Roundtable

The Scope of Judicial Supervision of the Political Authorities

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Introduction

On July 30, 2019 a roundtable discussion was held at the Institute for National Security Studies (INSS) dealing with the scope of judicial supervision of the government. Participants, in alphabetical order:

- Dr. Aviad Bakshi
- Prof. Avraham Bell
- Prof. Amichai Cohen
- Dr. Assaf Malach
- Prof. Suzie Navot
- Dr. Meital Pinto
- Dr. Maoz Rosenthal
- Dr. Yaniv Rosnai
- Dr. Yehoshua (Shuky) Segev
- Prof. Ron Shapira
- Adv. Pnina Sharvit Baruch
- Adv. Yehoshua Shufman
- Prof. Gila Stoppler
- Adv. Bell Yosef

The meeting was held against the background of a number of initiatives that have arisen recently to change the scope of judicial supervision of the political authorities by the Supreme Court. A key development occurred in May 2019, when as part of the coalition talks on forming the 35th government, a significantly large number of proposals were put forward on this subject, such as the establishment of an override clause, the determination of restrictions on the ground of reasonableness in legislation, changes to the composition of the Judicial Selection Committee, limits to the term of Supreme Court judges, and more.

The public debate around these initiatives was characterized by extreme polarization on both sides. Each side held steadfastly to its positions and argued that the other side was trying to destroy democracy, as it understood it. This is the background to the roundtable. In this context we wished to adopt a different approach: to present the fundamental disagreements, to understand them, and to chart them. In this way, we also hoped to locate the points where it would become clear that the gaps were not as wide and extreme as many people think, and that in certain contexts there is indeed agreement. The discussion avoided other aspects of the subject that are central in the public debate, and in particular the possible existence of other motives for the initiatives to change, such as to escape possible criminal proceedings. The idea was to hold a professional discussion. It is therefore important to underscore that when there was a general expression of understanding and even consensus over some changes to judicial supervision, it should not be seen as agreement over this dimension of the subject.

Preserving Israel's democratic identity is an important component of national security, and we therefore felt that INSS was a suitable setting for clarifying matters relating to this identity and the proper balance between the various government authorities.

The purpose of this summary is to present the main points that were raised. The discussion was held according to the Chatham House Rule, whereby documentation is without attribution of what is said to the participants, in order to allow free debate. Therefore, this summary refers to the main insights that were expressed without giving the names of the speakers or their institutional affiliation. To facilitate achieving one of the central aims of the meeting – finding agreement over issues – this summary presents a number of aspects where we found broad consensus among the different participants.

The discussion referred to three main initiatives:

a. Judicial intervention in the activity of the executive authority (in particular, reasonableness and the question of standing, and also whether we should distinguish between supervision of the executive level and supervision of the political level)

b. Judicial constitutional review and institution of an override clause

c. The selection process for Supreme Court judges

These three issues are not detached from one another, and there are several points of overlap. An important part of the discussion focused on the role and function of the Supreme Court. First we will look at this aspect, and then the initiatives themselves.

For the convenience of readers who are not lawyers or jurists, the attached document gives a short explanation of some of the main legal terms.

The Role and Function of the Court: Fundamental Aspects

The Relationship between the Court, the Government, and the Knesset

A basic subject that recurred throughout the discussion was the question of checks and balances in the Israeli court system. The claim that was common to many participants was that the Supreme Court is the most significant check that exists at present, in the absence of other structural checks (such as a presidential veto, dual legislative body, the authority of the International Court of Human Rights).

All the participants agreed that the Knesset is weak, both in terms of its independent ability to pass laws and in the sense of its ability to supervise the government. It was said that the government has absolute control of the legislative process, with little real supervision by the Knesset. In view of this, some participants maintained that judicial supervision of the executive level assumes special importance, and that weakening the Supreme Court means undermining the only existing check on the government.

On the other hand, it was stressed that a fundamental approach is that every element with power and authority must have checks, and this does not apply only to the government. Both the Supreme Court and the Attorney General must have some checks on their power. The question is who should have the last word, and the Court need not perforce be preferred over the government.

It was also said that there are areas where both the government and the Knesset avoid making laws for reasons of principle (prominent examples are the subject of religion and state relations, and legislation in the territories). In this situation, the Court is the only institution that can provide any assistance when a question arises on these issues. It was claimed that it is very problematic when the political authorities do not provide assistance, and yet attack the Courts for doing so.

A recurring argument that had considerable support was that the Court is in a situation where the political authorities don't make decisions, so the Courts must act as the "responsible adult."

On the other hand, some see this as justification for intervention in certain contexts. Others argue that even if the description of the reality is correct, the situation must be amended and the Courts must ask the political authorities to show responsibility and take the necessary decisions, while avoiding assuming this role themselves.

It was alleged that the goal of the initiatives to limit judicial intervention is to reinforce governance, so that the government can promote its objectives. On the other hand, it is claimed that the result will be poor supervision and review of the government, and there must be an actor that can stop the process when necessary and set boundaries. Even the politicians need someone to protect them from themselves (in other words, from taking decisions that are essentially problematic and are intended to satisfy public opinion at a political level).

Scope of Court Intervention in Decisions of Policy

Throughout the discussion there were questions about the desired extent of Supreme Court intervention in executive branch decisions. Some argued that the current level of intervention was so pronounced that the Supreme Court appeared to be running the country instead of the elected politicians; others felt that intervention was narrow and focused, and the Court generally avoided intervening on issues of a sensitive public character.

An empirical study that examined the scope of Supreme Court intervention in decisions at senior political level was presented. A review of all decisions issued between 1995 and 2017 (about 3,000 in number) found only a small percentage involving intervention. Nevertheless it was claimed that the very fact that the Court was prepared to intervene and demand reports and justifications was in itself problematic, reflecting a significant role in the conduct of state affairs.

Most participants agreed that following many years of judicial review, such review now has wide ranging consequences due to its penetration of legal consulting, and is already influencing the policy shaping. Some claimed that "consulting activism" is now a bigger problem than judicial activism in terms of preventing the implementation of unwanted political policy.

Moreover, it is argued that many decisions made by the Court concern issues that require expertise, for example on economic, managerial, and other matters, and the Court appoints itself as the experts (examples cited included Supreme Court rulings on prisons' privatization, the Mizrahi Democratic Rainbow, and protection of the Gaza perimeter). The claim is that questions of distributive justice involve economic policy and should not be subject to judicial decisions.

How the Court Functions

It was alleged that the Supreme Court is unreasonably overburdened, which has a negative effect on its work. The overload is partly due to the focus on "interesting" subjects that raise questions of principle, instead of on current legal cases.

A view was expressed that in the field of judicial intervention in executive and bureaucratic decisions, there should be greater intervention than at present, with the focus on implementing the rules of administrative law in a concrete case, while the Court prefers to deal with matters of principle. In the same context, it was alleged that the Court has neglected legal doctrine in favor of ethics and principles.

The Influence of Judges' Political Positions on Rulings

There was a sense that among the public and politicians, and particularly on the right, there has been an accumulation of rulings over many years that reflect a political outlook opposed to that of the government. It is argued that a considerable section of the public has a feeling that serious political issues, on which policy is formulated after thorough consideration, are ultimately decided by the Court instead of in the public forum.

Examples include the Recruitment Law, the Prevention of Infiltration Law, the Nation-State Law, the Settlement Regulation Law. These are central topics on the public agenda, including matters that are raised in elections, and they were all ultimately decided by the Supreme Court. It is this feeling among the public that has led to negative attitudes toward the Court.

The main counter-argument raised in this context is that the Court limits the government by definition: that is its role, whether the government is led by Likud or by Mapai. The fact that there has been a right wing government for a decade has created a strong psychological sense of an accumulation of rulings intended to limit it.

Another aspect that came up in the discussion, and appeared to be widely supported, is that it is necessary to recognize that these are above all social questions, and not just legal ones. When dealing with them, it is important to be aware of all the aspects and to take into account attitudes among the public and the consequences of judicial review, and find a way of expressing the public aspects as well as the legal ones.

During the discussion, participants highlighted fundamental issues concerning democracy and the meaning of public representation. Does the fact that the public votes in elections give the elected politicians a mandate to do anything in the name of the people over the following years? What does it mean if a legislative decision, according to the coalitional discipline system, does not reflect the majority view or even the view of most Knesset members (such as the issue of surrogate pregnancies for gay fathers)? And how should the minority be protected from the majority's wishes?

Another issue that was discussed was the basic assumption that the Courts protect human rights and legislators do not. First, it was stated that both courts and legislators are capable of taking terrible measures. Second, to present one side (the government) as ideological and the other side (the Court) as neutral gives the latter a structural advantage. Against this it was argued that courts have generally taken the most terrible steps when they stood with governments, and not when they opposed them. This stressed the need for democracy to protect the minority from majority rule.

The claim was also raised that a very significant part of the right wing feel that they are not partners in the judicial review process and are not represented in the Court, and that the entire process is turned against them. The sense is that the right does not gain from the judicial review process, so it feels no need to preserve it. That is why it is essential to involve the right in the process of shaping institutions, and to respond, to whatever extent, to its demands to limit supervision or increase its representation in the Court. The rejection of any proposal for change creates the public hostility to the Court that we see today, and also pushes the right wing to demand more far-reaching changes, while a willingness to examine some of the demands in a principled way could create trust and lead to compromise on other demands.

Comparative Aspects

It was stated that there is considerable experience of various mechanisms for limiting the extent of judicial intervention in political and executive decisions and in legislation, and this experience should be taken into account in the process of reshaping the scope of judicial intervention. Another view was that it is impossible to talk about constitutional mechanisms (such as the override clause, constitutional anchoring of certain rights, the structure and manner of selecting judges) without discussing the political culture in which they will operate.

Examples were given of countries undergoing constitutional crises, and in particular, the changes that have occurred in the legal and governing systems in Poland, Turkey, and Hungary. There were accounts of democratic governments with broad public support that take control of the media, oppress their opponents, and cause damage to the courts and other gatekeepers. The discussion sought to examine Israel against a background of this reality.

On one side the view is that Israel now differs from those countries. Any specific reform is legitimate in itself, but taken together they become dangerous and there is a fear of reaching the point of no return. The opposite view is that fear of the day when Israel will cease to be a democracy in fact represents populism by the Court and its supporters, who want to use these unfounded scare tactics in order to stabilize their own authority.

Reference to the Various Initiatives

Judicial Supervision of Government Decisions

Right from the start all participants stressed that there was no reason to terminate or call for the termination of all judicial review of the government. On this there was complete agreement. The question rather is one of degree.

There was also a discussion on the question of suitable remedies. The argument arose that today, when the Court determines that a decision is not legal, instead of canceling the decision and returning it to the political or executive levels, the Court makes its own decision. In a proper democratic system, the Court should cancel the decision and leave it in the hands of political and executive authoritiess.

Distinguishing between Intervention in Decisions at the Political Level and Intervention in Decisions at the Executive Level

Most participants agreed that it is valid to distinguish between interventions in decisions at the political level and at the executive level, and as a matter of policy, the Court should prefer broader intervention in bureaucratic decisions rather than the political decisions of ministers and deputy ministers.

However, some also stressed the obligation of the Court to intervene in petitions against ministers and other political elements, pointing out that a large part of constitutional and administrative law developed through such petitions.

Standing and Justiciability

These questions, which are intimately linked, brought out significant differences of opinion. Some believed that the Court should open its gates to other petitioners and show willingness to try additional issues, while others believed that limiting the right of standing to a concrete petitioner is a necessary step in order to stop the stream of petitions on matters of policy by public petitioners.

Another position was that while there was certainly agreement over preference for a concrete petitioner as far as possible, there were situations where a petition on a matter of principle must be filed by a public petitioner; otherwise there would be no way of attacking problematic policy. Stubborn insistence on justiciability and standing could allow the authorities to act freely in the absence of restrictions on their power, and perpetuate illegality.

An issue that was prominent among those who wished to limit the grounds for justiciability and broaden the right of standing was the question of how to do this. They agreed there was no point to legislation on the matter, since the Courts would bypass any legislative ban, and the change had to come from within the Court, through the appointment of judges holding a range of opinions, including conservative views.

Reasonableness

Many participants agreed that there was a problem regarding the breadth and vagueness of legal reasonableness. Some claimed that this problem has many dimensions: it is used by the critics of the Courts to argue that they use vague terms, it affects the ability of decision makers to plan their moves, and it harms legal doctrine itself.

For these reasons, most participants also agreed that when the Court can rest its ruling on specific legal grounds that differ from legal reasonableness, such as irrelevant motives or absence of authority, it is best to do so.

Others praised legal reasonableness, because it works to achieve a broad factual basis, is likely to expose irrelevant motives, and more broadly helps to develop administrative law. Moreover, it tends to make the administrative authority more vigilant about the various demands to which it is subjected.

Judicial Review of Legislation

Even those who wished to limit the powers of the Supreme Court agreed that judicial review of legislation in itself was reasonable, and here too it was a question of degree. There are extreme cases that even justify intervention in legislation.

The Override Clause

The public image of the proposal to establish the override clause aside, most of the participants expressed support for it. Disagreements focused over how to formulate it, and in particular on the following questions:

- What will the required majority be? Suggestions were 61, 65, 71, and 81.
- Will it be possible to override all rights and all basic laws? Here opinions diverged. One approach believed that it would be possible to override all rights and all basic laws (assuming that the legislator was not trying to harm core rights), while the other approach demanded to limit its application to some rights.
- How should be it anchored? Although there were also disagreements here, many showed a preference for making it part of the Basic Law: Legislation and part of a broader move toward completing the constitution.
- Frequency of use: some proposed that it should not be limited; others suggested keeping it for singular and unusual cases. The Hillel Somer "three strikes" model was mentioned, in which each Knesset has three chances to use the override clause.

It was also claimed that it is not correct to focus efforts on limiting the scope of judicial review in the override clause, partly for the reason that this provides legitimacy and recognition of the constitutional revolution.

Another claim that came from a different direction is that the override clause is a "shot in the foot" for the opponents of extensive supervision by the Court, because as soon as it is legislated, it will be easier for the Court to invalidate laws, knowing that the debate will go back to the Knesset and will not be the end of the issue. At the same time, for legislators, it will in fact be difficult to pass laws that completely contradict the Court ruling even if the required majority is 61. Ultimately, it was argued, the interaction created by the override clause will only increase tensions.

Selection of Judges

Even before the concrete discussion about structural mechanisms, there was fundamental disagreement on this question: on one side, the argument (although coming from a variety of perspectives) is that it is not a matter of how judges are selected, but rather how they behave. Proponents of the other side placed great hopes on a change in the manner of appointing Supreme Court judges, leading to a change (or balancing) in its composition as a way of solving many of the issues discussed here. Some even believed that the influence of the appointed judges would be far more drastic than any formal structural constitutional changes, such as restricting legal cause in legislation or establishing the override clause.

This principled discussion highlighted the point that the demands for a change in the composition of the Supreme Court, thus giving expression to different world views, focus on the Court's constitutional and administrative role, yet in its role as the Court of Appeal

there is broad preference for a professional court, free of political influences. If a constitutional court is set up, then it will be possible to have a separate selection process for its judges that also takes political aspects into account, while continuing to have a professional committee select judges for the appeals courts.

It was noted that based on empirical research, the reforms in the Judges Appointment Committee in 2004 and 2008 led to a reduction in the Supreme Court's intervention at the political level. Based on this research, it was argued that there is no need for further institutional changes, since intervention has already been reduced and continues to decline. Moreover, the current system for appointing judges creates a good balance, leading to coalitions between politicians and others representing various interests.

Most participants agreed with the view that eliminating the right of veto (which exists formally for other committee members but is in practice reserved for judges) over the appointment of new judges is an acceptable move in the current climate.

Some wished to reinforce the political dimension of judge selection, pointing out that some United States state judges are elected directly by ballot or their selection is confirmed by elections, and that in most countries there is political involvement in the selection of judges. There were supporters of a process of hearings, partly as a means of improving transparency (although this proposal also met with a great deal of opposition).

In the discussion on the ideal format of the judges selection committee, emphasis was placed on the aspect of balance. Doubts were expressed regarding the need for representation of the Israel Bar Association (particularly in the case of the constitutional head of judicial activity), and there were proposals to include academics in the committee as well.

Proposal for Institutional Changes

Defining the rules of the game (procedures for legislation and judicial review) and protecting them: an issue on which there was broad consensus.

Completing the constitution: there is broad agreement that this is a desirable move, although many participants felt that it was not realistic in the foreseeable future. Others believed that just the fact of having the constitutional move completed by the Court had led to its non-completion by political branches.

Setting up a constitutional court: there was considerable support for having a separate court that would not handle appeals and deal with constitutional and administrative cases. This would enable the Supreme Court to deal more effectively with appeals in other areas. Most participants agreed that the constitutional court would require an appointment process dominated by politicians. There was also a proposal to limit the term in office of judges (mostly in the range of 8 to 12 years).

Quorum for elimination of legislation: it was clear there was extensive support for the demand for an expanded quorum and significant majority to eliminate legislation.

Concentrated judicial review: there was general agreement that constitutional judicial review should be restricted to the Supreme Court.

Summary and Conclusions

The discussion was fruitful, respectful, and gave significant space to a very wide range of opinions and attitudes. It managed to give participants a positive and professional feeling, as expressed in their willingness to reconsider opposing positions.

In spite of the great differences between the participants in terms of their professions and their world views, it was possible to identify some central issues that arose repeatedly in the discussion and where there was a considerable degree of consensus (even if there was no outright majority):

- All agreed on the need for judicial review of the executive branch. The question is only one of degree.
- It was agreed that on a descriptive level, today's Knesset is very weak and does not have the ability for effective supervision of the government.
- There was broad agreement on the need to set clear, stable, and entrenched rules for the relationship between the three branches of government.
- There is considerable consensus, almost unanimous, that judicial review has leaked into legal advice, and a large part of its administrative and constitutional influence already occurs at the policy shaping stage.
- Most participants agreed that legal reasonableness is problematic in terms of scope, and therefore leads to much criticism. There was wide agreement with the position that if the Court can specify or quantify reasonableness or use alternative legal grounds, it would be best to do so.
- In this context, consensus emerged that it is not advisable to restrict the grounds of reasonableness in legislation. However, the reasons given were fundamentally different. Some believed that it is not right or proper to limit judicial review, while others believed that legislative limitation of reasonableness will in any case be ineffective and Courts will bypass it.
- There was almost total agreement that there are anomalous cases that justify judicial intervention in legislation.
- A consensus in principle also emerged around the override clause, although disagreement remained over how to design it (and in particular what majority would be required. Opinions ranged from 61 to 81).
- There is agreement that it is possible to think about specific changes in the Judges Selection Committee, in terms of its composition and the veto of certain groups. Most participants expressed the view that eliminating the veto of judges is acceptable in the current reality.

- Surprisingly, there was significant support for establishing a constitutional court, separate from the current Supreme Court. Supporters clarified that in a constitutional court most judges will be appointed on a political basis. It was also proposed to limit their terms of office (to about 10 years). Concentrating the power of constitutional judicial review in the hands of the Supreme Court only and the demand for a specific majority in order to reject legislation appeared to be reasonable restrictions.
- There was agreement that we need to distance ourselves from the perception that there is a perfect governing system or constitutional system, and also from ideas about adopting models from other countries, based on an understanding that structural mechanisms are closely linked to how they are applied and to the local culture of government.
- From the same point of view there is also acceptance of the position that the fundamental questions described here are not just legal or political questions, but also issues with long term social implications.
- An understanding emerged that there is no reason to completely reject any proposed changes to the existing situation, but each proposal must be examined individually, and certain changes should be accepted. Wholesale rejection could also lead to total adoption of all initiatives for change, which is not desirable even to some of their supporters.