

Assaf Meydani



The Israeli Supreme Court and the Human Rights Revolution

Courts as Agenda Setters

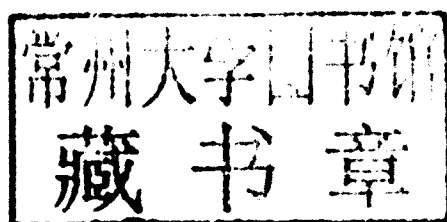
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Assaf Meydani

School of Government and Society, The Academic College of
Tel-Aviv-Yaffo



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THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS

This book explains the reciprocal relations between the Supreme Court and the Israeli political system. It is based on a unique approach that contends that the non-governability of the political system and an alternative political culture are two key formal and informal variables affecting the behavior of several political players within the Israeli arena. The analysis illustrates the usefulness of such a model for analyzing long-term socio-political processes and explaining the actions of the players. Until this model changes significantly, the decisions of the High Court of Justice express the values of the state and enable Israel to remain a nation that upholds human rights. The court's decisions determine the normative educational direction and reflect Israel's democratic character with regard to the values of human rights.

Dr. Assaf Meydani is a Senior Lecturer in the School of Government and Society at the Academic College of Tel-Aviv-Yaffo. His research interests include public policy, politics and law, and political economy. Dr. Meydani has been a Visiting Scholar at the Center for New Institutional Science at Washington University in St. Louis, Missouri, and the Institute of Management, Innovation, and Organization at the University of California at Berkeley. He is the author of *Political Transformations and Political Entrepreneurs: Israel in Comparative Perspective* (2009). His articles have appeared in journals such as *Israel Studies*, *Israel Law Review*, *Policy and Society*, *Constitutional Political Economy*, *Rationality and Society*, and *Land Use Policy*.

*To Marit, Romy, and Alma with love and appreciation.
To Lea and Ben-Zion Meydani – thank you for always
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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

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;

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)

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

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