"LANDMARK CASES" AND THE REPRODUCTION OF LEGITIMACY: THE CASE OF ISRAEL'S HIGH COURT OF JUSTICE

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The image of courts as impartial and independent sources of authority is considered a prerequisite if they are to play a legitimizing role. Yet many studies suggest that courts systematically support and uphold state-sponsored policies. I ask how courts can support dominant political interests and at the same time appear impartial. A solution is suggested by looking at highly publicized judicial decisions by Israel's High Court of Justice in which state policies concerning the Israeli occupied territories were overruled. Such cases, while rare, nevertheless reinforce the legitimacy of courts. Consequently, decisions that counter some governmental practices allow courts to confer legitimacy on other and sometimes similar governmental policies. Finally, I place the findings in a comparative context and outline a possible explanation for the circumstances under which landmark decisions are reached.

I. INTRODUCTION

The source of legitimate authority in the modern bureaucratic state, Weber (1978) tells us, is a formal legal order which justifies and rationalizes relations of domination and promotes the voluntary consent of the ruled. The rulers are confined by legal rules and cannot act arbitrarily. Their authority and command are based on their legal status and not on their personal attributes. This is the notion of "the rule of law" in which formally established norms are the source of legitimate domination (Weber, 1978). Yet for the legal system to legitimize domination, it must first secure its own legitimacy. This legitimacy, Weber says, is not derived from a higher order outside the legal system. Law is separated from other types of power and appears as an autonomous universe of discourse (Trubek, 1972).

Although the courts and the judiciary are an integral part of

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the state, they nevertheless proclaim that they act as if they are outside, if not above, it. Unlike lawmaking, finding and applying the law are deposited in the hands of legal experts and professionals whose legitimacy is derived from their ability to distinguish themselves from other social forces in general and from those holding state power in particular (Nonet and Selznick, 1978).

What seems quite straightforward becomes problematic in light of accumulated empirical knowledge which indicates that courts systematically support the operations of state rulers.[1] Weber attributed the tendency of judges to support the goverment to the fact that they "are inclined to stand on the side of 'order,' which in practice means that they will take the side of the 'legitimate' authoritarian political power that happens to predominate at the given moment" (Weber, 1978: 876). A substantial literature attributes this tendency to the social origins of judges, their political dependence on rulers, and their immersion in hegemonic ideology (Dahl, 1957; Miliband, 1969; Scheingold, 1974; Sachs, 1976; Funston, 1977; Collins, 1982; Kairys, 1982; Gordon, 1982; Unger, 1986).

I consider here a paradox that has rarely received attention: If courts are autonomous, what ensures that they will support those in power? And if they consistently support the rulers, how do they maintain their own legitimacy? If we accept both propositions, that judicial legitimacy is derived from the apparent independence of courts, and that courts generally support governmental policies, how can courts legitimize the politically dominant and at the same time retain their own legitimacy as unbiased institutions whose decisions are neither predetermined nor immediately attributable to extralegal considerations? In this essay, I examine what makes this apparent paradox possible.

Many theorists contend that upholding and sustaining state actions in court provide ultimate proof that the court is a legitimation vehicle (Dahl 1957; Adamany, 1973; Funston, 1975; Casper, 1976; Handberg and Hill, 1980). Although this may be generally correct, a judicial *failure* to uphold and sustain state actions can also contribute to state legitimacy. By occasionally overruling or annulling governmental policies in some "landmark cases," the juridical apparatus asserts its independence from the polity. Thus, the court can cast the cloak of legitimacy over the state as a whole by vindicating other decisions that uphold governmental actions as rightful and reasonable. In other words, decisions in which the court manifests its independence from other powerholders reinforce its legitimacy. This holds regardless of whether the particular results of these decisions are approved or disapproved by the public (for a similar distinction, see Adamany, 1973).

[1] See, e.g., for the United States: Dahl, 1957; Funston, 1975; Shapiro, 1981; for England: Griffith, 1985; for West Germany: Hase and Ruete, 1982; for Norway: Mathiesen, 1980; for South Africa: Suttner, 1986; for Canada: Mandel, 1985.

I do not mean to suggest, however, that legitimacy is an intended goal and that its reproduction is a well-calculated judicial policy. The intricate relations of law and politics often bring about unintended consequences; antigovernment court decisions are often both painful for the government and discomforting for the judiciary. However, a byproduct is that they often bring about a legitimation effect. Landmark decisions in which the jurisdiction of the court is reasserted also reinforce the legitimacy of the court as an independent institution. Consequently, such decisions thereby enhance the legitimacy of the government in general.

I use disputes between the Israeli goverment and the Supreme Court of Israel to examine how this mechanism works, presenting and analyzing landmark decisions in which the court reversed governmental decisions. These decisions deal with Israeli policies in the occupied West Bank and Gaza Strip and are the only cases in which those policies have been successfully challenged. After describing these decisions in detail, and in the context of other decisions in which governmental actions in the occupied territories have been upheld, I show how they have enhanced the court's own legitimacy and consequently legitimized Israeli rule over the territories.

When we speak of the legitimation of an institution, we must ask, Legitimacy for whom? Legitimacy relates to different audiences who do not necessarily share similar relationships with the institution at issue. This problem is particularly salient in light of the present study. There are at least three parties who are interested in Israel's governmental policies in the occupied territories: the Palestinian population in these territories, the Israeli public (and specific elites within it), and foreign governments who have a stake in these policies. This study addresses the effect of perceived legitimacy as it relates to the two latter recipients. The perceived legitimacy of the Palestinian residents is not studied here.[2] This study examines the response of Israeli public opinion leaders, the mass media, political elites, and the academics to policy issues processed by the court. Legitimacy is used to refer to perceptions that the political and legal orders are rightly constituted and deserve to be maintained (Eckstein, 1979).[3]

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[2] In general, the Israeli court became a central arena of struggle between Palestinians and the Israeli government, especially after 1979. Yet my data do not clearly show that the favorable cases discussed here directly affected the rate of litigation (see Appendix 1). Further, one study found that Palestinians did not perceive the judicial process only as a means for obtaining distributive goods. Rather, litigation was invoked for expressive purposes, as a form of self-affirmation and having a voice (Shamir, 1990). The fact that legitimacy has different effects on different audiences supports the idea that subordinate classes do not necessarily share the dominant ideology, which has more significance for the integration of the dominant class itself (Abercrombie *et al.*, 1980; for a similar finding in law, see Sarat, 1989). It is the impact of the judicial process on Israel's political and legal culture that is examined here.

[3] The concept of legitimacy is not devoid of theoretical ambiguities. Some

Israel's policies in the occupied territories offer a particularly useful context for the study of legitimation because these policies are highly controversial. Under such circumstances the transformation of political issues into legal ones may enhance the legitimacy of political decisions and promote the court's perceived impartiality. Nonetheless, the present case is not *sui generis*; rather, the study has theoretical implications that extend beyond the case of the occupied territories and Israel's legal system. In the concluding remarks, the findings are examined in a comparative context and some guidelines are offered for future research in the United States and elsewhere.

II. ISRAEL'S HIGH COURT AND THE OCCUPIED TERRITORIES

A. Background

The Israeli Supreme Court serves a dual function: as a high court of appeal, hearing appeals from district courts, and as a high court of justice (HCJ) with original jurisdiction over disputes between individuals and the state in matters that are not within the jurisdiction of other courts and tribunals. Since Israel lacks a written constitution, one of the court's primary objectives is to provide a constitutional means to ensure that public officials and agents of the state will not exceed or abuse their powers of discretion.

The Court is able to grant petitioners immediate relief and to issue orders and injunctions, either interim or absolute, which may compel the government to take a particular action or prevent it from taking an intended one. The court considers petitions rapidly and inexpensively. Any person who has reason to believe that a particular state action denies her legal rights may petition the court and ask it to issue an order *nisi*. A single judge reviews the petition and may issue an order requiring the relevant respondent to appear in court and show why a particular action should or should not be performed. A full hearing then takes place, and the court determines whether to annul its prior injunctions and to sustain the state's position or to order the respondents to act, or to refrain from acting, in a prescribed manner.

Since the beginning of Israel's occupation of the West Bank and Gaza Strip, the residents of these areas have been allowed to petition the HCJ. The petitions have asked the court to review the legality of a large variety of state actions and policies and to determine whether administrative officials exceeded their discretionary powers in their handling of particular affairs.

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have operationalized the concept in terms of compliance with authoritative orders (McEwen and Maiman, 1986). Others, less inclined toward behavioral studies, have spoken of it in terms of generalized consent (Abel, 1980), trust (Easton, 1965), and faith and confidence in authorities (Useem and Useem, 1979).

International legal standards do not give a population under occupation the right to petition the court of the occupying party. The Israeli authorities could have contested the court's jurisdiction to preside over matters that belonged to military rule in an occupied area. In fact, the court explicity stated that had such arguments been raised, they might well have been sufficient to prevent further litigation (*Hilu et al. v Government of Israel* (1972)). Yet when the first petitions from the occupied territories were filed, the Israeli authorities did not object to the HCJ's jurisdiction in a decision that was described as "unprecedented in international practice" (Shamgar, 1971). In the absence of arguments against its power to consider such a petition, the court accepted jurisdiction. The HCJ referred to the consent of the parties to litigate and later claimed that the court had an acquired right to rule in matters concerning actions taken by agents of the state, wherever they happened to operate (*El Masulia v. Army Commander* (1982)).

The HCJ's record shows that in the course of twenty years of occupation, from 1967 till 1986, residents of the occupied territories had submitted 557 petitions to the court. The cases the court heard during these years included matters of land and property confications and seizures, deportations, limits on the freedom of speech and the freedom of movement, demolition of houses, administrative detentions, and numerous other administrative decisions concerning taxation, permits of residency, and work permits. The overwhelming majority of these petitions were removed, compromised, or settled in one way or another (see Appendix 1).[4] Sixty-five petitions reached adjudication and were officially published as HCJ decisions in matters of dispute between the Israeli government and its agents (e.g., the military) and the residents of the territories. In deciding these cases, the court gradually established legal doctrines and judicial constructions that covered most of the debated issues.

Five of the sixty-five adjudicated cases upheld at least some of the arguments of the petitioners. All five were decided in 1979–80, over a time span of less than two years (see Appendix 1). Each of these cases dealt with a different issue. One, usually referred to as the *Elon Moreh* case, declared null and void a certain confiscation of land (*Dawikat et al. v. Government of Israel* (1979)). A second decision, often cited as *Mt. Hebron Deportees*, ruled against the legality of the deportation of two Palestinian leaders (*Kawasme et al. v. Minister of Defense* (1980)). In a third case, the court ordered the Minister of Interior to issue a newspaper permit he had

[4] These data are based on HCJ files. However, there might be slight inconsistencies due to inaccurate filing. Also, the number includes petitions of residents of East Jerusalem, which was annexed to Israel, but does not include petitions of prisoners. Although this article treats only officially published decisons, the larger body of unpublished decisions includes no cases in which the court favored the petitioners.

previously declined to grant (*El Asad v. Minister of Interior* (1979)). In a fourth decision, the court overruled an official refusal to allow the petitioner to reunite with his family (*Samara v. Regional Commander of Judea and Samaria* (1979)). And a fifth ruling prevented an acquisition of a Palestinian electricity company (*Jerusalem District Electricity Co. v. Minister of Energy et al.* (1980)).

These cases unquestionably marked a direct confrontation between the government and the court concerning policies and actions in the occupied territories. By declaring certain governmental actions to be void, illegal, or improper, the court publicly embarrassed the government and appeared to endorse alternative courses of action. Since the government deferred to the court's injunctions,[5] these decisions demonstrated judicial boldness and provided evidence of the regime's accountability.

By placing these cases in a broader perspective and by reading the decisions more closely, I show that the significance of these landmark cases was primarily symbolic rather than substantive. The long-range outcome of these decisions legitimized governmental policies precisely because these decisions became symbols of democracy in action. To demonstrate these arguments, three cases that involved confiscation, deportation, and freedom of speech are considered at length. The two remaining cases of rulings against the state, which received less public attention, reveal similar patterns and are consistent with the argument.

B. Land Confiscations: The Elon-Moreh Case

The most publicized and discussed of the landmark decisions is the 1979 *Elon Moreh* case in which the court declared a land seizure order issued by the army to be null and void. As a result, a Jewish civilian settlement built on this land had to be evacuated and removed (*Dawikat et al. v. Government of Israel* (1979)). The case stirred a heated debate in Israel, augmented the power and centrality of the HCJ, and is often cited as an indicator of judicial supremacy (see Barak, 1989: 305).

This was not the first time the court had dealt with a (privately owned) land confiscation in the occupied territories. The first attempt to challenge the validity of a land seizure was made in 1973, when the court ruled that land seizures for military purposes were within the scope of the legal framework prevailing in the occupied territories and that such seizures did not violate the provisions of international law. Moreover, the court declined to question the validity of the security considerations that backed up

[5] In *Elon Moreh*, the government evacuated the settlement. In *Mt. Hebron Deportees*, Israel allowed two of the deportees to return. In *El Asad*, the newspaper obtained a permit. In *Samara*, the petitioner was permitted to reunite with his family. In *Jerusalem District Electricity Co.*, the decision to acquire the company was postponed.

the administrative decision: "[O]ne thing is clear: the scope of the court's intervention in the operations of military authorities in security matters is necessarily very narrow" (*Hilu et al. v. Government of Israel* (1972); cf. Rubinstein, 1973a).

In similar cases that followed, the court gradually expanded the limits of the "security reasons" and "military necessities" concepts, thereby expanding the justification of policies in military terms. This expansion became acute in 1977, with the establishment of a new government in Israel that had promised its constituency a wide-scale Jewish settlement in the occupied territories. Yet it was essential to justify the civilian settlements in the occupied territories in light of military necessities if Israel wished to abide by its earlier commitments to respect the relevant provisions of international law, namely, the Hague Regulations Respecting the Laws and Customs of War on Land and the Fourth Geneva Convention Relative to the Protection of Civil Persons in Time of War.[6] Thus, land seizures were reviewed in light of article 52 of the Hague regulations. The court interpreted the article as allowing a temporary seizure of land with compensation for military purposes (examples are *Dawikat et al. v. Government of Israel* (1979); *Aioub et al. v. Minister of Defense* (1978)). The concept of the Hague regulations that allowed several specified actions when they were "imperatively demanded by the necessities of war" (art. 23) was liberally interpreted by the court, as was also article 49(6) of the IV Geneva Convention (cf. Cohen, 1985: 159–63; Dinstein, 1983: 229–39).

In December 1978 the court upheld the establishment of dwelling units for families of army personnel on confiscated land as part of the "military necessities" doctrine. The court also ruled that the temporary nature of the planned dwelling units was proof enough that international law had not been violated (*Salame et al. v. Minister of Defense* (1978)). Two months later the court ruled that a civilian settlement built on confiscated land did not conflict with international law since it promoted the security of the state:

> [T]here is no doubt that the presence of civilian settlements . . . contributes to national security and helps the army. One need not be a military expert to realize that terrorists can operate with more ease where the population is indifferent or supportive of them, than where part of the population observes them and informs the authorities about suspicious movements. . . . [A] Jewish settlement in an occupied area . . . serves concrete security needs. (*Aioub et al. v. Minister of Defense* (1978); cf. Dinstein, 1979)

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[6] Israel claims that its policies in the occupied territories do not violate the provisions of the Hague Regulations (Scott, 1915) and the IV Geneva Convention of 1949 (United National Treaty Series, 1950), although it claims that the latter is not binding on it. For a detailed discussion of the Israeli position with regard to international law, see Shamgar (1971); Dinstein (1983: 229–39).

The HCJ laid an additional brick of this doctrine in August 1978, when the petitioners in a new case recruited a former army general whose affidavit challenged the view that civilian settlements promoted the security of the state. The court decided that in such cases the official version would always prevail: "When a professional military controversy arises, in which the court does not have sufficient knowledge, he who speaks in the name of those responsible for the security of the administered territories . . . will be considered to hold innocent considerations. Very strong evidence will be needed to contradict this presumption" (*Amira et al. v. Minister of Defense* (1979)).

Yet only two months later, in October 1979, the court dramatically ruled that the seizure order that allowed the settlement of Elon Moreh should be declared null and void. The court found that the settlement was intended to be a permanent one, not in line with international law, and not justified by military needs (*Dawikat et al. v. Government of Israel* (1979)). Consequently, the government had to evacuate the area, using its armed forces to deal with the frustrated settlers. It was the first confiscation case ever won at court by Palestinian residents of the occupied territories, and it was "repeatedly referred to as proof of the effectiveness of the High Court in keeping the military within the parameters of the law" (Shehadeh, 1985: 22).

When the decision is studied more carefully, however, the reality appears to be different. The court did not rescind its previous decisions. The decision was not inspired by a novel set of considerations in assessing military necessities. Rather, the court confronted overwhelming evidence that undermined the government's security argument that the court had used as the touchstone to examine the legality of confiscations.

The court's doubts concerning the security reasoning arose from two facts. First, the Jewish settlers provided the court with an affidavit in which they explicitly denied that their settlement had been inspired by military considerations. They proclaimed that the settlement was "a Godly commandment to inherit the land promised to our ancestors," and that "[t]he act of settling . . . is not inspired by security considerations and physical necessities, but by the destiny and the homecoming of the people of Israel." Second, Israel's minister of defense publicly expressed his opposition to the establishment of the settlement, in sharp contrast to the opinions of the army chief of staff and other members of the cabinet (*Ma'ariv*, June 21, 1979, p. 5). Faced with these facts, one judge asserted: "[An] extraordinary situation is at hand. The respondents cannot agree among themselves about the issue." A second judge described the situation as "unprecedented in Israel's judicial history."

Under those circumstances, the court followed its own doctrine and ruled in favor of the petitioners. But at the same time it

paved the way for future alternative forms of land seizures. In its decision, the court suggested that future land-seizure orders could adopt the pattern of declaring lands as "state lands," and it promised that it would refuse to inquire into the validity of such declarations. In distinguishing between privately owned property and public property, the court ruled that land previously held by the former (Jordanian) government passed into the hands of Israel which, in accordance with international law, performed in the capacity of usufructuary (having a lawful right to make use of the land without a legal title of ownership).

Most of the lands in the occupied territories have been cultivated for generations by the residents but were not formally registered as private property. After the *Elon Moreh* case, the Israeli government ceased to consider these lands as private. Thus, in its isolated and well-differentiated decision, the court established new limitations on the ability of future petitioners to resist land seizures and provided a sounder legal basis for future takeovers. The court also ruled that in the future it would not intervene in matters of dispute concerning the ownership status of land and that such disputes would be heard before a military appeal board. Following the *Elon Moreh* case, therefore, the number of petitions regarding land seizures dropped significantly and those submitted were dismissed (e.g., *El Nazar et al. v. Regional Commander of Judea and Samaria* (1981); *Tabib et al. v. Minister of Defense* (1981)).

C. *The Freedom of Press: The El Asad Case*

The power to limit the publication of newspapers in Israel is based on two enactments. One is regulation 94 of the Defense (Emergency) Regulations of 1945, entitled "Newspapers Permits," which provides a district commissioner (from the Ministry of Interior) with exclusive discretion to grant permits or alter their specified conditions. Prior to 1979 the regulation was invoked only once, in 1964, when the court dismissed a petition which challenged the applicability of this regulation (*El Ard Ltd. v. District Commissioner of the Northern District* (1964)). The second enactment is article 19 of the Press Ordinance (1933). This article allows the Minister of Interior to ban a newspaper that publishes anything "which might endanger the public peace." In 1953, in interpreting this article, the court came close to the "clear and present danger" doctrine of the U.S. Supreme Court (*Schenck v. United States* (1919)) and applied it to limit the discretionary power of the Minister of Interior (*Kol Ha'am Ltd. v. Minister of Interior* (1953); cf. Lahav, 1977). This decision became a cornerstone of the judicial approach to freedom of speech in Israel, and after the occupation, in East Jerusalem.[7]

[7] Immediately after the occupation, Israel unilaterally annexed East Jerusalem and Israeli laws became binding there. In most cases, however, the

The first case of an Arab publication related to the issue of freedom of press only indirectly. In 1978, the distribution of an East Jerusalem paper, *A Tali'a*, was not allowed in the occupied territories, and the newspaper appealed to the HCJ. The state claimed that the newspaper belonged to the Communist party of Jordan, which was banned by the Jordanian laws that prevailed in the territories. Therefore, the newspaper could not be allowed in the territories. In addition, it argued that the newspaper was involved "in agitation and subversive actions against the Israeli military authorities." The military also submitted an affidavit claiming that the newspaper's chief editor headed an organization that included a dangerous military group. This latter assertion, however, was made only to document the subversive activity of the newspaper.

The court rejected most of the state's arguments. It ruled that the content of the newspaper was not so different from other permissible materials. The court also ruled that the vague allegation against the chief editor could not be proved in the absence of substantial evidence, implying that the state should come up with more concrete evidence in future cases. Notwithstanding, the court *dismissed* the petition because of the alleged connection between the newspaper and the group behind it, which was involved in "underground activity, arms supply, and terrorism" (*A Tali'a et al. v. Minister of Defense et al.* (1978)). Thus, the court implicitly renewed the legal principle behind regulation 94: Regardless of the content of a publication, the state could limit it if the publication was put out by an extremist body. *A Tali'a* opened the door to a future policy toward the Palestinian press that was based on the identity of the people behind the publication.[8]

Yet a few months later, when regulation 94 was tested, the court disappointed the state. The Minister of Interior declined to grant a permit to publish a new newspaper on grounds that the petitioner was a subversive element. El Asad, the publisher, petitioned the court, which ordered the minister to issue the requested permit (*El Asad v. Minister of Interior* (1979)).

This case, like *Elon Moreh*, is often cited as a milestone in the court's firm insistence on human rights (e.g., Negbi, 1981). The decision contained harsh words about regulation 94: "The provision in the Defense (Emergency) Regulations is drastic and monstrous. It was enacted by a colonial regime, and it does not suit basic concepts of a democratic state." The court added a reasoning that did

government limits Palestinian publications on the basis of regulation 94 and avoids using the more restrictive (from the state's perspective) Press Ordinance. East Jerusalem is a center of Palestinian publications.

[8] I treat the Court's implied suggestion to use regulation 94 as a "renewed" policy because since the *El Ard* case (1964) the regulation had not been tested. In 1976, the attorney general instructed the Department of Justice not to use the regulation because it violated "basic democratic principles" (Attorney General Instructions No. 60.219, 1976).

not appear in future cases; Considering that the regulation was invoked before the actual publication of the newspaper, Justice Landoi, who wrote the majority opinion, said:

> I am not afraid that granting the permit might substantially endanger the security of the state. It is better not to restrict, at least for the time being, the freedom of expression, and to put the petitioner and his publication to test. If the publication would become a forum for inciting and subversive materials, the Commissioner may immediately use his authority to abolish the permit on grounds of Regulation 94(2).

This latter remark strengthened the perception that the court was deeply concerned with the freedom of press. Yet it seems that the three justices who presided over the case were somewhat uncomfortable with this decision. Justice Ben-Porat joined Justice Landoi "with many qualms and scruples," and Justice Kahn dissented.

The pattern of subsequent decisions suggest a narrower view of the court as a guardian of the freedom of speech. The court sustained the power of the authorities to forbid publications in a series of cases that replicated *El Asad* and that were based on identical legal reasonings and factual bases (e.g., *Mahul v. Minister of Interior* (1981); *Aioub v. Minister of Interior* (1981); *Asli v. Minister of Interior* (1983); *El Hatib v. Commissioner of the District of Jerusalem* (1986)). The decisions that followed *El Asad* did not reverse it, and yet the outcome of *El Asad* remains exceptional.

The explanation for this exception is that in *El Asad* the state failed to provide the court with a certificate of immunity. Israel's rules of evidence allow the Minister of Defense to sign a certificate of immunity on grounds that revealing the evidence against a petitioner might pose a security threat. In such cases, the court is allowed to examine the evidence, without revealing it to the petitioner, in order to establish whether the immunity is justified. These procedures allow the court greater participation in decision-making (Rubinstein, 1973b). But in *El Asad* the government overlooked the HCJ's procedural advice in *A Tali'a* and failed to substantiate with a certificate of immunity its unspecified claim that the petitioner was involved in subversive activities. This action showed disrespect to the court and encroached on its authority. The court, therefore, issued the injunction that obliged the authorities to grant the permit.

Further, while *El Asad* was regarded as a landmark of judicial activism (Negbi, 1981), it had no long-term effect. A similar case reached the court less than two years later when the state, acting on the basis of regulation 94, refused to issue a permit to Dr. Najwa Mahul. Mahul wished to publish a weekly magazine of public health, sociology of science, and gender issues, but the state argued that she was associated with hostile elements. In this case,

the state followed the instructions of the court in *El Asad*. The state provided the court with a certificate of immunity and allowed the Justices to review the evidence against the petitioner. The court was satisfied by the procedures followed by the state:

> Regulation 94, which severely regulates the freedom of speech and expression, is not very popular in this court. [The State Attorney] notifies us that . . . the Commissioner does not wish to pull an opaque screen and he is willing to remove it for our consideration. . . . He has security considerations and he submits us with a Certificate of Immunity. . . . By adopting this procedure, *the harshness of the Commissioner's absolute authority . . . is neutralized*. . . . [T]hus we can find the balance which is absolutely necessary between the security of the state and the protection of basic rights and proper procedure. (*Mahul v. Minister of Interior* (1981); emphasis added)

Since 1981, regulation 94 has been used routinely. In another case, the state expanded its powers and used the regulation to close an existing newspaper. The newspaper had been published since 1978, and yet its closing was upheld by the court: "Not the content of the publication is the basis for the decision, but its being an instrument of a banned and hostile terrorist organization" (*Asli v. Minister of Interior* (1983)). *El Asad*, then, remains the exception rather than the rule.

D. The Case of the Mt. Hebron Deportees

A few months after the *Elon Moreh* decision (1979), the HCJ delivered another dramatic decision in *Mt. Hebron Deportees* (1980, first case). The court ruled that the deportation of three Palestinian leaders accused of agitating the Palestinian population had not been carried out according to prescribed legal procedures. Consequently, it recommended that two of the deportees, Mr. Kawasme and Mr. Milhem, be permitted to return home. Again, while this decision is often brought as an example of the protection the court gives to the residents of the occupied territories (e.g., Cohen, 1985), the picture is quite different in the context of the court's other rulings in matters of deportation.

At the time *Mt. Hebron Deportees* (1980) was decided, the court had already established firm legal constructions that sustained the right of Israel to expel people from the occupied territories. It accepted the state's position that the relevant emergency regulation that established the right to deport was still in effect in the territories. It also accepted the state's interpretation of article 49 of the IV Geneva Convention that explicitly forbade deportation, as relating only to mass deportations but not to the deportation of individuals (*M'rar v. Minister of Defense* (1971); *Abu Awad v. Regional Commander of Judea and Samaria* (1979)).

Still, in the course of previous rulings which upheld the state's

decision to deport, the court reiterated the procedures required by law in the execution of a deportation order. These procedures established the right of a deportee to confront a military advisory committee where he could argue against the deportation order. Two facts about this procedure are noteworthy: First, the committee could only make recommendations but did not possess decisive powers. Second, the court had previously ruled that it would refuse to review the committee's recommendations. In other words, the court agreed to review only the procedure, rather than the substantive process, of deportations. Thus, by the time *Mt. Hebron Deportees* was heard, it was already fairly clear that Israel's legal ability to deport could not be directly challenged in court. The only basis for such challenge would be a flaw in following the procedure. Such was the case of the three Mt. Hebron deportees.

The deportees were given no opportunity to confront the committee and address the HCJ. The severity of the procedural violation was further magnified by the fact that the court had previously warned the authorities against the attempt to bypass the procedural process. Four years earlier, a person had been deported after he petitioned the court and before the actual hearing took place. Although the court *dismissed* his petition, the presiding Justice harshly rebuked the government and the attorney general for this wrongdoing (*El Natashe v. Minister of Defense et al.* (1976), unpublished decision; also in National Lawyers Guild–Middle East Delegation, 1978).

In the Mt. Hebron case, therefore, the court sided with the petitioners:

> It is self-evident that prior to a deportation, the petitioner may approach the advisory tribunal. . . . [T]he action of the [state] was especially grave because it was not the first time that it tried to "outsmart" this court. It happened in the case of Dr. Natashe, when the deportation was carried out hastily, before this court had an opportunity to hear him, and this action was bitterly criticized by Justice Etziony in the decision of March 20, 1976.

In spite of the harsh criticism, and although the court acknowledged the overt illegality of the deportation the court recommended the return of only two of the three deportees. It partly accepted the secondary argument of the state attorney, who claimed that the deportees had deprived themselves of their rights to appeal the Israeli system of justice because they preached the elimination of Israel.

The court examined the substantive reasons that motivated the administrative decision. It concluded that the statements made by two of the expelled persons, Kawasme and Milhem, did not show their desire to eliminate Israel. The third petitioner was quoted as saying that there would come a day when "the flag of Palestine will flutter in all towns." The court ruled: "This is a

clear statement of instigation which is aimed at the elimination of Israel. . . . [A] man who preaches violent action against the state in order to exterminate it cannot enjoy any remedy from the court." Thus, although the state violated its own procedure, the HCJ partially upheld the state's action. Of the three presiding Justices, one dissented, arguing that the HCJ should have ordered the return of all three deportees.

Four months later, the HCJ announced its decision in a petition submitted by Kawasme and Milhem, who returned to Israel and faced a new deportation order. According to its established doctrine in previous cases of deportation, the court dismissed the petition (*Kawasme et al. v. Minister of Defense et al.* (1980), second case). The early *Mt. Hebron Deportees* case, therefore, did not announce a new judicial doctrine. On the contrary, it reinforced the fundamental lawfulness of the act of deportation. Later attempts to challenge the right of Israel to deport were dismissed by the court (e.g., *Nazal et al. v. Regional Commander of Judea and Samaria* (1985)).

E. The Samara and the Electricity Company Cases

The HCJ favored Palestinian petitioners in two other decisions. The first case was the *Samara* decision (*Samara v. Military Commander of Judea and Samaria* (1979)). The petitioner asked the court to review an administrative decision not to allow him to return from his workplace in Germany and join his family in the occupied territories. The state attorney argued that the military commander had absolute discretion to grant or deny such permits and that these matters should not be decided by the court. The HCJ reacted firmly to the attempt to prevent a judicial review of the administrative decisionmaking process. It rejected the state's position and overruled the administrative decision. Yet the *Samara* case remained an isolated decision which was never cited as an applicable precedent in later cases. In a series of later decisions, the court decided not to interfere with the state's policy regarding family reunions. Consequently, all later petitions to the court to allow family reunions were dismissed (*Mashtaha v. Military Commander of Gaza* (1985); *El Saudi v. Civil Administration of Gaza* (1986)).

The second case, unlike the other decisions we discussed, did not involve a dispute between an individual and the state. The case involved the Jerusalem District Electricity Company, which petitioned the HCJ to review a governmental decision to acquire the company supplying electricity to East Jerusalem and other areas within the occupied territories (*Jerusalem District Electricity Co. Ltd. v. Minister of Energy et al.* (1981)). The terms of the company's concession allowed Israel to acquire the concession within East Jerusalem (juridically part of Israel). The HCJ ruled

that the notice of acquisition served to the company by the Minister of Energy with regard to the area of the concession within East Jerusalem was lawful. Yet the HCJ ruled that according to international law, the military commander could not serve the same notice with regard to that part of the concession that related to the occupied territories. The state tried to overcome this legal barrier by arguing that the acquisition served security purposes. The HCJ found no evidence that the company created a security risk and concluded that the real motive behind the acquisition had been political. The court ruled that the notice served to the company by the military commander was unlawful. Consequently, the government decision to acquire the company was postponed. *Jerusalem District Electricity Co.* was the last of the five cases in which the HCJ overruled Israel's governmental decisions in the occupied territories. The only long-term effect of these decisions was the legitimation effect, to which I now turn.

III. THE LEGITIMATION EFFECT OF THE COURT'S RULINGS

The HCJ enjoyed a reputation for independence and impartiality prior to the cases discussed in this study. It role in protecting individual rights was already acknowledged in other spheres of public policy (e.g., decisions concerning freedom of press; see *Kol Ha'am Ltd. v. Minister of Interior* (1953)). But after the Israeli occupation of the West Bank and Gaza Strip, Israelis became especially attuned to policy issues concerning these areas and their inhabitants. Consequently, the court's decisions in matters of dispute between the Israeli government and the Palestinian petitioners placed the court at the center of public attention. The mere ability of Palestinian residents to petition the HCJ was regarded as a sign of the court's receptiveness and received local and international attention (e.g., Shamgar, 1982, Cohen, 1984).

The landmark cases discussed here significantly contributed to the image of the court as an impartial body which boldly challenged the government in its pursuit of justice. This is most evident in the way these decisions were extensively reported in the news media and discussed by political observers and legal scholars.[9]

The *Elon Moreh* decision, for example, was printed verbatim over four pages in the daily *Ma'ariv* (23 October 1979, p. 17). Further, each landmark ruling was followed by a flood of commentaries and editorials that praised the court's contribution to the democratic character of Israel and the humane nature of Israeli rule in

[9] The importance of the news media in conveying perceptions of legitimacy is particularly central given that Israel has only four major newspapers. Of the 78 percent of the population who read newspapers, 93 percent read these four (Ben-Ami, 1988).

the occupied territories. One columnist wrote that the *Elon Moreh* decision was "a document which fills with pride everyone who considers Israel to respect not only the rule of law . . . but also the celebrated spirit of Judaism" (Bartov, 1979). Another wrote that "the High Court of Justice deserves a blessing and respect. It proved to be a guardian of law and justice and demonstrated its independence" (Kol, 1979). Another claimed that "[t]he decision of the court in the case of *Elon Moreh* enhanced great respect towards Israel; it proved that 'there was justice' in Jerusalem and that Israel was indeed ruled by Law" (Peres, 1979). In short, as one observer put it: "The open mindedness of the court proves that Israel is a 'legitimate state' which is governed according to constitutional principles" (Evron, 1979).

The same enthusiastic response was expressed in scholarly writing about the court. Cohen (1985), a legal historian who studied the protection of human rights in the occupied territories, wrote that the HCJ "proved to be one of the most effective safeguards against abuses" (*ibid.*, p. 80). Negbi (1981), a legal scholar who examined the overall record of the HCJ in the occupied territories, concluded: "It is due to the jurisdiction of the High Court over the territories that the humanitarian character of the military rule remained intact and the moral contamination of the Zionist undertaking and the State of Israel had been prevented" (*ibid.*, p. 164). A report that sharply criticized Israel's policies of human rights singled out the HCJ:

> There is ample evidence that Supreme Court intervention restrains the potential arbitrariness of military government action, even when there are instances in which the Supreme Court is unable to help these residents. It may, therefore, be concluded that the existence of the Supreme Court in the background is to the benefit of the local population. (International Center for Peace in the Middle East, 1985: 15)[10]

The HCJ's legitimacy, then, was reinforced by the court's apparently antigovernment decisions. The impact of the landmark decisions on the legitimacy of the court cannot be exaggerated. Numerous writers repeatedly stress the invaluable importance of the HCJ to the image of Israel as a democratic state and point at the role of the court in securing humane policies. Most students of the court share the conclusion that the HCJ is "a solid defender of liberties" and rest their conclusion on the record of the court in the occupied territories (Rubinstein, 1987; also see Bracha, 1982; Segal, 1989; Alon, 1989; Shamgar, 1982; Zamir, 1987; Israel National Section of the International Commission of Jurists, 1981). These opinions are consistent with the findings of public opinion studies. One

[10] I do not dispute the potential deterrent effect of the HCJ on state action. Yet I believe that any restraints imposed on the government are compensated for by the legitimation effect of the HCJ's presence.

recent public opinion study reports that Israelis trust the integrity of the HCJ much more than they trust their elected parliament and their cabinet (Peres, 1987).

Israelis are not the only ones who acknowledge the decisions of the court as legally binding interpretations of Israeli and international law. Egypt's foreign minister welcomed the *Elon Moreh* decision and went as far as to conclude that the decision marked a shift in Israeli public opinion (*Yediot Achronot*, 23 October 1979, p. 2). Another daily newspaper reported enthusiastic responses by Palestinian leaders and American and British observers who saw the HCJ's *Elon Moreh* decision as an indication of Israel's moral strength (*Ma'ariv*, 25 October 1979, p. 3). A recent U.S. State Department report on human rights criticized Israel's deportation of Palestinian leaders, regarding the action as a violation of the Geneva Convention. The same report acknowledged that the Israeli Supreme Court held a different interpretation of the relevant provision (*New York Times*, 8 February 1989, p. A8). Such assertions suggest that the Israeli Court enjoys a high stature also in the eyes of foreign observers.

The analysis of cases decided by the Israeli Supreme Court suggests that the effect of the landmark cases was primarily symbolic. On the one hand, the cases reinforced the court's legitimacy as a solid defender of human rights. On the other hand, all these cases were isolated victories of Palestinian petitioners which were not followed by similar results in subsequent cases. None of the decisions had any significant effect on later policies, save the growing sophistication of the authorities in their implementation of legal procedures. Yet the significance of the cases was exaggerated, allowing them to appear as symbols of justice.

Such symbols appear when isolated court decisions are mistakenly identified as real breakthroughs, and as a result courts and litigation are perceived as effective means for obtaining rights and implementing them. Exaggerated expectations about the ability of the judicial system to impose a political change are created. Thus an effective "myth of rights" (Scheingold, 1974) evolves, a belief that "litigation can evoke a declaration of rights from court; that it can, further, be used to assure the realization of these rights; and finally, that realization is tantamount to meaningful change" (*ibid.*, p. 84). The Israeli Supreme Court created such a myth of rights in reacting to the actions taken by the Israeli government in the occupied territories.

How does this impact come about? The bottom line of a decision, its immediate outcome, stripped of legal reasoning, can shape the image of the court. Justice Landoi, in his concluding remarks in *Elon Moreh*, was aware of this phenomenon of "selective memory": "I know perfectly well that the public is not interested in the legal reasoning but pays attention only to the final conclusion. Hence, the court risks its appropriate status as one which stands

above the debates which divide the people" (*Dawikat et al. v. Government of Israel* (1979)). While the judge was concerned with the ability of the court to retain its legitimacy as a nonpolitical institution, his statement also hinted at the potential impact of a decision regardless of its long-term significance in judicial and political terms. The reputation of the HCJ as a "fortress of justice" (Negbi, 1981) obscured the fact that the judiciary supported the government in the overwhelming mass of circumstances. In the course of twenty years of occupation there were very few scholarly challenges to the image of the court as a defender of human rights (e.g., Shehadeh, 1985; Feldman, 1987; Zichroni, 1987).

Judicial decisions that failed to sustain the position of the state in some concrete cases has allowed Israel to appear as a determined guardian of human rights. The fact that the court established its authority above the rough and tumble of politics, and the fact that one could point to crucial moments when the court did not side with the government, allowed the Israeli administration to justify policies by falling back on those numerous rulings that were upheld at court. For example, following a particular seizure of land which was upheld in court, Israel's prime minister instructed Israeli diplomats to cite the judicial decision when explaining Israel's policies in the occupied territories; referring to the HCJ's decision, the prime minister said: "If someone will tell me that Jewish settlements in the Land of Israel are illegal . . . I would reply: There are Justices presiding in Jerusalem" (Zadok, 1979).

Consequently, there was a growing tendency for Israeli officials to justify policies in legal terms. Rubinstein (1987) described the evolving political culture in which everything that was legal also became moral and ethical, a political culture often described as legalism: "The ethical attitude that holds moral conduct to be a matter of rule following" (Shklar, 1964). Thus, when an Israeli official was asked why a pregnant woman was being deported, he explained: "Because the High Court dismissed her petitions, removed the *order nisi* and determined that she did not have a right to permanent residency in Gaza" (Rubinstein, 1987).

Most important, the landmark cases provided reassurances that Israel's administrative and political institutions were responsive to constitutional values. In fact, the HCJ itself seemed aware of its legitimizing role. In *Mt. Hebron Deportees* it reminded the state: "[I]nsistence on following the letters of the law is not a nuisance but is a duty to be followed under all circumstances. It is the obligation of the authorities not only for the sake of the individual . . . but also—and perhaps mainly—*in order to retain the image of the state as a lawful state for the sake of all its citizens*" (*Kawasme et al. v. Minister of Defense* (1980); emphasis added). Friedman (1989: 354) offered an insightful analysis of this phenomenon: "Why did Israelis insist on this pretense of law? Because without

the mask of the law, the conflict between them and the Palestinians would be just a messy tribal feud, and that would not be consistent with how the Israelis see themselves and how they want the West to see them."

IV. CONCLUSION

Although instances of overruled governmental actions were conspicuously rare, they nevertheless enhanced, rather than undermined, the overall legitimacy of Israeli policies in the occupied territories. The court legitimized policies by first establishing its own legitimacy as an institution which stood above and outside particular political interests. In light of this stature, the court could authoritatively uphold other, even apparently identical, policies. The court's legitimacy was promoted at those moments in time when it reached decisions that were in apparent contrast to dominant political interests. By looking at the symbolic effects of such decisions, I have tried to account for both the court's legitimacy and its enhanced legitimizing function.

This phenomenon has implications that go well beyond the Israeli case. Although a comprehensive comparative analysis cannot be done here, I can evaluate American analyses of the relationship of law and politics in light of the suggested thesis. The legitimizing function of the United States Supreme Court has not gone unnoticed by American students of the court. Yet only few of them have explored the actual process that enables the Supreme Court to legitimize policies.

One of the earliest attempts to analyze the role of the Supreme Court illustrates this point. Dahl (1957) showed that the Court generally supported and upheld the major policies of the dominant national alliance. He concluded that "the main task of the court is to confer legitimacy on the fundamental policies of the successful coalition" that happened to rule at a given moment in time (1957: 294). Dahl looked at those judicial decisions which overruled policies and concluded that in most cases, these decisions were either trivial or of marginal importance (*ibid.*, p. 287). Other cases which were viewed as "landmark" decisions were reached at times when the "lawmakers and the Court were not very far apart; moreover, it is doubtful that the fundamental conditions of liberty in this country have been altered by more than a hair's breadth as a result of these decisions" (*ibid.*, p. 292).

In general, Dahl treated such cases as exceptional, and he attributed them to unique circumstances: "[T]here are times when the [ruling] coalition is unstable with respect to certain key policies; *at a very great risk to its legitimacy powers*, the Court can intervene in such cases and may even succeed in establishing policy" (*ibid.* p. 294; emphasis added). In other words, Dahl assumed that by deciding against the dominant majority, the court could *under-*

mine its own legitimacy. But Dahl also argued that the ability of the court to legitimize policies stemmed from the court's legitimacy as an interpreter of the Constitution, and that the source of the court's legitimacy was the "influential" view of the court as a protector of minorities against tyranny by majorities (*ibid.*, p. 282). In many of these cases, in which the court struck down provisions of federal law as unconstitutional, it stood up *against* the majority (*ibid.*, p. 282). Should we not, therefore, read these decisions as instances in which the court's centrality and importance were augmented? Reframing Dahl's analysis within my proposed theoretical solution may help to resolve this contradiction.

Black (1960) and Bickel (1962) came closer to the proposed picture of legitimizing. They argued that the mere power of judicial review provides legitimacy to the entire American system. The Supreme Court's *potential* ability to overrule acts of Congress creates a legitimating function which is "an inescapable, even if unintended, by-product of the checking function" (Bickel, 1962: 29). Their argument, however, stopped short of identifying *concrete* cases in which the Supreme Court used its powers of judicial review to overturn intended policies as precisely those moments in time when the legitimacy of the court and of the American political system was reproduced.

Most like my own view is Scheingold's (1974) analysis of the relationship between law and politics in the United States. He argues that courts and litigation inspire a "myth of rights" which is "premised on a direct linking of litigation, rights, and remedies with social change" (*ibid.* p. 5). Scheingold examines the Supreme Court's landmark decisions in segregation issues, school prayers, defendants' rights, and reapportionment. He shows that such decisions often become mere symbols of justice, since they are not accompanied by an implementation process. Still, he shows how such decisions reinforce a myth of rights. For example, he quotes the *New York Times* response to the Supreme Court's 1965 birth control decision: "The Supreme Court 7-to-2 decision invalidating Connecticut's birth control law is a milestone in the judiciary's march toward enlarged guardianship of the nation's freedoms" (*New York Times*, 9 June 1965, in *ibid.*, p. 35). He further argues: "Many legal scholars and writers who are continually analyzing and evaluating the interaction between law and politics in the United States can reasonably be thought of as ideologists of the myth of rights" (*ibid.*, p. 21).

Scheingold's thesis, largely based on Edelman's (1967) work, is that the principal impact of the myth of rights is on perceptions of legitimacy because "[t]he myth of rights can generate support for the political system by legitimating the existing order. . . . [I]t reassures us that the institutions of American politics will respond to just claims and that any mistakes that occur are not only aberrational but subject to the self correcting devices built into the con-

stitutional system" (1974: 91). In contrast to the myth of rights, and acknowledging that judicial decisions do occasionally run counter to dominant interests, Scheingold shows that there are systemic pressures which shape "judicial outcomes in a manner generally consistent with predominant political tendencies" (*ibid.*, p. 89). In other words, he asserts that "judicial decisions do not ordinarily run counter to the ostensible lines of power" (*ibid.*, p. 93) and that the "dominant tendency [is] surely to reinforce the status quo" (*ibid.*, p. 91). We need further research, however, to support the assertion that it is at times of dramatic decisions—dramatic precisely because they run against predominant political tendencies—that the myth of rights is reinforced.

Scheingold (1974) and Dahl (1957) did not fully explore the circumstances under which courts reached decisions that were not in line with predominant political interests. Dahl (1957: 293) assumes that such cases are produced when a change of guard in the dominant political coalition has not yet been followed by new appointments of Supreme Court justices. As a final word, I suggest some possible guidelines for future research on this issue. In at least four of the five landmark cases I examined, the HCJ reacted to practices that seemed to restrict its own participation in decisionmaking or to limit its discretion: In *El Asad* the court rejected the governmental attempt to restrict its access to confidential evidence. In *Elon Moreh* it insisted on adhering to its previous judicial doctrines. In *Mt. Hebron Deportees* it reacted to the attempt to exclude it from supervising the deportation process. And in *Samara* the HCJ rejected the attempt to deny its jurisdiction.

It seems, therefore, that the petitions which were granted were not stimulated simply by the court's discomfort with the substance of the policies pursued by the state. Each time, the court reacted to practices that seemed to upset the division of authority within the power structure of the state and to narrow the HCJ's jurisdiction. I do not suggest that *all* cases of dispute between the judiciary and the government stem from struggles over issues of jurisdiction. Yet I believe that this line of inquiry may shed more light on the circumstances under which antigovernment decisions are reached. Jurisdictional struggles express the judiciary's independence, while permitting the judiciary to generally act in ways that support the interests of the government of the day.

APPENDIX 1

Petitions Submitted to the Israeli High Court of Justice by Palestinian Petitioners from the Occupied Territories, 1967–1986

Year	No. of Petitions	Adjudicated Cases	Unpublished/ Removed	Overruled Government Actions	% Overruled
1967	—	—	N/A		
1968	—	1	1	—	0
1969	6	2	8	—	0
1970	4	—	4	—	0
1971	9	3	12	—	0
1972	6	4	10	—	0
1973	6	1	7	—	0
1974	11	—	11	—	0
1975	11	1	12	—	0
1976	16	—	16	—	0
1977	16	—	16	—	0
1978	21	4	25	—	0
1979	33	6	39	3	7.7
1980	30	5	35	2	5.7
1981	29	9	38	—	0
1982	49	4	53	—	0
1983	25	2	27	—	0
1984	30	4	34	—	0
1985	80	12	92	—	0
1986	110	7	117	—	0
Total	492	65	557	5	0.89

SOURCE: HCJ files.

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