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Israel's Political Elite Facing the High Court of Justice: Post-2023 Updated Review

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"When the castle of law falls into ruins, the rulers' millstone would grind the common man into dust."

Menachem Begin, Israel's Prime Minister 1977-1983 and Opposition Head 1949-1977. (Brought at an HCJ deliberation by a petitioner opposing Netanyahu's coalition formation eligibility).

"No Castle is falling into ruins."

Esther Hayut, Israel's Supreme Court President at the time (May 2020 answering the petitioner).

"We will maintain our vigilance, facing the thunders and lightnings which appear to foresee the coming of a storm, with the law at our sights, we shall fend off that tempest."

Also, Esther Hayut, Israel's Supreme Court President at the time (November 2022 after realizing the elected government's planned judicial reforms).

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Abstract

Israel's High Court of Justice (HCJ) reviews political decisions, intervening in matters relating to tensions dividing Israeli society usually favoring human rights. Consequently, the HCJ has been at odds with Israel's far right, ultraorthodox and coalition formateur parties, a trend intensifying since the 1990's. Between November 2022 until October 7th 2023, Israel's Jewish right-wing religious-orthodox coalition advocated institutional reforms aimed to curb down the court's independence. This behavior goes against expectations which assume that judicial independence benefits politicians in competitive democracies, therefore deterring them from harming it. Utilizing these expectations' logic, I examine the HCJ's political behavior and the consequent political reaction. I show that as the risk for Israel's Prime Minister's legal and personal survival increases, so will attacks on the court's powers. With a coalition which its preferences juxtapose the court's preferences and a supportive public opinion, these attacks would intensify.

Keywords

Judicial Independence, Insurance theory, Institutional Reforms, Centralized Personalization, Israel's High Court of Justice

Introduction

Why would democratic governments seek to decrease judicial independence? This theoretical question that has been studied by a variety of scholars, approaches and methods (Feld and Voigt 2003; Helmke and Rosenbluth 2009; Huq 2021; Randazzo, Gibler, and Reid 2016; Ríos-Figueroa and Staton 2012), is the basis for the analysis this paper offers regarding Netanyahu's November '22 government's attempts to curb down judicial independence. The Israeli case offers a combination of an independent court, namely the Supreme Court, with wide-reaching judicial review powers over constitutional and administrative affairs, which the court utilizes in its capacity as a High Court of Justice (HCJ) (Dotan 2014; Jacobsohn and Roznai 2020; Weill 2012). This independent court reviews the activities of a government system intertwining between periods of (in)stability (Rosenthal 2017), and extreme centralized personalization of politics (Rahat and Kenig 2018), focused mostly on the Prime Minister's position (Kenig 2021; Rosenthal 2023). For a long time, this contrast in the balance of powers between the different government branches, prevented an institutional reform which would have limited judicial independence (Aronson 2016; Meydani and Mizrahi 2010).

Since 2007 small scale institutional reforms considering the court's powers begun, seeking to eradicate them through incremental changes and judicial nominations of conservative judges (Rosenthal, Barzilai, and Meydani 2021). It should be noted that in Israel the political branch can easily overturn constitutional arrangements with little if any constitutional limitations (Roznai, Dixon, and Landau 2023). Thus, some claim that the reason for reluctance from reforming the court stemmed from 'habitual' institutional path dependence, that carried a high level of friction deterring politicians to take the road to institutional changes (Aronson 2016). Judicial reform reluctance also coincides with insurance theory that claims that independent courts facilitate political competition: they safeguard the possibility that all sides would be able to

compete for an elected government position (Dixon and Ginsburg 2017). Thus, political leaders would avoid taking advantage of situations in which they can decrease judicial independence, understanding that they might be political losers and would need a system that could secure their potential to win again (Staton, Reenock, and Holsinger 2022, 24–29).

Yet, after getting re-elected to power in November 2022, a Likud-led coalition with the far right and ultra-orthodox religious parties, initiated a set of large-scale reforms seeking to decrease judicial independence and the scope of the HCJ's judicial review (Roznai and Cohen 2023). Thus, going against institutional path-dependence and insurance theory expectations, Israel's 2022 Likud-led government chose to decrease judicial independence. Using the theoretical expectations made by insurance theory and emphasizing its strategic choice aspects, *this paper seeks to examine the reasons that made the November '22 government initiate the implementation of radical reforms in judicial independence and review*.

Below, I examine the theoretical mechanisms that yield a decrease in judicial independence and derive some empirical expectations from them. I then review the political aspects of the HCJ's behavior between 1995-2018. Afterwards I examine several maneuvers taken against the HCJ along the years by Israeli politicians, including those taking place between November 2022-October 2023 marking the first wave of reform attempts taken by Netanyahu's government. I then point at the main patterns emerging from this review and discuss their relevance to comparative judicial politics.

Judicial Independence and Threats against Courts: Some Analytical premises

Judicial independence offers courts and judges the ability to check other government branches by vetoing legislation and public policy decisions, and setting standards for the practices of policy design, implementation and

evaluation (Cox and McCubbins 2001; Randazzo, Gibler, and Reid 2016; Whittington 2003). Assuming that politicians would avert the activities of an institutional veto player, and that politicians also have the powers to re-structure institutions, politicians should avoid court empowerment and would decrease judicial independence the first opportunity they have (Helmke and Rosenbluth 2009). However, democratic expansion and the will to preserve civil and human rights have been embedded in the expansion of judicial review and independence (Randazzo, Gibler, and Reid 2016; Shapiro and Stone 1994; Tate 1995). Furthermore, politicians avoided using their power against high courts even when courts intervened in their actions (Hirschl 2009b). Hence, judicial independence is a part and parcel of contemporary democracies, which politicians approved and protected throughout the third wave of democracy (Helmke and Rosenbluth 2009).

However, recently the rise of populism and the wave of democratic erosion experienced by second and third waves democracies (Laebens and Lührmann 2021) shows that politicians are willing to curb down court powers and limit judicial independence (Botero, Brinks, and Gonzales-Ocantos 2022; Huq 2021). There is a wide array of court curbing moves politicians in democracies can take to erode judicial independence (Kelemen 2012). These include overriding court decisions, decreasing court funding, removing particular jurisdictions from the court's authority, court packing or re-designing court's judicial selection mechanisms (Kelemen 2012). Thus, the option of judicial independence erosion, should be understood in terms of purposeful behavior: politicians can erode judicial independence, yet their tendency to do so varies. What would drive the extent of institutional reforms seeking to curb down the court's powers?

Insurance theory claims that political parties who fear that they might be losing elections and distrust the future majority's commitment to preserving their rights, would entrust this function with an independent majority (Helmke

and Rosenbluth 2009). Hence, when 'normal' leaders endure 'normal' times (i.e. no emergency that calls for a decrease in human rights), then there is no point in judicial review erosion as an independent court legitimizes the existing regime and the coalition leading it (Staton, Reenock, and Holsinger 2022, chap. 4). Yet, when times are not 'normal' and the leaders need to take 'non-normal' measures that could yield a coup d'état, judicial independence is at perils.

However, the court can be the institution that ensures stability by signaling the opposition and the public that the activities are safe and democracy is not at stake. That maneuver could be more beneficial if the court and the leader do not share the same preferences and that the potential usurpers accept the court's status as an independent mediator between the government and the opposition. Hence, there is a strong positive incentive for governments to refrain from eroding judicial independence as it might benefit them (Staton, Reenock, and Holsinger 2022, chap. 4). Yet, for the court to be accepted by all sides of the political process and then to be unharmed, it cannot be perceived as an agent biased against these sides (Staton, Reenock, and Holsinger 2022, 23). Furthermore, politicians cooperate with the court to insure their long-term political survival (Staton, Reenock, and Holsinger 2022, 27). However, if the court continuously intervenes with the works of government in a way that might harm its political survival, then it is prone to set a political coalition of any type against it.

Expectation 1: Judicial independence erosion would happen when:

Expectation 1a: The ruling political elite associates judicial independence with a potential threat to their political survival.

Expectation 1b: Public opinion trust in the courts as a trustworthy mediator between governing players decreases.

These expectations use some of the conditions proposed by insurance theory to show how judicial independence is kept examining how judicial independence would be restrained. Scholars examining this theory from various

aspects have been consistently showing that even with some level of institutional resentment between politicians and judges politicians maintain courts' judicial independence (Dixon and Ginsburg 2017; Staton, Reenock, and Holsinger 2022). Yet, scholars closely examining hybrid regimes have been more skeptical about the strength of this theory. Some emphasize the importance of the country's regime type as influencing the politicians' inclination to accept the judiciary as the insurer of political competition (Aydın 2013; Epperly 2018). Other accounts emphasize the constitution-making process as the facilitator of judicial independence (Aydin-Cakir 2023). Others offer a more nuanced approach to the insurance theory's applicability (Bertoli, Garcia, and Garoupa 2022). What can the Israeli case offer to the comparative study of insurance theory?

Israel's regime is geographical hybridity (Ariely 2021), demonstrates ethnic dominance of its Jewish majority (Smooha 2005), and has various defects stemming from the influence of religious and military institutions on government policy making (Merkel 2012). However, its party system is competitive and relatively open allowing, within the 1967 Green Line, for the existence of a vibrant political system comparable to some European multiparty systems (Shugart 2021). Combining various components of democratic qualities and showing variance in the way Israeli political elites relate to the judiciary and judicial independence, offers a unique testing ground for insurance theory controlling for particular aspects of its attainment and loss.

Below, I expand Israel's High Court of Justice, its powers and its activities' political aspects. I then turn to review the measures taken throughout the years to curb its independence. Afterwards I examine insurance theory's validity to the Israeli case and beyond.

Israel's Supreme Court, the High Court of Justice, and the Judicialization of Politics in Israel

Israel's Supreme Court (ISC) serves as a court of last resort in the Israeli court system. In petitions against the government's decisions and activities on either administrative or constitutional matters, the Supreme Court serves as primarily a first and final instance referred to as the High Court of Justice (HCJ) (Rosenthal and Talmor 2022). Between 2011-2018 46% of the ISC's decisions were related to the HCJ.[2] No other legal procedure was as frequent as this one. Thus, while other procedures affect citizens' lives and relate to legislation and public deliberation, the main issue that occupies the court's attention is its functioning as the HCJ. As the HCJ deals mostly with petitions against the government, politicians' main concern with legal decision is with the HCJ's decisions.

The HCJ's review powers have been expanding its constitutional review powers since 1969, taking dramatic turning points after basic laws' legislation that further allowed it to do so (Rosenthal and Talmor 2022). This expansion also related to administrative review with the court increasingly using interpretive measures such as reasonableness and proportionality to review administrative decisions, evoking beliefs that the court uses these matters to enforce its judges' preferences rather than hold a strict legal analysis (Cohn 2019; Dotan 2000; Sulitzeanu-Kenan, Kremnitzer, and Alon 2016; Weill 2020). Furthermore, the court expanded its justiciability and standing doctrines opening its gates for petitioners loosely affected by government decisions seeking the court's support (Doron and Meydani 2007; Meydani 2014). By the mid-1990's, following the legislation of two human rights oriented basic laws, the court sustained its position as a veto player on Israel's political decisions.

[2] Weinshall Keren, Lee Epstein & Andy Worms. The Israeli Supreme Court Database (ISCD), 2018 version URL: http://iscd.huji.ac.il

For such vetoes the court used procedural faults in government and Knesset decisions and normative reasoning to nullify these decisions (Hirschl 2009a). While the political elite was resentful of the court's intervention in government and Knesset decisions, it did little to limit these review powers (Doron and Meydani 2007; Meydani and Mizrahi 2010).

How did the ISC in its capacity as the HCJ used these powers? The HCJ's willingness to get involved in key issues shown in landmark decisions that pertain to Israeli politics has been studied by others (Hirschl 2009a). To examine the courts' behavior as a general trend, I use two datasets: the ISCD data I related to above, and the Rosenthal-Barzilai-Meydani Israel's High Court of Justice's Executive (IHCJE) decisions review data (Rosenthal and Talmor 2022). I use the ISCD data with its focus on the Israeli Supreme Court and legal aspects of judging, and the IHCJE data to examine the HCJ's government interactions' political implications.

To begin with (and using the ISCD), a key question is what is the main tool which the HCJ might use to influence government decisions and parliamentary legislation? The following table shows the proportions of different court procedures or dispositions within the HCJ:

Disposition Court	*N*	*Pct.*
On the merits	3609	48.74%
Withdrawal - recommended by judges	1669	22.54%
Withdrawal - unknown reason	1393	18.81%
Out-of-court settlement	480	6.48%
In-court settlement	223	3.01%
Other	30	0.41%
All	*7404*	*100.00%*

Table 1: Court Dispositions HCJ

The most frequent category of the court's decision making is its on-the-merits part of its decision-making. Does this trend vary between legal issues? Using the Weinshal et. al (2018) coding for legal issues let us first see the legal issues the HCJ examines:

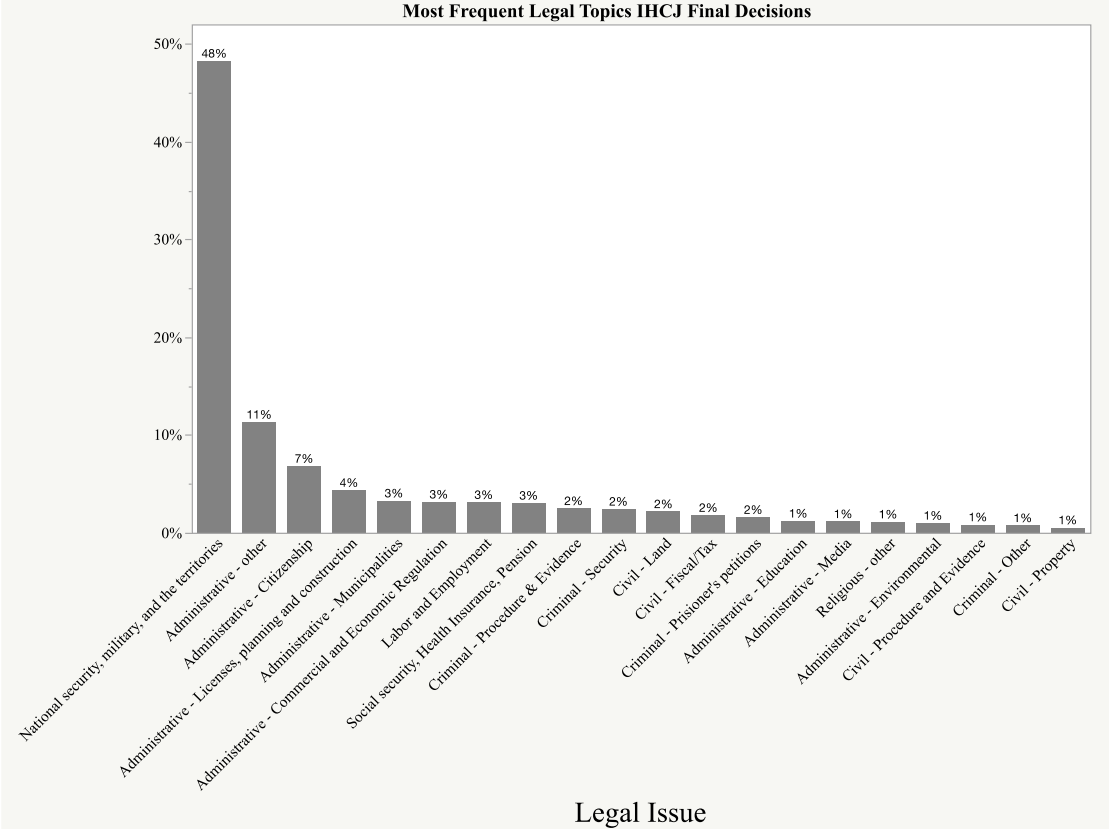

Figure 1: Legal Topics Examined by the HCJ 2011-2018

The data shows that the IHCJ mostly handed decisions on security matters including handling the occupied territories, followed by administrative law issues. It is worth mentioning that although constitutional law issues raise quite a lot of public attention, (Cohen 2020; Gavison 2000; Rotman 2020) their proportion in terms of what the court is doing is minor. Given the centrality of on-merits decisions, what is the extent of HCJ judges' willingness to intervene in government decisions? I use the IHCJE which offers a pool of 8446 judges' individual decisions on HCJ on-merits cases that relate to petitions set against government ministries by various petitioners between the years 1995-2018.

Characteristic	N = 8,446[1]
Judges' Decisions	
Accepted	938 (11%)
Partial	247 (2.9%)
Rejected	7,261 (86%)

[1] n (%)

Table 2: HCJ Judges' Decisions on On-the-merits petitions

We can see that for the most part HCJ judges tend to reject petitions. We are left with 11% of the petitions that made it to this phase. Keep in mind that this phase relates to 48% of HCJ decisions and hence a low rate of acceptance to begin with. Thus, with petitioners turning against the government seeking the court's support, the court is quite reluctant from giving such support. Thus, while having a high reputation for being an activist court, this court is quite careful in the decisions it makes against the government. Yet, do these decisions relate to a particular political issue? Re-running the different decision types and coding them in accordance with the Comparative Manifestos Project's political ideology coding scheme shows the following:

Ideological Domains	**Accepted**, N = 938[1]	**Partial**, N = 247[1]	**Rejected**, N = 7,261[1]
Economics	30 (3.2%)	11 (4.5%)	262 (3.6%)
External Relations	0 (0%)	0 (0%)	3 (<0.1%)
Fabric of Society	353 (38%)	95 (38%)	1,675 (23%)
Freedom and Democracy	100 (11%)	25 (10%)	980 (13%)
Non Ideological	100 (11%)	42 (17%)	2,483 (34%)
Political System	210 (22%)	35 (14%)	1,359 (19%)
Social Groups	20 (2.1%)	15 (6.1%)	106 (1.5%)
Welfare and Quality of Life	125 (13%)	24 (9.7%)	393 (5.4%)

Table 3: Judicial decision making in an ideological context.

Two topics within the accepted decisions are salient: what Rosenthal and Talmor coded as Fabric of Society which relates to the influence of Jewish religion on Israeli public sphere and to the topic of the Israeli beyond-Green-Line settlements. The other frequent category is the Political System that relate to issues of political handling public policy. Hence, the intervention in one topic (Fabric of Society) makes ultra-orthodox religious and far right parties relate to the court as (at least) interventionist. The intervention in the other topic (Political System) makes whoever is in power relate to the court as interventionist. The IHCJE dataset includes the years 1995-2018. For the most part, the coalition formateur was the Likud during these years. The conservative-right Likud usually cooperated with the far-right and the ultraorthodox parties as its usual coalition parties, usually including a rotating center-right party

(Rosenthal 2017, chap. 4). Hence, on Israel's core ideological issues the court has been at odds mostly but not only with the Israeli right.

This is a key issue to the Staton, Reenock and Holsinger take on insurance theory. For the court to be accepted by all sides of the political process, it has to maintain an unbiased position(perceived or real), when that position is gone, judicial backlash could be predictable (Expectation 1a). I now turn to examine that backlash implemented by Israel's political elite since 1995 onwards.

The Judicial Backlash

Since 1995, when it declared its ability to strike down laws, Israel's Supreme Court has been under political pressure to decrease its intervention in the government and Knesset decisions (Doron and Meydani 2007; Meydani and Mizrahi 2010). This pressure resulted in a series of institutional attempts to affect the procedures of judicial nominations and various political initiatives aimed at reducing the powers of the judiciary (Navot and Peled 2009). The direct anti-HCJ backlash includes three maneuvers: the attempts to affect judicial nominations to the ISC (and therefore the HCJ), the attempts to reform Israel's constitutional structure thereby limiting the HCJ's powers, the attempts to construct a Constitutional Court in Israel, and the attempts to reform the institutional powers held by Israel's government's legal advisors.

The topic of judicial nominations as a political measure is a key to Israel's judicial backlash, making the court more reluctant then it used to be in reviewing political questions and accept the petitions involved with them (Rosenthal, Barzilai, and Meydani 2021). ISC judges are selected to office by a judicial selection committee. This committee includes three factions (three Supreme Court judges, four politicians—two from the government and two from the Knesset—and two lawyers from Israel's Bar Association). An amendment to the Law of Courts (section 6a) enacted in 2004 states that committee members do not represent the institution that placed them on the committee but must select judges based on the committee members'

preferences. Another amendment added in 2008 determined that to select a Supreme Court judge, there must be a majority of seven of the nine committee members.

Before the 2008 amendment, a simple majority was the selection rule. It gave the judges an advantage in the committee if they had even two supporters from the other committee factions (politicians or lawyers), or if these factions were split. Hence, until 2008 the Supreme Court (under the guidance of the Chief Justice) and the Bar Association could have selected Supreme Court Justices with little if any political influence. Since 2008, a coalition supporting a judge's nomination has to include some of the committee's political members (Friedmann and Watzman 2016, chap. 33).

The minister of Justice can 'push' through her candidate. Ministers of Justice used such opportunities to diversify the court, with judges who either came from circles the judges would not usually support (such as the private sector) (Friedman, 2016, ch. 36), or those associated with a conservative judicial agenda (Rosenthal, Barzliai and Meydani 2021). Minister of Justice Ayelet Shaked between 2015-2018 was able to maintain this policy direction steadily and purposefully increasing court reluctance from intervening in the government decisions and Knesset legislation (Rosenthal, Barzliai, and Meydani 2021).

The Minister of Justice has agenda-setting powers given to here even by the possibility of postponing the nominations committee meetings, due to her concerns regarding other factions' behavior. Minister of Justice Tzipi Livni did not summon a committee meeting after she was not able to convince the Supreme Court President to support a candidate she wanted to nominate as a Supreme Court judge. She was not successful in that attempt but she did incur damages to the court by preventing new nominations to the Supreme Court (Rosner 2006). During 2022 the judicial nomination process went through another change: the hearing judges face in the judges' nominations committee

were to be aired in real time so the public will be able to view these nominations. This initiative was taken during 2022 by the Minister of Justice at the time, Gideon Sa'ar, with the approval of the Supreme Court President, Ester Hayut.

Within the early days of the November 2022 Netanyahu coalition which includes the far right and ultraorthodox Jewish parties, the issue of the nominations re-emerged with some proposals seeking to make their way to the coalition agreements. The initial proposal was to expel judges and the bar association from the judicial nomination committee. This law passed a first reading, after being amended so that the judicial nominations committee would include an equal amount of Members of Knesset from the coalition and the opposition (Maanit and Spigel 2023). Going back to the Minister of Justice's agenda setting powers, he also did as Livni did back in 2005, and withheld the judicial nominations' committee gathering fearing it will select a Supreme Court judge he disapproves off. He needed to call for a committee meeting after the HCJ signaled it might intervene in that decision (Maanit 2023).

Moving beyond judicial nominations, since 1995 Members of Knesset have been offering constitutional amendments that through legislation aim to curb down the court's constitutional review powers. A recurring theme in these proposed amendments is an *override clause*. If accepted, this tool would allow a legislature to veto a constitutional decision made by courts, by declaring that it is aware that it explicitly rules against the constitution (Weill 2016). This mechanism effectively exists in the Israeli legal system since the 1994 amendment to the Basic Law: Freedom of Occupation (Weill 2016). Yet it is specific to these laws, limited in its implementation and cannot be broadened to judicial review relating to other issues.

Two ideas regarding legislating an override clause exist within the Israeli political system: one idea is to add an override clause to the Basic Law: Human Dignity and Freedom legislated in 1992. Another idea is to create a general override clause related more generally to ISC/HCJ decisions. When such

decisions veto a Knesset legislation, then the Knesset would be able to override that decision (Weill 2016). The more over-reaching override clause wishes to follow the Canadian override clause, that includes an option for the legislature to temporarily override the Supreme Court decisions regarding the legislature's decisions (Weinrib 2016).

The main supporters of these ideas since 2012 are the Israeli right-wing parties and religious ultra-orthodox parties.[3] However, Israel's center parties also partially accepted the override clause idea. Prof. Daniel Friedman was a Minister of Justice on behalf of *Kadima* between the years 2007-2009: a center-right party. Prof. Friedman proposed that the ISC/HCJ's decisions to nullify laws would have to be set on a clear legislative permission. However, in return, the Knesset would have the ability to override the court's decisions on constitutional matters (Friedmann and Watzman 2016, 309–10).

Friedman leaned on a bill proposed by a public committee (The Ne'eman Committee), which determined that the Knesset could override a court decision to veto a Knesset law due to lack of constitutionality with a 70 MKs' majority. Friedman aimed at a lower threshold of 61 MKs (Friedmann and Watzman 2016, 309–10). He was able to convince the government to approve his bill on that matter (Friedmann and Watzman 2016, 311–12). However, Kadima's government collapsed, and the Likud's new coalition did not wish to push through that bill (Friedmann and Watzman 2016, 311–12).

The Kadima government collapsed due to a corruption scandal that accompanied it almost since its formation. Ehud Olmert who was the Kadima government's Prime Minister, faced a series of investigations and criminal charges which eventually yielded an indictment, conviction, and imprisonment. Prof. Friedman, a long-time critic of the ISC/HCJ, was nominated in 2007 when

[3] Earlier bills on this matter were proposed by left-wing parties such as Meretz, which wanted to make sure that the Knesset cannot change the basic Law: Human Dignity and Freedom (Vilan 2002).

these affairs were already under investigation. Moreover, he was nominated after the previous Minister of Justice, Haim Ramon, resigned due to a corruption allegation (in which he was found guilty). Olmert eventually resigned from his post (in September 2008), after the police recommended that he would face trial. On that point, Olmert's coalition partners and senior Kadima members played a key role in his resignation (Schnider 2018). After Olmert's resignation begun a political turmoil in which none of Friedman's initiatives were legislated.

When the Likud came to power in 2009, Ya'acov Ne'eman became the Minister of Justice. He tried to promote the override clause based on a 65 MKs' majority. The Supreme Court and Israel's President opposed this bill, which the government decided to abandon (Zarhin 2012). Since then, MKs from all political sides have been setting various drafts of Basic Law: Legislation and Basic Law: Judiciary on the Knesset's agenda. A clear dividing line between the right and center on this matter was the number of MKs needed to override a court decision. While the right's bills proposed a 61 MKs majority (Shaked 2020), the center proposed an override clause based on at least a majority of 80 MKs (Elharar 2020). For the most part, these bills did not even reach a preliminary vote stage in the Knesset. However, they showed that Israel's center and right accepted the idea of an override clause relating to the Supreme Court's decisions. The two camps remained split on the threshold for the Knesset to implement this law. With Netanyahu's 2022 coalition, the will for an override clause returned with politicians aiming again for the 61 MKs majority. This bill passed first reading to be processed by Israel's Knesset for further legislation. Another bill that passed first reading is a bill forbidding the court from nullifying basic laws (Maanit and Spigel 2023). The meaning of this law should it pass is that any law that the Knesset legislates, if it will be titled as a basic law could not be reviewed by the court.

A bill that directly relates to the HCJ's constitutional powers that did become a law was the reasonableness law that forbade the court from using

reasonableness as an argument to nullify government decisions. This law relates to one of the key tools that the HCJ expanded during the 1990's as a tool to review and effectively veto government decisions. This bill was legislated as an amendment for a basic law assuming that it will gain immunity from constitutional review when framed as a part of Israel's evolving constitution. It became a law in July 2022 and went to the HCJ for constitutional review (Maanit and Spigel 2023). The HCJ not only decided to overrule that law, it also determined that it had the right to nullify basic laws, until a constitution would be set in place (Bendel 2024).

Another initiative was to constitute a law that would not allow the judiciary to claim that a Prime Minister does not have the capacity to rule due to a legal conflict of interests. This conflict of interests can be legal proceedings against the prime Minister due to corruption allegations (Fuchs 2023; Wootliff 2021). This idea followed the convention in France where the President enjoys legal immunity while in office. However, in France, the President also faces term limits, and therefore that immunity is limited. In Israel, a Prime-Minister does not face term limits, and hence adopting that law could theoretically mean that a Prime-Minister will enjoy life-long immunity from legal proceedings (Barak 2021). This law was reviewed by the HCJ that determined that the law was legislated for Netanyahu's personal reasons and deferred its implementation deferred to the next Knesset (Fuchs 2024).

Another measure which critics of the HCJ aimed at pursuing was to nominate a Constitutional Court that would serve as an instance higher than the HCJ on constitutional matters. Since 1994, primarily right-wing and religious members of Knesset have been setting this bill on the Knesset's table to no avail. The reasoning offered by lawmakers submitting these bills is that there should be a court authorized to review laws based on the basic laws and nullify them. This court should also have the option to nullify ISC/HCJ decisions. Its proposed

makeup consistently determines that HCJ judges' would at best be a minority in that court. (Karai 2020; Rotem 2009).

Throughout these attempts to legislate a constitutional court, two patterns emerged: right-wing politicians lead the bill, Likud ministers reject the bill, and bills' initiators face opposition by pro-court activists (Doron and Meydani 2007). Thus, this idea did not enjoy the support of any other institution, non-right-wing political parties, or the public opinion's support. Hence, while being still raised periodically on the Knesset's table, most parties in Knesset veto it. However, within the 2022-2023 backlash the Knesset chairperson threatened that if the HCJ would nullify the backlash laws, then the government will create a Constitutional Court (Bloch 2023).

Beyond seeking to curb down the court's powers, backlash supporters directed their efforts at various legal gatekeepers, either within the government and its ministries, law enforcement agencies, and the High Court of Justice's judicial independence. Such attempts include the will to separate the powers of Israel's government's legal advisor (*Yoetz Mishpati La'memshala*) between two functions: offering legal advice to the government and the head of the government's prosecution agency (*Praklitut*). Although this maneuver carries advantages for the rule of law (Barzilai and Nachmias 1998), once the attempts by the Israeli government prosecutors to indict Prime-Minister Netanyahu intensified, the prominent supporters for this move were right-wing parties which were seeking to decrease the legal advisor's institutional powers (Hovel 2015).

This issue became relevant again as it was set on the Knesset's agenda as a private legislation bill on July 2023 by Likud Members of Knesset (Maanit and Spigel 2023). Another private member bill that passed a first reading (out of the required three readings) allows for the ministers (including the prime Minister), to ignore the council their government legal counselors. Currently, that counsel is perceived as an order, and the Likud led coalition aims that it will

become a non-obligatory advice (Maanit and Spigel 2023). The HCJ's rulings empowered these legal counselors' advisory power turning it into a de-facto decision. Hence, these decisions are also an attempt to decrease the powers of the court (Luria and Mordechay 2023), and can be perceived as a part of the backlash.

The Puzzle: What Happened on 2022?

One striking pattern throughout this description is the clear punctuative nature of the 2022 judicial backlash. While having a clear base of recurring themes since 1995, and two smaller scale backlashes during 2006-2009 and 2015-2018, the November 2022 coalition came out with an unprecedented ambition and determination to curb down the court's powers. This struggle was based on a 64 members coalition in the 120 seats Israel Knesset, and raised social protests in an unprecedented scale in Israel (Shultziner 2023). What was the discerning factor here? What made this coalition move from making policy statements and private legislation to initiating these ideas that have been circling in Israel's political system for a long while?

One explanation is that the court has been non-strategic as it was willing to probe into core political issues that triggered the judicial backlash (Hirschl 2009a). This claim is empirically correct and accounts for the increasing resentment within Israel's political center and right from the court's behavior. However, that dynamic should have raised the current backlash long ago. The lack of radical political action against the court until 2022 was that the court enjoyed public support. Thus, even if policy-wise the politicians might have been ideologically opposing the court's interventions in government decisions and Knesset legislation, the court had the public on his side. Therefore, a political coalition that would have acted against the court would have lost the public's favor (Meydani and Mizrahi 2010).

The issue of public opinion support of the court as one of its key factors to avoiding backlash is also emphasized by insurance theory. A central

assumption is that if the government goes against the court there is a price to pay and that price is higher as the court is more trustworthy (Staton, Reenock, and Holsinger 2022). Yet, when public opinion support for the court and its values decreases, the government would pay a lower price if it goes against the court. In this context, several accounts show that Israel's public opinion loses its appreciation of the courts, even when that loss of support is controlled by other factors (Gerber and Givati 2023). The source for this loss of public opinion support is disputable. Some claim it resulted from the court's behavior (Gerber and Givati 2023), others from the politicians' rhetoric regarding the court (Atmor and Hofnung 2021). However, the public' support for the court is lower than it used to be and that means it lost one of its key guardians. Beyond the loss of public opinion support, the November 2022 coalition of far-right and ultraorthodox parties, was a cohesive coalition united in its opposition to the HCJ's involvement in the government's affairs. Its behavior towards the court and seeming indifference towards democracy makes a clear political sense. These are parties whose favor of liberal democracy and the HCJ as its symbol is low to begin with. The door was open to hurt the court who potentially lost its holding over the public opinion.

Yet, there is a missing piece here: The Likud and Netanyahu. Netanyahu and the Likud he leads are at the hub of eroding democracy and the court's powers as a main goal of that aim. But this was also not the case until recently. For years Netanyahu was persistent in his support of the court and the judiciary in a way that coincided with a liberal commitment that used to be the Likud's trademark. Netanyahu vowed to keep that aim several times in the recent past (Glickman 2012; Schnider 2019). What was different in Netanyahu's preferences towards the judiciary and its status in 2022?

Since 2020, Netanyahu faces a corruption trial that could end up with imprisonment. Netanyahu, at least until the October 7th catastrophe, did not face any political competition from within his party or the coalition parties.

Decreasing the judiciary's power and limiting judicial independence can be instrumental for a political party seeking to maintain its place in power. Yet an easy question in this case is why would the Likud party simply not show Netanyahu the way out and deal with his legal affairs without making it a part of his personal struggle? After all, this is what Kadima's leadership did with Olmert in 2007. The answer is embedded in Israel's centralized personalization of politics (Balmas et al. 2014). When centralized personalization takes place in parliamentary party-based systems, the focus of the political conversation turns from organizations, ideas and cleavages to leaders' personal valence which wins or loses political campaigns (Caprara et al. 2008; Garzia 2011).

Israel is an extreme case in its extent of personalization within parliamentary competitive democracies (Rahat and Kenig 2018), with Netanyahu being a salient example of that trend. Hence, the Likud leans on Netanyahu for survival. However, do Likud voters support Netanyahu in his legal battles? Back in 2008 Prime Minister Olmert facing a corruption trial was removed by his coalition partners and party leaders for losing public opinion support due to corruption (Weber 2008). Shouldn't the same mechanism work here? To answer this question, we need to keep in mind an institutional fact: Israeli formateur parties do not need to have an absolute public opinion majority to maintain office. They need to be in a position where they can unite the highest number of parties in Knesset that can block a no-confidence vote against the ruling coalition. Hence, if the ultraorthodox and far-right parties form a cohesive (at least) Minimum Winning Coalition with the Likud around the judicial independence limitation concept, the Likud needs to make sure that their own supporters believe that Netanyahu's trial is unjust and should not be supported. Is this the situation?

Before the 2022 election on 24th-25th October 2022 Prof. Yoav Peled from Tel-Aviv University and the Smith survey institute did a public opinion survey on a 700 people representative sample of the adult Jewish population in Israel.

The survey had a 3.7% sampling error and included a wide variety of questions. An interesting question this survey used was the following: "Do you agree with the claim that law enforcement agencies, the mass media and the left framed Benjamin Netanyahu?". Of the respondents 39% agreed with the claim, 45% disagreed and 16% said they do not have any opinion on the matter. Hence, no position has a clear majority here. From those agreeing with the claim, 42.11% reported intending to vote for Likud in the elections, 10.53% would vote for Shas, 9.77% to Yahadut Ha'tora and 18.8% to Zionut Datit.

From those disagreeing only 5.33% were Likud voters, Shas and Yahadut Hatora 0.31% each and Zionut Datit 2.82%. From those claiming no view on this issue 26.27% were Likud voters, Shas 2.54%, Yahadut 3.39% and Zionut 15.25%. From each category of either agreement or hesitation with the trial as conspiracy the Likud and coalition supporters are the majority. Thus, the Likud party could not take any action but support Netanyahu and at least as a by-product support the assault on the judiciary. The change then in 2022 is the trial and the political support Netanyahu got from his supporters, which are not the majority of the population, but the majority needed to form the coalition shaped in November 2022.

Discussion

This account of the way Israel's political elite interacts with its judiciary is overall informed by the Staton-Reenock-Holsinger elaborated account of courts as bullworks for democracies in a manner coinciding with insurance theory. The first account proposed a rational choice based explanation of why strategic politicians would preserve judicial independence and democracy, as they need the courts as strategic mediators between the coalition and opposition, where both sides lean on the court for preserving their ability to be in power. This calculus goes off the rails when the sides do not perceive the courts as a neutral agent facilitating fair enough rules of the game and oversee that elected governments do not abuse their power. Above, I showed that the main issue

that politicians relate to is Israel's High Court of Justice (HCJ). This court has not been kin on intervening in the government's affairs. However, its intervention pertains to core ideological issues which has put it at odds with Israel's far-right. Moreover, its intervention also relates to governance matters that put it in a position of conflict with whomever is in power.

I reviewed the main tools for initiating judicial backlash by various governments in Israel focusing on judicial nominations, constitutional reforms, and the threat to create a constitutional court. Three backlashes stood out: the 2006-2008 period, 2015-2018 and then again since 2022. The 2015-2018 period focused on judicial nominations and got the response it was looking for by turning the court to being more restrained. The two other periods were characterized by actual legislation efforts to curb down the court's powers. These periods were juxtaposed to the Staton et. al prediction as well as to Israel's governments usual behavior towards the court. I showed that the court as a leader of an independent judiciary that dealt with corruption charges allegations against the Prime Minister (Olmert during 2007-2008 and Netanyahu from 2018 onwards), became a problem for both these leaders. For Olmert's party, the Kadima constituency did not support a party led by a suspect (eventually indicted and imprisoned) potentially corrupt politician. Yet, the Likud voters supported Netanyahu and to the most part thought his trial was a conspiracy.

In terms of the lessons for insurance theory, this analysis shows that its main hypotheses are not self-enforcing when ideological preferences enter the calculus of the court and politicians. Moreover, this analysis re-iterates the emphasis insurance theory places on courts being accepted as non-involved players in the political arena. When this happens, then the road for backlash is clear.

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