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SYMPOSIUM ARTICLE

Reforming the Israeli High Court of Justice: Proposed versus Desirable

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Abstract

Constitutional courts are expected to operate under certain conditions (independence, transparency, democratic pedigree) and to resolve controversies in accordance with legal rules, principles and procedures. When these expectations are repeatedly frustrated, the legitimacy of the court is damaged and it is perceived as a partisan institution. This article discusses four structural problems in the operation of the Israeli High Court of Justice, which have contributed significantly to the Court's current legitimacy crisis: fact-finding, panel composition, standing, and judicial selection. The article examines the governmental reform plan with regard to these structural problems and proposes practical solutions for each of the problems.

Keywords: Supreme Court reform; constitutional law; judicial review; Israel; panel composition

1. Introduction

Reform of the Supreme Court presupposes identifying problems in the way in which the Court operates. The overall and immediate problem that this article identifies with the Israeli High Court of Justice is that right-wing politicians and their supporters regard the Court as a partisan institution. Evidence of this perception is found in numerous polls that show that the ratings of the Court have been declining continuously over the past decade, especially among right-wing voters. Further proof of this perception is the governmental plan for an overhaul of judicial reform, with an emphasis on reining in the Supreme Court and restoring the balance of power in Israel, which has allegedly been violated by decades of left-leaning judicial activism. The plan

includes changes to the system of selecting judges, which would provide the governing coalition with the power to appoint judges; promulgation of an 'override clause', which will give the Knesset the power to reverse Supreme Court decisions if it strikes down primary legislation; and abolition of the reasonableness doctrine to prevent judicial intrusion in matters of public policy and appointments.

This article discusses four structural problems in the operation of the Israeli High Court of Justice, which are only partly addressed by the various proposals to reform the Court. These problems share a common motif: the lack of checks and balances over judicial discretion, thus enhancing the danger of political bias. The problems are (i) fact-finding, (ii) panel composition, (iii) standing, and (iv) judicial selection. The article examines the government reform with regard to these structural problems and proposes practical solutions for each of them.

For the purpose of the article, the reader should be informed generally of the twofold structure of Israel's Supreme Court. First, it is the Court of Appeal of last resort, empowered to hear appeals in civil and criminal matters against judgments and other decisions of the district courts.[1] This capacity does not differ in nature or scope from that of any appellate court, and includes mandatory appeals (appeals as of right, which are taken to the Supreme Court from the determination of district courts sitting as first instance) and permissive appeals (appeals allowed pursuant to a motion to certify, where the district courts sat on appeal from the magistrates' courts). Second, the Supreme Court presides as the High Court of Justice (HCJ) and handles grievances of private persons and public interest groups against the various organs of the state as a court of first and last resort.[2] In this latter capacity it exercises equitable authority in nature – namely, even in matters found to be under HCJ jurisdiction it still has discretion to refuse to assume jurisdiction on the grounds that the petitioner or the petition itself does not satisfy threshold requirements (such as standing, justiciability, clean hands, mootness, ripeness). Many of the high-profile administrative and constitutional issues are reviewed before the HCJ. The government's judicial reform plan does not address explicitly the powers or setting of the Court, although it is the principle judicial institution that enlarged the scope and depth of judicial review in administrative and constitutional issues. This article tries to fill this void by addressing the structure of the HCJ and offering appropriate changes.

2. High Court of Justice fact finding

Generally, supreme courts do not handle questions of fact; they deal with the law that raises a 'big issue' (such as equality, religious freedom, freedom of expression, the relationship between religious organisations and the state, the balance between civil liberties and national security), and the accuracy of the facts is a preliminary assumption. Therefore, Supreme Court litigation does not entail actual testimony of witnesses or the presentation of evidence.

[1] Basic Law: The Judiciary, s 15(b) (Israel).
[2] ibid ss 15(c) and 15(d).

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It focuses on arguing about the law in abstract and the application of the law to an assumed or given set of facts. All of this occurs provided that the lower courts have conducted a formal fact-finding process. However, the Israeli Supreme Court, in the most prominent issues before the public eye, sitting as a High Court of Justice, exercises original and final jurisdiction without the lower court having undertaken fact-finding procedures and without a formal fact-finding process. Indeed, typically, petitions and responses to the HCJ must be supported by affidavits that affirm all relevant facts, but there is no cross-examination, presentation of evidence, discovery, or other adversarial and time-consuming means to assist the justices in resolving fact-specific issues.[3]

This situation is problematic and may lead to misunderstandings, mistakes, and even instances of dishonesty. However, most of all it enhances the danger of political bias and injures the Court's integrity and credibility, which rests on the presumption that the parties present the facts of the case through an adversarial process to an impartial decision maker.[4] In the absence of a formal fact-finding process consisting of a meaningful adversarial presentation of the facts, the justices tend to reach a factual conclusion at an early stage, adhere to that conclusion in the face of counter-facts later formed,[5] and litigants and large groups in the population often conclude they are partisan players in the litigation rather than a detached observer in the dispute.[6]

An example can be seen in a recent oral argument in HCJ 2412/23 *The Movement for Quality Government in Israel v The Knesset*. The petition challenged an amendment to Basic Law: The Government, which limits the ability of the Attorney General to remove a serving prime minister from office.[7] The

[3] The lack of a fact-finding process is often presented as judicial policy outlined by the HCJ, which denies requests to testify, cross-examine or other means to develop and to resolve factual controversies; see Omer Dekel, *Cross Examination in the High Court of Justice and the Administrative Court* (2012) 35 *Iyuney Mishpat* (*Tel Aviv University Law Review*) 151; but see Daphne Barak-Erez, *Administrative Law: Procedural Administrative Law* (Israel Bar Association 2017) 444–46 (who defines this state of affairs as a feature of HCJ procedure and less as judicial policy).

[4] HCJ 5/48 *Leon v Acting District Commissioner of Tel Aviv (Gubernik)* 19 October 1948, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C48%5C050%5C000%5CZ01&fileName=48000050_Z01.txt&type=4 ('This court is not an arena for a duel of surprises between litigants but a forum for the basic clarification of disputes between parties. Such clarification after proper preparation by the parties is only possible if the submissions are properly defined and do not hide more than they disclose').

[5] See also Netael Bandel, 'Only the High Court Is Allowed to Act Unreasonably', *Israel Hayom*, 10 July 2023, https://www.israelhayom.co.il/news/law/article/14374202.

[6] According to Fuller, the need to postpone judgment is one of the clear advantages of the adversary system: Lon L Fuller, 'The Adversary System' in Harold Berman (ed), *Talks on American Law* (Vintage Books 1971) 34, 43 ('a tendency to judge too swiftly in terms of the familiar that which is not yet fully known'); Lon L Fuller and John D Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 *American Bar Association Journal* 1159; John Thibaut, Laurens Walker and E Allan Lind, 'Adversary Presentation and Bias in Legal Decisionmaking' (1972) 86 *Harvard Law Review* 386.

[7] HCJ 2412/23 *The Movement for Quality Government in Israel v The Knesset* (oral arguments held on 3 August 2023). The amendment (No 12) was enacted following an earlier petition to the Court and news reports that the Attorney General, Gali Baharav-Miara, had been considering the removal of

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Court's three most senior justices were assigned to hear the case: Chief Justice Esther Hayut and Justices Uzi Vogelman and Yitzhak Amit. During the five-hour televised hearing,[8] the justices from the 'liberal camp' of the Court showed their discomfort with the amendment, viewing it as personal legislation designed to prevent the removal from office of Prime Minister Benjamin Netanyahu.[9] Chief Justice Hayut asserted that the 'fingerprints are very very clear', referring to a plan designed to prevent Prime Minister Benjamin Netanyahu from being removed by the Attorney General or by the Court. To this, her fellow panel member Justice Vogelman added that 'with regard to the personal motive – the situation is clear. It is a very large mosaic from which there is only one conclusion. The fact is the law is personal'.[10] Later, in oral argument, Chief Justice Esther Hayut insisted that '[Likud Knesset Member] Moshe Saada said two days before the law was passed in its second and third hearings, "we legislated it because of Netanyahu." You can't get clearer than that'.[11]

Hayut probably found Saada's comment in the petitioner's brief. A few hours later, Saada tweeted that Hayut had distorted his comment and had taken it out of context.[12] Conservative media sources also criticised Hayut for the double standard because she refused to hear a comparable oral argument in a case concerning the legality of the maritime border agreement between Lebanon and Israel, reached by the left-leaning government of Yair Lapid a year ago.[13] The petitioner argued that the Lapid government's decision not to certify the agreement by the Knesset was motivated by bad faith. He based his argument on comments made by the (then) Prime Minister Lapid in a press conference. Chief Justice Hayut rejected the argument immediately, stating that notwithstanding the accuracy of the Prime Minister's comment, it was irrelevant in respect of the government as a whole.

Another recent instance where it was alleged that the HCJ misconceived or misconstrued the material facts is HCJ 8948/22 *Sheinfeld v The Knesset*.[14] The HCJ disqualified Aryeh Deri, the Shas leader, from serving as Minister of the

Prime Minister Benjamin Netanyahu on the ground of alleged breach of a conflict-of-interest agreement for his involvement in the judicial reform.

[8] https://www.youtube.com/watch?v=5kwlkS4zGVQ (in Hebrew).

[9] Jeremy Sharon, 'High Court Judges Say Law Shielding Netanyahu Clearly Legislated to Benefit Him', *The Times of Israel*, 3 August 2023, https://www.timesofisrael.com/liveblog_entry/high-court-judges-says-law-shielding-netanyahu-clearly-legislated-to-benefit-him.

[10] Chen Maanit, 'Israel's Top Court Says Law to Get Around PM's Incapacitation is "Personal" in Nature', *Haaretz*, 3 August 2023, https://www.haaretz.com/israel-news/2023-08-03/ty-article/israels-high-court-to-hear-petitions-against-law-to-get-around-pms-incapacitation/00000189-b9ce-d821-afdd-bbeee54b0000.

[11] ibid.

[12] Saada tweeted '[t]he law was self-evident and from the beginning it talked about PM removal due to physical inability to function. The Attorney General and the Court sought to usurp authority that was not theirs, and therefore we had to legislate and unambiguously clarify the obvious both regarding the current prime minister, and regarding future prime ministers', https://twitter.com/MosheSaada1/status/1687041354499510278 (in Hebrew).

[13] Akiva Bigman, 'Esther Hayut's Personal Salad', *Mida*, 7 August 2023.

[14] HCJ 8948/22 *Sheinfeld v The Knesset* (18 January 2023).

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Interior and Minister of Health. The majority of the Court held that his appointment was 'unreasonable in the extreme'; therefore, the Prime Minister must remove him from office. The Court's determination was based on Deri's accumulated criminal convictions, including a recent conviction on his own admission as part of a plea deal for tax offences, and Deri's declaration before the Magistrates' Court that sentenced him for these offences, according to which he would retire from political life. Some of the majority justices opined that in view of Deri's declaration, which led to the imposition of a more lenient sentence, he was not allowed to serve as a minister in accordance with the doctrine of estoppel. The *Sheinfeld* decision was reached 10 to 1, with most of the conservative justices joining the progressive justices.[15] However, the HCJ still faced the accusation of double standards – namely, that it would have found a way to legitimise the appointment had it been a left-leaning government or had Deri been a left-centre politician.[16] Moreover, Deri and his supporters contested that he had never made any commitment to retire permanently and that a key factual point in the majority holding is incorrect.[17] Because of space constraints of this article, this factual point cannot be explored in full. Suffice to say that Deri did not stipulate explicitly that he was permanently retiring from the Knesset, and that the former Attorney General, Avichai Mandelblit, attested in a television interview after the HCJ ruling that Deri 'did not pledge that he would quit politics as part of a plea bargain', which 'seem[s] like proof that the Court made a mistake'.[18]

My objective here is not to engage in 'whataboutism' or to play a game of 'factual gotcha', but to claim that this is a systemic problem that characterises HCJ adjudication. Granted, no supreme court is beyond reproach, and 'fact issues' also arise in respect of other supreme courts in common law countries.[19] Moreover, the HCJ deserves some forbearance as the problem results

[15] Justice Elron dissented, holding that the petitions should be rejected, but believed that the Prime Minister should contact the Chairman of the Elections Committee so that he could determine whether Deri's recent tax convictions involved legal disgrace, which would have precluded Deri from serving as a minister.

[16] Ben-Dror Yemini, 'High Court of Justice Exposed Its Bias by Dismissing Deri from Government', *Ynet*, 19 January 2023, https://www.ynetnews.com/article/h1w5ftlsi; Talia Einhorn, 'In Disqualifying Deri, the High Court Exceeded Its Authority and Made a Factual and Legal Error', *Now 14*, 28 February 2023, https://www.now14.co.il/%D7%A4%D7%A8%D7%95%D7%A4-%D7%98%D7%9C%D7%99%D7%94-%D7%90%D7%99%D7%99%D7%A0%D7%94%D7%95%D7%A8%D7%9F-%D7%9E%D7%A1%D7%91%D7%99%D7%A8%D7%94-%D7%9C%D7%9E%D7%94-%D7%91%D7%92%D7%A5-%D7%98%D7%A2%D7%94; Yehuda Shlezinger, 'The Great Injustice Done to Aryeh Deri', *Israel Hayom*, 18 April 2023, https://www.israelhayom.co.il/news/politics/article/13949900.

[17] Jeremy Sharon, 'Deri v. High Court: What Did He Actually Pledge in His 2022 Plea Bargain?', *The Times of Israel*, 24 January 2023, https://www.timesofisrael.com/deri-v-supreme-court-what-did-he-actually-pledge-in-his-2022-plea-bargain.

[18] Eliav Breuer, 'Arye Deri Quitting Politics Was Not Part of Plea Bargain, Mandelblit Admits', *The Jerusalem Post*, 12 February 2023, https://www.jpost.com/israel-news/politics-and-diplomacy/article-731375.

[19] See Amanda Frost, 'The Limits of Advocacy' (2009) 59 *Duke Law Journal* 447; Allison Orr Larsen, 'Confronting Supreme Court Fact Finding' (2012) 98 *Virginia Law Review* 1255. For recent examples of 'facts problems' in the US Supreme Court see Ian Millhiser, 'The Supreme Court Hands the Religious

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from the fact that historically the Israeli Supreme Court was considered simply to be an appellate court.[20] Its original jurisdiction of receiving direct applications against the administration, inherited from the British Mandate, was relatively limited. However, it should also be noted that the great constitutional decisions of the HCJ in the period of the founding of the State of Israel were based on cross-examination and the presentation of evidence.[21] This practice was later abandoned for reasons of efficiency – on the ground that the right to cross-examine was being abused by litigants and squandered scarce judicial resources – and in order to reduce the Supreme Court's workload.[22]

So, let us suppose that one is swayed by my presentation that the HCJ has a fact-finding 'problem'. Why should we conclude that this problem creates a political bias? Why is it not just another case where the search for truth is traded against, or outweighed by considerations of efficiency? Why not assume that the burdens resulting from this deficiency are evenly distributed between the legal players? I wish to suggest two explanations.

(1) *HCJ fact-finding discretion and political bias*

Since the arrival of legal realism, it has been generally understood that trial courts possess wide discretion in ascertaining the facts of the case (including the liberty to choose to believe one witness rather than another), which may lead to judicial bias.[23] In the HCJ, even if we assume that there is competitive briefing supported by affidavits, disputed facts are adjudicated solely by judicial impression, as there is no cross examination or discovery. Thus, the justices are given an amazingly wide discretion, even more than that of ordinary trial court judges. However, the discretion of the HCJ in handling facts does not end here: by law and by practice, the HCJ still retains discretion to enable fact-finding procedures when it deems such procedures to be

Right a Big Victory by Lying about the Facts of the Case', *Vox*, 27 June 2022, https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch; Sherrilyn Ifill, 'When Diversity Matters', *The New York Review of Books*, 19 January 2023, https://www.nybooks.com/articles/2023/01/19/when-oral-arguments-matter-sherrilyn-ifill.

[20] Malvina Halberstam, 'Judicial Review, a Comparative Perspective: Israel, Canada, and the United States' (2010) 31 *Cardozo Law Review* 2393, 2415.

[21] HCJ 7/48 *Al-Karbutli v Minister of Defense* (3 January 1949) ('The rule is that each respondent must give an affidavit for himself so as not to deprive the petitioner of the right to cross examine the respondent in court about his harmful action, which is the subject of his complaint'). See also HCJ 95/49 *Al-Khoury v IDF Chief of Staff* (which is considered a cornerstone in Israeli constitutional law: 'On behalf of the respondents, two affidavits were submitted: the first (on behalf of the first respondent) statement is from the Chief of the Moyal Squadron, Deputy Chief Military Prosecutor; the second (on behalf of the second and third respondents) sworn statement is from the assistant to the district supervisor of the Israeli Police. They were interrogated thoroughly and at length by the petitioner's attorney. From all the information before us (including the petitioner's affidavit), the following facts preceded the issuance of the detention warrant dated 26.9.49'). See also HCJ 1/49 *Bejerano v Minister of Police* (10 February 1949), unofficial translation at https://versa.cardozo.yu.edu/opinions/bejerano-v-police-minister.

[22] Barak-Erez (n 3) 444 fn 133; Dekel (n 3) 160.

[23] Jerome Frank, *Courts on Trial* (Princeton University Press 1949) 57.

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'justified'.[24] Moreover, if that is not enough discretion, the HCJ has developed new activist grounds of review, such as reasonableness and proportionality, in order to bypass factual difficulties (such as where the factual showing of bad faith or extraneous considerations is not required).[25] Thus, the HCJ has an almost boundless discretion in finding the facts, far more than that of an ordinary trial court, which is bound by rules and procedures and is supervised by an appellate court. While I do not suggest that the HCJ justices decide factual questions in an entirely political or partisan fashion, few people would deny that the exercise of judicial discretion in these circumstances does not involve the justices' ideology.[26] Out of the 15 justices of the HCJ, only four are considered to be moderate conservative and eleven are progressive,[27] who also usually control the senior and extended panels. Under these conditions the discretion of the HCJ in fact finding has a clear ideological leaning to the left.

(2) *The HCJ Department and political bias*

The High Court of Justice Department (HCJD) at the office of the Attorney General is responsible for representing state authorities in proceedings filed in the fields of administrative and constitutional law. In this respect, the HCJD views its role as providing the Court with full and reliable facts that facilitate expedient disposal of the case. In doing so, the HCJD diverts from the adversarial model of public law adjudication and adopts a public interest

[24] High Court of Justice Rules of Procedure, s 18(a) ('A party who wishes to cross examine the person who gave an affidavit on behalf of the opposing party, the court may allow him to do so, if he deems it necessary for the sake of justice'), and s 20(b) ('In any matter not stipulated in these regulations, the Court may, at its discretion, if it deems it necessary to do justice, act in the way that is practised in a trial before a district court'). With regard to practice see Barak-Erez (n 3) 445.

[25] Barak-Erez (n 3) 431 fn 85.

[26] Ryan J Owens and David A Simon, 'Explaining the Supreme Court's Shrinking Docket' (2012) 53 *William and Mary Law Review* 1219, 1224 ('Ideology ... drives much of Supreme Court decision making. It motivates whether the Justices grant review in cases, to whom the Chief Justice assigns opinions, whether the Justices bargain and negotiate over the content of opinions, Justices' decisions to join final opinion coalitions, and the Court's review of lower court decisions').

[27] Alex Traiman, 'A Crisis of Judicial Proportions Explained, Part I: Reforming the Supreme Court, *JNS*, 31 March 2023. Recent Chief Justices have denied the classification of justices as conservative and progressive; see Esther Hayut, Statement in the Opening Session of the Association for Public Law Conference, Dan Carmel Hotel, 3 January 2019, https://supreme.court.gov.il/Speeches/%D7%93%D7%91%D7%A8%D7%99%20%D7%A0%D7%A9%D7%99%D7%90%D7%AA%20%D7%91%D7%99%D7%AA%20%D7%94%D7%9E%D7%A9%D7%A4%D7%98%20%D7%94%D7%A2%D7%9C%D7%99%D7%95%D7%9F%20%D7%91%D7%9B%D7%A0%D7%A1%20%D7%94%D7%A2%D7%9E%D7%95%D7%AA%D7%94%20%D7%9C%D7%9E%D7%A9%D7%A4%D7%98%20%D7%A6%D7%99%D7%91%D7%95%D7%A8%D7%99%203-1-2019.pdf. However, this classification is commonly used by the Court's press and general media; see Yuval Yoaz, 'Misgav, Leave Sohlberg Alone', *Haaretz*, 30 January 2017, https://www.haaretz.co.il/opinions/2017-01-30/ty-article-opinion/.premium/0000017f-dc3b-db5a-a57f-dc7b4c430000; Sharon Pulver, 'A Revolution at the Top: Three of the Four Elected Justices – Conservatives', *Haaretz*, 22 February 2017, https://www.haaretz.co.il/news/law/2017-02-22/ty-article/.premium/0000017f-e3f0-d9aa-afff-fbf81c8d0000; Mor Shimoni, 'Three Conservative Judges on the Way to the Supreme Court', *Maariv*, 22 February 2017, https://www.maariv.co.il/news/law/Article-575705.

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model.[28] Typically, the current role of the HCJD is justified by the assertion that the objective of judicial review and Supreme Court litigation is not merely to decide the concrete controversy between the parties but to ascertain the legality of the governmental action and to prevent abuses of official power. With regard to fact finding, the claim is that the adversarial model assumes some parity between the opposing parties, while in reality the government enjoys significant advantages over the petitioner with regard to access to information and a procedural advantage in the form of the presumption of regularity.[29]

The problem with these contentions is that they are contingent upon questionable factual claims. While it is usually true that the government enjoys significant advantages over private petitioners, it is not true with regard to public petitioners, who have extensive financial and legal resources. Moreover, some scholars have suggested that the mutual cooperation between the Supreme Court and the HCJD has mutually enhanced the legal and political powers of both institutions and the emergence of a 'symbiotic' relationship, which has led to the appointment of great numbers of public prosecutors to the courts.[30] This, in turn, has reinforced the personal and ideological agreement between the key figures in the two institutions. If this account has some truth in it, then the HCJ and the HCJD should be viewed as a public interest group and their in-house fact-finding processes as politically suspect in a sense.

To conclude, political neutrality is questioned when short cuts in fact finding are taken. The obvious solution is to install lower court fact-finding procedures. However, the government's reform plan does not address this structural problem directly.

3. Panel composition

The HCJ normally sits in panels of three justices, with the Chief Justice, Deputy Chief Justice or the senior Justice presiding.[31] The Chief Justice may extend the panel to an uneven number of justices before the beginning of the proceedings in a particular case. Panel composition is not random; rather, it is determined by the Chief Justice via the Court Registrar.[32] Usually, the panel is controlled according to seniority and availability, but the Chief Justice holds the discretion to determine panel composition or require the petition to be heard by a panel of the three most senior justices.[33]

[28] Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2014) 126.

[29] ibid 134–35.

[30] Daniel Friedmann, *The Purse and the Sword: The Trials of Israel's Legal Revolution* (Oxford University Press 2016) 237–51; Aaron Garber, "'Was It or Was It Not": Can There Be Stare Decisis Granting the Attorney-General Monopoly on Representation?' (2021) 44 *Tel Aviv Law Review Forum* (in Hebrew).

[31] Courts Law, 1984, ss 26, 28. Seniority is to be determined according to the date of appointment.

[32] ibid s 27.

[33] It is not clear how often the Chief Justice intervenes in panel composition. Recent Chief Justices maintained that their authority to determine panel composition is used only in rare

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These arrangements are a remnant of British Mandatory rule in Mandatory Palestine. The Supreme Court of British Mandatory Palestine was the highest court in the local area, but its decisions could be appealed against before the Privy Council.[34] Moreover, special powers given to the Chief Justice were intended to provide the British Mandate with control over the HCJ, but also reflected the view that British judges were learned, experienced, unbiased and incorruptible, with some grain of disdain towards the local law and population.[35] In 1957, the Knesset empowered the Chief Justice to give further hearing to any matter decided by a panel of three justices.

Over the years, jurists have noted that these historical arrangements are unfitting for a court of last resort, charged with the role of establishing precedents.[36] Another notable critique is that it is open to both intentional and unintentional abuse and manipulation. Above all, the arrangement impairs the Court's two basic functions: (i) to resolve disputes evenly and justly, because it raises the possibility that the outcome of the case was predetermined by the composition of the panel and that different compositions yield different results; (ii) to clarify and unify the law by establishing a consistent, unified and clear body of precedents. Establishing and adhering to precedents is part of the professional culture that enables the Court to develop the law incrementally. However, a court that sits in hundreds of panel combinations subverts the functions of uniformity and clarification.

I wish to state two additional problems raised by the current practices of panel composition. The first is that the arrangement is an affront to judicial independence in that justices may feel obligated to curry favour with the Chief Justice who assigned them to the case. The second is that they intensify the democratic deficit of the HCJ by adding another counter-majoritarian layer to the operation of the Court – namely, the Chief Justice.

In the formative years of the Court, it was never considered to have the Court sitting *en banc* (as in the United States): at that time, the expected workload made the rendered division of labour advisable.[37] In recent years, however, accusations of tampering by the Chief Justice in panel composition

cases (dozens out of thousands of cases). See Remarks by Chief Justice Miriam Naor of the Supreme Court at the Opening Ceremony of the Bar Association Conference at the Dan Hotel, Eilat, 21 May 2017, https://www.gov.il/he/departments/news/president_speech. I find this claim difficult in several ways. First, the impact of the authority is not determined solely by frequency, but also by the circumstances in which it is exercised (for example, important cases with broad social and political implications). Second, no explanations or justifications are given when the authority is used, which makes it almost impossible to monitor or guard against abuse. Third, over the last decades, the senior panels were mainly packed by justices belonging to the progressive camp; so it is clear that the transfer of the case to a senior panel *ipso facto* affects the result along known ideological lines. Fourth, sometimes a transfer to a senior panel was made not to influence the result but as a way of influencing the reasons supporting the result.

[34] Joseph Laufer, 'Israel's Supreme Court: The First Decade' (1964) 17 *Legal Education* 43, 44.

[35] Haim H Cohn, 'The First Fifty Years of the State of Israel' (1999) 24 *Journal of Supreme Court History* 3, 10.

[36] Jacob Quat, 'On the Structure of the Supreme Court' (1965–66) 22 *Hapraklit* 249.

[37] Cohn (n 35) 3–4.

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have become very common.[38] In the past, Chief Justices used their authority mainly to decide the composition of panels in blockbuster cases and those with high political profiles. Today, the authority of the Chief justice is used inconsistently and without a full explanation, leaving court watchers speculating, for example, why a case was assigned to an extended panel of nine justices and not eleven, or why it was assigned to the most senior panel and not to a more 'regular' panel or to an extended panel. Moreover, a journalist who was covering the Court reported that certain justices have been removed from panels that handled certain issues following their taking a 'lone wolf' approach to these issues.[39]

I am not arguing that every panel composition is problematic. My claim is that our current panel system, which gives the Chief Justice the sole and final authority in selecting who among the Court's members is to sit on which case, and without being forced to explain, is problematic. An example can be seen again in HCJ 2412/23 *The Movement for Quality Government in Israel v The Knesset*. The case was assigned to the Court's three most senior justices: Chief Justice Esther Hayut and Justices Uzi Vogelman and Yitzhak Amit. All the justices are classified by court watchers as part of the 'liberal camp'. On the day following the oral argument, the Court issued a temporary injunction ordering the respondents to give reasons as to why implementation of the amendment should not be stayed. The justices also extended the bench to 11 justices;[40] there was no real explanation as to why this change was made. Why wasn't the case assigned to the 11-justices panel in the first place? Why wasn't the panel extended to a full *en banc* of 15 justices?[41] We can only speculate because Chief Justice Hayut did not provide an explanation for her decision to extend the panel.

The government proposal to mandate *en banc* deliberation of all sitting justices in cases involving judicial review of primary legislation tries to confront this problem. However, I believe that the proposal should not be limited to judicial review of legislation but rather extend to all complex, difficult or important cases when the Court believes there is a particularly significant issue at stake. Moreover, panel composition should be chosen randomly and without consideration of seniority or judicial ideology, in order to prevent tampering and to ensure the integrity of the administration of justice.[42]

[38] See in recent years the accusation of senior legal official, Yair Altman, 'Hayut Chose the Panel that Would Rule Like Her', *Israel Hayom*, 24 December 2019, https://www.israelhayom.co.il/article/718295; David Rabi, 'The Panel Composition in the Supreme Court: How Does It Affect the Fate of the Petitions?' *Maariv*, 3 September 2020, https://www.maariv.co.il/news/law/Article-787586.

[39] Nomi Levitsky, *The Supremes: Inside the Supreme Court* (Hakibbutz Hameuchad – Sifriat Poalim 2017) 438–39.

[40] Jeremy Sharon, 'High Court Issues Injunction, Seeks Answers from the State on PM Recusal Law', *The Times of Israel*, 6 August 2023, https://www.timesofisrael.com/high-court-demands-answers-from-state-on-recusal-law-expands-panel-to-11-justices.

[41] Jeremy Sharon, 'Unprecedented 15-Judge Panel to Hear Petition Against Coalition's Reasonableness Law', *The Times of Israel*, 31 July 2023, https://www.timesofisrael.com/unprecedented-15-judge-panel-to-hear-petitions-against-coalitions-reasonableness-law.

[42] It was reported by Channel 12 recently that the coalition is seeking to pass new legislation that would establish that the composition of the Supreme Court panel will be decided randomly by computer: TOI Staff, 'Coalition Said Pushing Bill that Would Limit Powers of Next Supreme

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I suggest also that a losing party can request a rehearing *en banc* if the majority of the justices agree to rehear the case.

For my last comment on panel composition and precedents, until recently, the doctrine of stare decisis was almost non-existent in Israeli constitutional law. Indeed, as a matter of law the Supreme Court is not bound by its past decisions,[43] but it was often declared that precedents bind the Court as a matter of judicial policy.[44] The 'justiciability revolution' of the 1980s and the constitutional revolution of the 1990s have annihilated this.[45] The Supreme Court during that period, Professor Mautner writes, radically deviated from the first principle of its authority, which is the basis of its operation, that of being bound by the precedents of the past, and created a sharp break in its professional culture, which requires respect for its precedents and which allows only incremental changes in the law.[46] Take, for example, the decision in the *United Mizrahi Bank v Migdal Communal Village* case,[47] which established judicial review over primary legislation. The decision was handed down by an extended panel of nine justices, and is considered by former Chief Justice Aharon Barak to be the leading precedent of the constitutional revolution.[48] However, Moshe Landau, a retired Chief Justice of the Supreme Court at the time the decision was handed down, called the *Migdal* decision an 'academic seminar', arguing that in the light of the Supreme Court's final ruling, the fundamental questions that were raised, discussed and determined should have been left for further consideration.[49] A similar opinion was voiced by retired Justice Haim Cohen.[50] It was also argued not only that the *Migdal* decision stealthily overturned earlier constitutional decisions but also that its reasoning was fractured. Let me be clear, I do not argue that the *Migdal* decision should be overturned; I argue that there are no serious rules governing the regulation of precedents in Israeli constitutional law.

There are signs that the doctrine is being revived when some HCJ justices (and especially from the liberal activist wing) cite stare decisis as part of their legal reasoning. For example, Justice Vogelman has stated in a number of recent oral arguments that the Court is authorised to review Basic Laws

Court', *The Times of Israel*, 4 September 2023, https://www.timesofisrael.com/coalition-said-pushing-bill-that-would-limit-powers-of-next-supreme-court-president.

[43] Basic Law: The Judiciary, s 20(b).

[44] Itzhak Englard, *An Introduction to Law* (2nd edn, Nevo 2019) 165 (in Hebrew).

[45] Haim H Cohn, 'Obiter of Blessed Memory' (2000) 31 *Mishpatim* (*The Hebrew University Law Review*) 415.

[46] Menachem Mautner, *Liberalism in Israel: Its History, Problems, and Futures* (Tel Aviv University 2019) 33.

[47] CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C93%5C210%5C068%5Cz01& fileName=93068210_z01.txt&type=4.

[48] Aharon Barak, *The Judge in a Democracy* (University of Haifa 2004) 79 ('While I am aware there are those who critique the ruling in *Bank Ha'Mizrachi* ... However, as long as the *Bank Ha'Mizrachi* ruling stands, it reflects the law of the land').

[49] Moshe Landau, 'Judicial Enactment of a Constitution to Israel' (1996) 3 *Mishpat Umimshal (Law and Government)* 697.

[50] Cohn (n 45).

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that 'abuse the Knesset's constituent authority'. Vogelman insisted that this is 'a matter of positive law' and that 'the Court is within well-known precedents, established by an expanded bench'.[51]

The claim that precedents should be established by an extended bench (but of what size?) seems like sound judicial policy. However, the fact is that many of the precedents of the Barak Court were decided by a three-judge panel, and even those decided by extended panels did not include all sitting members of the Court. Moreover, Israeli constitutional law is missing landmark decisions, like *Marks v United States*,[52] to regulate what counts as binding precedent. One possible reason for the absence of clear rules regarding precedents and panel compositions seems clear. It is neither a precedents regime nor a non-precedents regime, but a regime of judicial discretion. Within such a regime, maintaining unchecked discretion in determining panel composition is of the utmost importance.[53]

4. Standing

Like other high courts of last resort, the HCJ has discretion over which cases it reviews.[54] Over the years, the Court has developed rules and standards to guide its discretion; these include justiciability, clean hands, mootness, alternative remedy, delay. Among these minimal requirements that control the decision to grant a review was that of standing: petitioners to the HCJ had to assert their own legal rights and interests, as opposed to rights and interests shared by others or by the public in general, in order to be entitled to a hearing on the merits of the dispute.

However, at the start of the 1980s, the HCJ started to relax the requirement to the point of abandoning it: the petitioner to the HCJ need not show standing if the petition raises issues of constitutional importance.[55] The justification offered for this change was that the HCJ is responsible for the protection of the rule of law and democracy. Scholars have criticised the annulment of the standing requirement. In the legal academic arena, Menachem Mautner surveyed the HCJ case law (from 1979 to 2005) and identified an increase over the years in the filing of applications by Knesset members that lacked 'private' standing. Because of media coverage and since, for various reasons, those politicians were mainly from the left, Mautner explained, the Israeli public had

[51] Sharon (n 9).

[52] *Marks v United States*, 430 US 188 (1977).

[53] A good example is the issue of house demolition; see David Kretzmer and Yaël Ronen, *The Occupation of Justice* (2nd revised edn, Oxford University Press 2021) 376–77.

[54] HCJ 45/49 *Ontricht v Chairman of Haifa Municipality Election Committee* (12 September 1949); HCJ 10/59 *Levy v The Regional Rabbinical Court* (29 June 1959); HCJ 991/91 *Pasternak Ltd v Minister of Construction and Housing* (2 September 1991). While, formally, the US Supreme Court cannot refuse to hear an admissible case, it has discretion whether to grant certiorari to review the case. Several considerations for review could be found in Rule 10 of the Rules of the Supreme Court of the United States (2019).

[55] Ruth Gavison, 'Constitutions and Political Reconstruction? Israel's Quest for a Constitution' (2003) 18 *International Sociology* 53, 63; Ariel L Bendor, 'Standing of Public Interest Organizations in Israel' (2022) 31 *Transnational Law and Contemporary Problems* 195.

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learned to identify the HCJ as an adjunct of the leftist Meretz political party.[56]

During the past decade the opposite trend could be identified in the Court's approach to standing, although it was not that conspicuous or settled, reflecting a wariness of citizen-initiated lawsuits in which the plaintiff alleged no personal injury beyond concern that the government had acted unlawfully.[57] Justices, mostly from the 'conservative camp' of the HCJ, increasingly but sporadically apply an intermediate approach, qualifying the permissive approach by a list of limiting exceptions and other judicial means. Unfortunately, this reverse trend does not resolve the issue; it exacerbates the problem because the standing doctrine has once again become an ideological battleground between liberal and conservative justices about the role of the HCJ. This is especially so because the Court retains substantial discretion over whether to employ standing or not. In other words, the intermediate approach transforms the standing doctrine from a tool to constrain the Court's discretionary screening authority into a tool to expand it.

5. Selection and appointment of justices

Originally, the justices of the Supreme Court were nominated by the Minister of Justice and confirmed by the provisional government.[58] Out of concern that appointment by the executive alone was undesirable as it might breach democratic separation of powers, and based on the understanding that justices should be chosen based primarily on professional merits, the following committee was established in the Judges Law of 1953: the Minister of Justice (presiding) and one other cabinet minister; two Knesset members; two members of the Bar to be nominated by the Bar Council; and the Chief Justice and two justices of the Supreme Court, the justices to be elected biannually by the full bench.[59]

The mechanism for electing judges is an integral part of a system of constitutional checks and balances.[60] In this system the HCJ is given the power

[56] Menachem Mautner, 'Why Is the High Court of Justice Associated with the Left?', *Haaretz*, 26 October 2010, https://www.haaretz.co.il/opinions/2010-10-26/ty-article/0000017f-ed98-da6f-a77f-fd9e8aff0000.

[57] AdminA 3782/12 *Tel Aviv-Yafo District Commander of the Israel Police v The Israeli Internet Association* (24 March 2013); HCJ 2031/13 *Regavim v Netanyahu, Prime Minister* (22 June 2015); HCJ 4244/17 *Har Shemesh v Director of the Tax Authority* (12 April 2017); HCJ 9044/18 *Asor v Attorney-General* (3 December 2018); HCJ 837/19 *Fuchs v Attorney General* (4 February 2019); HCJ 2723/19 *Ir Amim Association v Police Commander of the Jerusalem District* (19 May 2019); HCJ 1724/18 *Shamir v Minister of Justice* (11 June 2019).

[58] Cohn (n 35) 3. The provisional government assumed the powers of the High Commissioner, who appointed the justices of the Supreme Court of British Mandatory Palestine. The High Commissioner acted upon instructions of the British Secretary of State for the Colonies, and the justices served at their pleasure.

[59] Today the Committee's composition is established in Basic Law: The Judiciary, s 4(b).

[60] Compare William H Rehnquist, 'Presidential Appointments to the Supreme Court' (1985) 2 *Constitutional Commentary* 319 ('But though the President ... may be subject under our system to checks and balances administered by the judicial branch of government, the courts themselves are subject to a different form of checks and balance administered by the President. Vacancies

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(a significant part of which it has appropriated to itself since the 1980s)[61] to balance and restrain the executive and legislative branches. The shift in the powers of the HCJ is often presented as part of a transition from a British to an American constitutional model, with the HCJ having the power to declare Knesset legislation unconstitutional.[62] However, there has been almost no change in the mechanism for electing judges since 1953, despite the considerable changes in the power of the Supreme Court.

The Saar amendment was designed to weaken the power of the justices on the committee and consequently to increase diversity among the members of the Supreme Court.[63] However, the amendment gave the justices a veto power to thwart the appointment of conservative nominees who might imperil the liberal super-majority. Supreme Court justices, unlike ministers and Knesset members, vote as a block, but they are also what Marc Galanter calls 'repeated players',[64] planning their steps well ahead of time, and even threaten to shut down the committee's work for years, in order not to endanger the liberal-progressive majority in the HCJ.[65] Thus, a significant part of the HCJ overreach is related to the fact that, after blatant and perhaps even wild activism, the justices who sit on the committee for selecting judges managed to prevent the appointment of distinctly conservative judges.[66]

The veto power given to the justices is not similar to the veto power given to politicians or others. The justices determine who will join them, or rather

in the federal judiciary are filled by the President with the advice and consent of the United States Senate. Just as the courts may have their innings with the President, the President comes to have his innings with the courts').

[61] Since the 1980s there has been a systematic increase in the power of the Supreme Court by enlarging the scope (for example, in standing and justiciability doctrines) and the depth of judicial review (for example, the changes in theory and practice of the reasonableness and equality doctrines). Later, in the 1990s, after the enactment of the new Basic Laws (Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation), the Supreme Court adopted a fully fledged form of judicial review over primary legislation; for more see Joshua Segev, 'The Changing Role of the Israeli Supreme Court and the Question of Legitimacy' (2006) 20 *Temple International and Comparative Law Journal* 1, 39–46.

[62] See, eg, Daphne Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective' (1995) 26 *Columbia Human Rights Law Review* 309, 346 ('The Israeli system will now face the same unresolved problems raised by judicial review in the American system: invalidation of the so-called "will of the majority" and adjudicating on the border of politics. In other words, it will face the legitimacy question: Should the courts be allowed to defeat laws enacted by a democratic legislature?').

[63] Galei Tzahal, 'Confirmed in the Knesset: The Appointment of Judges to the Supreme Court Will Require a Qualified Majority of 7 of the 9 Members of the Committee for the Appointment of Judges', *Globes*, 29 July 2008, https://www.globes.co.il/news/article.aspx?did=1000366509; Mark Schon, 'The Sa'ar Law Has Risen Against Its Creator: The Meeting of the Committee for the Appointment of Judges Exploded', *Calcalist*, 22 September 2008, https://www.calcalist.co.il/local/articles/0,7340,L-3122243,00.html.

[64] Marc Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 8 *Law and Society Review* 95.

[65] Levitsky (n 39) 425.

[66] ibid. See also Yonatan Green, 'The Peculiar Case of the Israeli Legal System' (2023) 24 *Federalist Society Review* 212, 238.

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who will not join them, and this is a classic problem of entrenchment. Right-wing politicians and voters fear that the progressive majority in the HCJ is permanently entrenched in the light of the strategic behaviour of the justices in the committee. The ability of the justices to use their veto power effectively is connected to another 'feature' of the committee's proceedings: secrecy. Historically, all candidatures and proceedings were to be kept secret, fearing undue influence over the committee's decision making. In recent decades it was decided that nominations decided by the committee will be officially published in time, so as to enable objectors to move the committee to review the nomination. However, the committee's hearings, interviews and deliberations on specific nominations to the HCJ remain secret, which increases the democratic deficit of the committee, and prevents public scrutiny of nominees and the actions of the members of the committee.

With regard to transparency, an interesting comparison can be made with the selection of justices to the US Supreme Court: justices are nominated by the US President on the advice and with the consent of the Senate. In the American Senate, for more than the first hundred years, the approval of and consent to the selection of judges, as stipulated in the Constitution, were held in confidential procedures.[67] The decision to open the confirmation hearings in the Senate to the public was made on the appointment of Brandeis in order to reveal the anti-Semitic motivations of the senators who opposed his appointment. In short, a public hearing guarantees transparency and democratic accountability of both the judges and the committee members. Sunlight, according to Brandeis, is the best disinfectant. The independence of the judiciary is important, but this does not mean that, when they are up for election or promotion, they are exempt from having to account to the public for decisions they made during their career, as judges are not above the law.

6. Conclusion

This article has identified four flaws in the current structure of the HCJ: fact finding, panel composition, standing, judicial selection. These flaws are independent of outcomes in specific cases or the current membership of the HCJ. A large part of the request for a judicial overhaul derives from frustration about the ideological balance of the HCJ,[68] its semi-natural law and undemocratic constitutional theory,[69] and the way in which it uses its power in its substantive decisions in specific cases (for example, the HCJ approval of the Gaza

[67] Richard S Beth and Betsy Palmer, 'Supreme Court Nominations: Senate Floor Procedure and Practice, 1789–2011', Congressional Research Service, CRS Report for Congress, 11 March 2011, https://sgp.fas.org/crs/misc/RL33247.pdf.

[68] Alex Traiman, 'A Crisis of Judicial Proportions Explained, Part I: Reforming the Supreme Court', *Jewish News Syndicate*, 31 March 2023, https://www.jns.org/a-crisis-of-judicial-proportions-explained-part-i-reforming-the-supreme-court.

[69] Avishai Grinzaig, 'Levin Unveils Plan to Reduce Power of Israel's Supreme Court', *Globes*, 5 January 2023, https://en.globes.co.il/en/article-levin-unveils-plan-to-reduce-power-of-israels-supreme-court-1001434722; Friedmann (n 30).

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Disengagement and unwillingness to defend the civil rights of those who oppose the Disengagement).[70]

Discontent with the administration of justice is as old as law,[71] and it is almost inevitable when one is on the losing side of constitutional adjudication.[72] Yet, we should not be misled by this unavoidable dissatisfaction into ignoring the real problems in the way in which the HCJ operates today, and the genuine sense among right-wing voters and politicians that the Court had been transformed into a partisan institution, taking sides in the political struggle in favour of the 'Jewish-secular-liberal' group.[73]

Here we come to the core of the problem and why these structural problems matter. The role of the HCJ is to resolve disputes, but any such resolution will necessarily make at least one side of the dispute unhappy. However, the role of a court is to produce an outcome by which even the losing parties will abide. In order to produce this result, though, there must be some basic degree of respect for the HCJ and for the adjudicative processes it maintains: namely, the HCJ game should not be rigged, so that it will be worth playing. I take the following as minimum requirements of the rule of law as it applies to the work of the HCJ: (i) requiring standing as a precondition to the commencement of legal proceedings; (ii) installing formal adversary fact-finding processes; (iii) preventing tampering in the composition of panels and reconstructing stare decisis; (iv) enhancing transparency and preventing entrenchment in the selection of justices by the committee.

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[70] Eliav Breuer, 'Israeli Judicial Reform Is Tit-for-Tat over Gaza Disengagement', *The Jerusalem Post*, 10 March 2023, https://www.jpost.com/israel-news/article-733906. Assaf Malach compiled 50 notable left-of-centre decisions, mostly given by the HCJ in a diverse range of topics, that demonstrate the need for a judicial overhaul: Rochel Sylvetsky, '50 Israeli Supreme Court Decisions', *Israel National News*, 3 May 2023, https://www.israelnationalnews.com/news/370855.

[71] Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 29 *American Bar Association* 395.

[72] Stephen E Sachs, 'Supreme Court as Superweapon: A Response to Epps & Sitaraman' (2019) 129 *Yale Law Journal Forum* 93, 103; Daniel Epps, 'Nonpartisan Supreme Court Reform and the Biden Commission' (2022) 106 *Minnesota Law Review* 2609, 2611–12.

[73] Tova Tsimuki, '"Most of the Judges Are Leftists": Statements by the Expected Minister of Justice and the Planned Reform', *Ynet*, 27 December 2022, https://www.ynet.co.il/news/article/s1mjwuotj; and compare Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011) 99.

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