulings and possible changes in legal interpretation, minor or secondary social changes, and the dimension that deals with major social alterations. Barzilai concludes that despite minor changes, no major changes in the socio-political characteristics of the state and the public have taken place in Israel.

In this book, we claim that the Supreme Court played a necessary, but not sufficient, role in the design of the institutional changes that occurred in Israel between 1948 and 2007. Specifically, in its decisions on controversial issues, the court served as the shaper of the value of human rights. Whereas at the beginning of this period the Court limited the ability of citizens to appeal in matters concerning decisions of the parliament and the government, by the end of the period it had expanded this ability significantly, thus implementing an informal policy of procedural judicial activism (Mautner, 1993; Barzilai, 1998; Hofnung, 1999;

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Hirschl, 2001; Mizrahi and Meydani, 2003; Galnoor, 2004; Cohn and Kremnitzer, 2005). In effect, during this period, the relationship and the institutional equilibrium between the Court and the parliament were significantly transformed, thus enabling an informal institutional change regarding the rule of “who governs?” in controversial issues. The “who governs?” rule is not all-inclusive (Medina, 2007). However, it is an informal channel for shaping the Israeli institutional reality, a channel in which the Supreme Court has a crucial role. This institutional channel of alternative governance enables the Supreme Court to design policies based on the values of human rights and apply them in controversial issues.

Research about the link between law and politics in Israel discusses the relationship between the Israeli High Court of Justice (HCJ) and the political system, the Knesset, and the government at length. Researchers disagree about the HCJ’s degree of involvement in public life. For example, Yoav Dotan states that:

It seems that in Israel of the twenty-first century no words can describe the important role the HCJ plays in public life. I am doubtful if there is another community so affected by and dependent upon the decision making of a judicial forum as the political community in Israel is affected by the HCJ. Similarly, there seems to be no other judicial forum so deeply involved in the economic, political and social arenas. (Dotan, 2004 :161)

In contrast, Barak Medina presents a different position, claiming that the involvement of the HCJ in policy making is overrated:

I would like to dispute the claim that judges are the de facto rulers. An easy way to examine the issue would be by estimating the role the HCJ played in each of the major social decisions made in Israel since the 1980s during Barak’s tenure. Some of the decisions to be discussed: the 1985 economic plan, settlement expansion, the invasion of and retreat from Lebanon, the Oslo agreements, privatization agreements, increases and reductions in the children’s allowance, the disengagement plan, the Homat Magen Operation, construction of the separation wall, the implementation of the tax on capital gains, changes in immigration policy, policies implemented during the second Lebanon war etc. All of these decisions were made by the Israeli Knesset without the actual involvement of the HCJ. It did not initiate any one of the aforementioned decisions. They were not made as a result of its decisions, nor as a result of petitions filed. Despite the fact that some of the decisions were discussed in the High Court of Law after being made by the political system, in no case did the HCJ intervene (except with regard to certain aspects of the separation wall’s route and the war on terrorism as mentioned later). (Medina, 2007: 410)

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This book attempts to shed light on the extent of judicial involvement in political life from a different point of view, one that is based on quantitative examination of the HCJ's rulings and decisions regarding the relationship with the government in Israel. This approach is integrated within a path-dependent analysis of the relationship between the Supreme Court and the political system from 1948 to 2007.

The book develops as follows. Chapter 2 looks at the number of petitions filed in the HCJ against the government between 2000 and 2006, examining the distribution of petitions against ministers and the judicial results of the petitions. Such an empirical, quantitative analysis yields surprising as well as paradoxical results about the intervention of the Supreme Court in Israeli government policy. Some may claim that, contrary to popular belief, the Supreme Court exercises very limited intervention in the decisions of the Israeli government. Others may claim that the Supreme Court exercises a high level of intervention. These findings are mainly descriptive and do not pretend to analyze the reasons for the findings in depth. What the findings do lead us to is an institutional-process analysis of the relationship between the Supreme Court and the Israeli Knesset. As Epstein, Ho, King, and Segal (2005: 110) note, "This institutional-process theory remains the strongest candidate for resolving our paradoxical empirical findings."

Chapter 3 discusses common explanations analyzing the relationship between law and politics, whereas Chapter 4 presents the theoretical framework in which the Supreme Court is analyzed as a political entrepreneur. This analysis is based on a shared mental model and political entrepreneurship. Chapter 5 begins the empirical study by focusing on the characteristics of the Israeli political structure and culture. Chapter 6 continues this discussion by focusing on the non-governability of Israel's political institutions and on Israel's alternative political culture. Both chapters describe the characteristics of the Israeli system that influence the behavior of the political players, among them the role of the Supreme Court in determining and designing institutional change and policy.

Chapter 7 deals with the Supreme Court and the political system in light of social and political processes in Israel from 1948 to 1999. Chapter 8 provides a detailed look at the struggle in 2000 to create a new conservative Constitutional Court, thus redefining the Supreme Court of Israel as an informal alternative form of governance that could oversee the protection of human rights in Israel. Chapter 9 discusses how between 1999 and 2007, the informal rule of "who governs" in Israel enshrined the

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Supreme Court as the arbiter of controversial issues concerning human rights in Israel. In a continuation of this analysis, Chapter 10 elaborates on the Supreme Court of Israel as an agenda setter by examining three Israeli legal cases. In that chapter, we elaborate on the role of the Supreme Court in courts that deal with military law in the region. We also analyze the Interrogation Case of 1999 and the case known as the Land Decision Case of 2002. Chapter 11 discusses in detail the debate over the High Court of Justice's relationship with the Knesset (the Israeli parliament) and proposes a multi-level arrangement for the two institutions. Finally, Chapter 12 draws conclusions and outlines the implications of the study.

The Intervention of the Israeli High Court of Justice in Government Decisions: An Empirical, Quantitative Study with Paradoxical Results

There is a wide variety of literature about the relationship between the Israeli High Court of Justice (HCJ) and politics in Israel. The legal and political literature examines the role of the HCJ in various contexts: as part of a ruling elite (Unger, 1975; Mackinnon, 1989; Hirschl, 2001; Barzilai, 2003), as an interest group (Cowan, 1958; Schubert, 1985), and as a special kind of bureaucrat within certain structural conditions (Gely and Spiller, 1990; Segal, 1997; Epstein and Knight, 1998; Cornell and Gillman, 1999). Some scholars stress the contribution of the Supreme Court to societal equilibrium (Parsons, 1962; Nonet, 1976), whereas others stress the cultural and political factors that contribute to the limited role played by the Court (Rosenberg, 1991; Barzilai, 1998, 1999).

In the case of Israel, scholars stress the inability to govern, which is characterized primarily by the decline in the power of political parties and the ascendance of individualist values in the public's attitude toward the authorities (Doron, 1986; Edelman, 1994; Barzilai, 1999; Dror, 2001; Arian, Nachmias, and Amir, 2002; Mautner, 2002). Furthermore, the literature also includes studies that used the quantitative empirical method to assess the HCJ's decision making. This line of research began with American researchers who proposed conducting empirical studies to learn about the actual influence of judicial institutions. Several such studies were conducted in the United States (Schubert, 1974; Segal and Spaeth, 1993; Epstein and Knight, 1998) as well as in Israel (Shachar and Gross, 1996; Shachar, Gross, and Harris, 1996; Gross and Shachar 1999; Dotan and Hofnung, 2001; Salzberger, 2003; Shachar, Gross, and Goldschmidt, 2004; Dotan and Hofnung, 2005; Hofnung and Weinshall-Margel, 2010; Sommer, 2010). The goal of the studies was to determine certain aspects of the Court's work such as the extent of response to petitions, the issue

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of discourse and controversy in rulings, the assigning of judges, and so forth. The chosen methodology was based on quantitative analyses of measurable variables from the rulings and decisions of the HCJ in the belief that such an approach would allow us to base our conclusions on empirical data as opposed to intuition (which cannot be validated) (Shachar, Gross, and Goldschmidt, 2004: 255). Although quantitative research is unable to encompass all of the aspects of the Supreme Court's behavior when it operates as the HCJ, it is nevertheless informative, as Eli Salzberger (2003) claims. Moreover, in reality, only a small number of high-profile rulings receive public attention, far fewer than the number of decisions actually handed down. Rulings that attract such attention do not reflect the full picture of the HCJ's work or its relationships with other authorities. For instance, Eli Salzberger claims that, "A judge seen as having a liberal reputation in penal policy as a result of a sole ruling or a couple of rulings where she adopted the liberal position might actually hold a conservative position in criminal law (statistically speaking)" (Salzberger, 2003: 553).

This book continues the empirical, quantitative line of research regarding the HCJ's intervention in the government's decision making. Literature in Israel on this topic lacks such an analysis – one that uses a quantitative methodology. The measured variables are as follows:

1. The extent of the caseload in the Supreme Court.
2. The number of petitions against the government in the HCJ between 2000 and 2006.
3. The relative percentage of petitions against the government in the HCJ between 2000 and 2006.
4. The distribution of petitions filed with the HCJ against the government (by ministers).
5. The distribution of petitions filed with the HCJ against the government (by judicial results).

Salzberger criticizes Shachar, Harris, and Gross (1996) because they based their research on specific rulings instead of the general collection of the High Court's rulings:

The database compiled by the lawyers' chamber is a biased collection of High Court rulings. The choice of rulings is based on the conventional attributes (in other words, the rulings chosen are either well-reasoned,

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containing interesting legal disputes, or constitute legal innovations). However, the rulings that are not published and comprise the majority might provide a truer view of the High Court's work. (Salzberger, 2003: 554)

The importance of quantitative data gathering and analysis, albeit partial, was mentioned in Yoav Dotan's research:

Investigation of the data concerning pre-petitions is not a simple job . . . the existing cases in the HCJ archives lack many details regarding this or that procedure. Nevertheless, we haven't given up on the attempt to draw some quantitative conclusions – partial and lacking as they might be – regarding the pre-HCJ procedures during the research period. This has been done by conducting a sample check of the cases found during the research in the departmental archive. Due to the fact that the sample included only the cases in the departmental archive as well as the lack of information in some of the cases, the data is to be considered preliminary. (Dotan, 2004: 181)

2.1. ON THE METHOD OF THE QUANTITATIVE STUDY

We examined petitions filed against ministers via the HCJ alone as opposed to the ones filed via administrative courts (small HCJ) or the procedures discussed in the Supreme Court in its function as a court of appeals. We began our research with the data published in the courts' report. However, given that the courts' report samples major rulings only, we decided to broaden the sample based on two additional databases, Takdin and Nevo, which include about 90 percent of all rulings as well as the HCJ's petitions. The petitions sampled were the ones in which the answering party was a minister, a minister's representative, or the government (hereinafter: the government).

The sample included a total of 2,869 petitions in the period beginning in 2000 and ending in 2006. This period was chosen for a number of reasons. First, in 2000, the court law was passed, which established administrative courts (small HCJ)¹ intended to reduce the caseload in

¹ The Administrative Courts Law (2000) has given district courts the authority to discuss administrative issues previously discussed in the HCJ (small HCJ). Administrative issues are defined according to paragraph 2 of the law as a dispute between an administrative authority and an individual. Paragraph 5 defines the topics on which the administrative court is authorized to rule. Examples of such topics include administrative petitions against the decision of an authority in cases of appointments according to the first amendment (i.e., property taxes, education, business licensing, local authorities), administrative appeals according to the second amendment (i.e.,

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the Supreme Court and the HCJ. Moreover, this was an attempt to institute a new procedure – petitions were to be filed with district courts that functioned as administrative courts – instead of the HCJ. Second, studies conducted by several researchers, including Eran Vigoda-Gadot, Fany Yuval, and Shlomo Mizrahi, demonstrated that from 2000 to 2006, there was a decline in public trust in the Supreme Court (Vigoda-Gadot and Yuval, 2000–2004; Vigoda-Gadot and Mizrahi, 2005–2006). Normally, one would expect this decline to influence the number of petitions filed with the HCJ.²

The mean annual number of petitions was 514, approximately 5 percent of the petitions filed in a given year. For instance, in the year 2000, 9,681 petitions were filed to the Supreme Court (according to the courts' report – including civil appeals and criminal appeals, administrative appeals on decisions of administrative courts and petitions to the HCJ); 289 of them were petitions to the HCJ against the government. In 2006, 11,028 petitions were filed to the Supreme Court (according to the courts' report), 537 of them were petitions to the HCJ against the government. Note that we found it hard to locate a single official source. A comparison of preliminary sources – the courts' report, the HCJ's section in the law department, the Nevo database, and the Takdin database – yielded several gaps in information. For instance, according to the courts' report, in 2000, there were 9,681 petitions filed with the Supreme Court, while the Takdin database indicated there were 8,235. Moreover, we found methodological differences between these databases. For instance, according to the statistical data in the courts' report, the column of HCJ procedures includes petitions by prisoners entitled "appeals by prisoner" as well as petitions entitled "different requests HCJ" or "HCJ procedures." The current research attempted to isolate the petitions entitled HCJ, so our sample included a total of 2,869 petitions.

appeals of decisions by communal associations, the appeals committee on sewage taxes, certain decisions about planning and construction law), as well as administrative appeals for civilian aid in cases included in the third amendment such as public tenders. Any administrative issue that is not included in the preceding list is to be discussed in the HCJ. In addition, an administrative court can pass each matter to the HCJ if it seems to be a matter of special public importance.

² For a review of explanations regarding the trend in which Israeli parties and individual politicians have often turned to the courts for intervention in national and internal party affairs, government policies, and even in parliamentary procedures, see Yoav Dotan and Menachem Hofnung, "Legal Defeats – Political Wins: Why Do Elected Representatives Go to Court?" *Comparative Political Studies*, vol. 38(1), 2005, pp. 75–103.

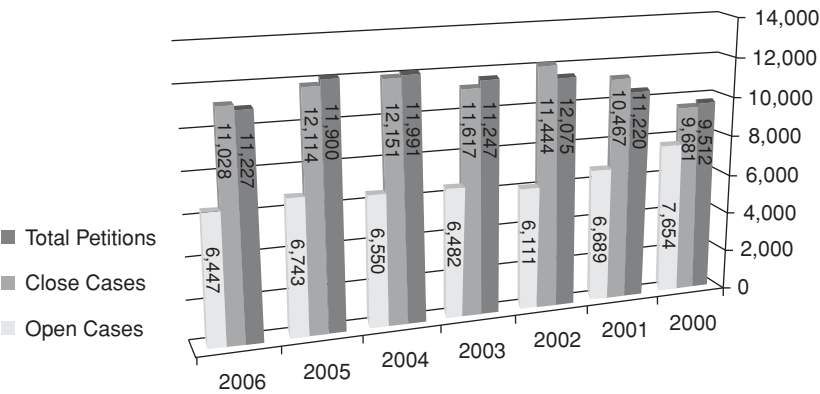


FIGURE 2.1. The extent of the caseload in the Supreme Court.

Figures 2.1, 2.2, and 2.3 are based on the courts’ report, which also includes petitions entitled “appeals by prisoner” and “different requests HCJ” under “HCJ procedures.” They are also based on the Takdin database, which includes additional cases that reached the Supreme Court, including civil or criminal appeals of which the government or its members are a part. As a result, the number of the petitions discussed in the HCJ against the government includes a total of 3,300 petitions. This sample is larger by 431 petitions than the sample we used in the current research.

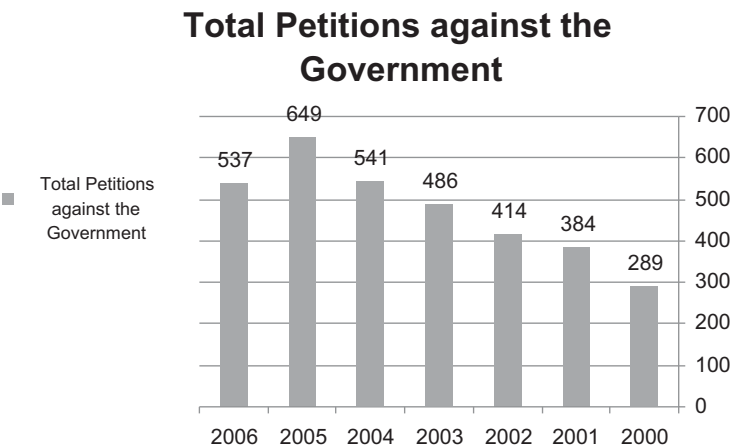


FIGURE 2.2. The number of petitions against the government in the HCJ between 2000 and 2006.