Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint

*Daphne Barak-Erez**

I. Introduction: Judicial Review in Israel: a Case-Study

The debate around the scope and function of judicial review is a classical one. The present article will address it by focusing on the case study of judicial review in the Israeli Supreme Court. The focus on this example is of special interest because the Israeli approach has transformed significantly since the 1980s and currently presents an especially broad version of robust judicial review. Additionally, taking into consideration the intensity of public life in Israel and the challenges that the country faces (including security threats), the case law of the Israeli Supreme Court touches on diverse and controversial public matters.

In order to fully assess these developments, it is worthwhile to review the doctrinal changes, which have enabled the broadening of the scope of judicial review. Against this background, the article will assess the *de-facto* impact of these developments and will depart from the more traditional debates around the jurisprudence of the court, which focused on the normative desirability of the doctrinal changes.[1]

II. Doctrinal Changes and the Growing Scope of Judicial Review in Israel

The developments in the law of judicial review since the 1980s have been dramatic, and include the following:

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* Stewart and Judy Colton Professor of Law, Chair of Law and Security, Faculty of Law, Tel-Aviv University. An earlier version of this article was presented at a joint conference of the Israeli Supreme Court and the Indian Supreme Court, December 2008.

1. The writings of Ruth Gavison present probably the most powerful version of the criticism of the expansion of judicial review. Gavison pointed to the burden of litigation and legal uncertainty accompanying the increasing involvement of the High Court of Justice in public questions, the implications of this intervention for the erosion of the status and legitimacy of the Supreme Court, its contribution to the dilution of the public arena (because controversial issues are shifted to the decision of the High Court of Justice), and also to the problem of the indirect legitimating effect of the judicial decisions regarding actions that are ethically and publicly flawed, when petitions against them are rejected on their merits. A contrary academic position, supporting the court's policy, is represented by Mordechai Kremnitzer who consciously upholds a broad judicial mandate, allowing for intervention in cases of corrupt government norms. He also holds that, in fact, the High Court of Justice has adopted restraint in its intervention policy, despite its declaration concerning the expansion of justiciability. See Ruth Gavison, Mordechai Kremnitzer and Yoav Dotan, *Judicial Activism–For and Against: The Role of the High Court of Justice in Israeli Society* (2000) [Hebrew].

i. Reasonableness as a basis for judicial review of administrative decisions:

Since the 1980s, the Israeli Supreme Court has increasingly recognized reasonableness as a basis for judicial review. The reasonableness test extends beyond mere irrationality and enables the court to overrule decisions which do not balance properly between relevant considerations, when the balance struck is "extremely" unreasonable or extends beyond the "zone of reasonableness".[2] The recognition of the norm of reasonableness as a central method for judicial review of administrative action has close links also to the changes in the formal boundaries of the doctrine of justiciability (discussed below) since justiciability barriers were considered to be improper when there was a norm that applied to the case at hand; in practice, this norm was, in many cases, the test of reasonableness.[3]

ii. The broadening of standing (locus standi):[4]

The Israeli Supreme Court has started to recognize the possibility of petitions brought by public petitioners, which do not represent their individual interests, as long as the petitions touch on significant rules of law or constitutional questions. This development is also connected to the doctrine of justiciability, because public petitioners tend to bring to the court petitions regarding political life and security matters, traditionally considered to be unjusticiable. Indeed, many of the public petitions deal with issues that raise the question of justiciability concerns (and relatively more than other petitions)[5] .

iii. The new definition of justiciability:

Traditionally, the doctrine of justiciability stated that the court would avoid discussing matters of a political nature.[6] This rule was revisited in the *Ressler* decision[7], which drastically changed the doctrine. Aharon Barak J., author of the majority opinion, drew a distinction between "normative" non-

2. The principal precedent which laid the foundation for the test of reasonableness is H.C.J. 389/80 *Dapei Zahav Inc. v. The Broadcasting Authority*, 35 (1) PD 421 (1980).
3. For a critical discussion on these two developments as a one-piece work, see Moshe Landau, "On Justiciability and Reasonableness in Administrative Law" 14 *Tel Aviv Univ. L. Rev.* 5 (1989) [Hebrew].
4. See e.g. HCJ 217/80 *Segal v. The Minister of the Interior,* 34(4) PD 429 (1980).
5. For a critical discussion of the developments of the law of standing in connection to justiciability considerations, see Shuki (Joshua) Segev, "In Defense of the Traditional Right of Standing" 49 *Hapraklit* 499 (2006) [Hebrew].
6. HCJ 65/51 *Jabotinsky v. Weizmann,* 5 PD 801 (1951). For discussion in the traditional doctrine see for an example Alfred Witkon, "Judiciability" 1 *Isr. L. Rev.* 40 (1966).
7. HCJ 910/86 *Ressler v. the Minister of Defense,* 42(2) PD 441,449-451 (1988) (Hereafter *Ressler*).

justiciability, which refers to a petition that does not involve a legal norm[8] and institutional non-justiciability, which relates to a petition that can be legally resolved, but discussing it could breach the delicate balance of mutual respect between the judiciary and the other branches of government.[9] However, Barak J. also explained that normative non-justiciability is a fake problem, since a legal norm that is pertinent to the conflict can always be found. In the absence of a specific norm, decisions can always rely on general legal norms and, above all, on the principle of reasonableness.[10] Concerning institutional non-justiciability, when a legal norm exists, a court decision need not be considered problematic and the Court should therefore refrain from intervention only in extreme and hard-pressed circumstances. Shamgar J. and Ben-Porat J., however, were not committed to as strong a view but were also willing to broaden the limits of justiciability.[11]

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8. *Id.* at 475. "A dispute is justiciable in the normative sense if legal standards exist for its resolution. A dispute is not justiciable in the normative sense if legal standards do not exist for its determination. The question is not whether the dispute ought to be resolved by the law and in court, but rather whether it is feasible to decide it in that way."

9. *Id.* at 488-489:

   "A dispute is institutionally justiciable if it is appropriate for it to be determined by law before a court. A dispute is not institutionally justiciable if it is inappropriate to be determined according to legal standards before a court. Institutional justiciability is therefore concerned with the question of whether the law and the courts constitute the appropriate framework for the resolution of a dispute. ... The question is not whether it is possible to decide the dispute by law in court; the answer to this question is in the affirmative. The question is whether it is desirable to decide the dispute–which is normatively justiciable–according to legal standards in court."

10. *Id.* at 477-488.

    "The relevant point of departure for examination of normative justiciability (or non-justiciability) is the conception that the law is a system of prohibitions and consents. Every act is permitted or forbidden in the world of law... Every act is contained within the world of law... There is no 'legal vacuum,' in which actions are undertaken without the law taking any position on them ... In sum, the doctrine of normative justiciability (or non-justiciability) seems to me to be a doctrine with no independent existence. The argument that the issue is not normatively justiciable is merely amount to alleging that no prohibitive norm applies to the action, and that accordingly the action is permitted. My approach is based on the view that a legal norm applies to every governmental action, and that within the framework of the applicable norm it is always possible to formulate standards to ascertain the conditions and circumstances for action within the framework of the norm. This is certainly the case with regard to norms, which determine jurisdiction, and norms that determine the proper considerations in the exercise of jurisdiction. This is also the case where the operative norm is that which requires reasonable conduct by the government. Within the framework of this norm it is always possible to formulate passed standards for the examination of the reasonableness of conduct, and the authority's action will be examined on its merits pursuant to these standards, without any recourse at all to the claim of normative justiciability (or non-justiciability)."

11. For more details on the views of Barak J. regarding standing and justiciability, see, Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" 116 *Harv. L. Rev.* 16, 97 – 220 (2002).

iv. Judicial review of primary legislation:

The most evident change in the Israeli case law since the 1990s is connected to the introduction of judicial review of legislation following the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, 1992.[12] These basic laws were interpreted by the Israeli Supreme Court as introducing the possibility of judicial review of legislation that infringes on the basic rights recognized in the basic laws.[13] This development cannot be attributed only to the Court, because it had revised its traditional view on judicial review of legislation as a result of a change instigated by the Israeli Knesset. However, the broadening of judicial review on administrative actions in the previous decade had paved the way to judicial review on acts of legislation. The perception that controversial issues are not beyond the reach of the Supreme Court was a vital condition that enabled the introduction of judicial review of legislation as a legitimate concept.[14]

iv. Proportionality as a basis for judicial review:

Since the 1990s, there has been an extensive use of the test of proportionality,[15] also found in the new basic laws, as another method of judicial review.[16] This test has given the Supreme Court another juridical tool to examine actions to which no other specific norm applies, and has thus enhanced the process of broadening of the boundaries of judicial review.

The key question to be evaluated in this article is the scope of the actual use of the doctrinal new options introduced by the Court. The discussion will clarify that the changes were significant, but less than what were predicted. Subsequently, important changes in spheres that involve the issues emphasized by the Supreme Court in its earlier precedents in the area will be considered.

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12. See Aharon Barak, "The Constitutional Revolution: Protected Human Rights" 1 *Mishpat Umimshal* 9 (1992/3) [Hebrew]; Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" 26 *Colum. Hum. Rts. L. Rev.* 309 (1995).
13. C.A. 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village,* 49(4) P.D. 221.
14. See Hillel Neuer, "Aharon Barak's Revolution" 11 *Techelet* (1998) [Hebrew]. It is important to stress that there is no identity between the considerations that support broadening the boundaries of justiciability and the considerations that support judicial review of legislation.
15. This test focuses on the connection between the aim of the government action and the means used to promote it.
16. Section 4 of the Basic Law: Freedom of Occupation and section 8 of the Basic Law: Human Dignity and Liberty, which state the criteria for judicial review of legislation, require that an infringement of a constitutional right, even when meant to promote a "proper cause", must not exceed the required extent needed for this cause.

III. Modest Changes *De-Facto*

This section seeks to explain that judicial intervention of the Israeli Supreme Court in administrative and legislative decisions is more limited than what is usually assumed.

A. Avoiding Intervention in Major Policy Decisions

The most prominent phenomenon rising from the case law regarding politically sensitive issues is that the Supreme Court has never intervened in the major crossroads of government policy making. Indeed, the Supreme Court has discussed issues which have political bearing, but ultimately, the major policy decisions of the government have proved to be immune from judicial intervention as the following examples demonstrate.

In matters connected to the Israeli-Arab conflict, the Court did not intervene in decisions regarding the conduct of foreign policy negotiations. Regarding the future of the occupied territories, the court was not willing to examine questions bearing on the settlement policy *per se*,[17] which is probably the most prominent question that radiates indirectly on the analysis of other issues like the legality of route of the security barrier.[18] The Court exercised an equal measure of restraint concerning the peace process initiatives. All the petitions against the Oslo process were dismissed.[19] Likewise, the main petitions against the disengagement plan were dismissed though the settlers' petition regarding the financial aspect of the scope of their compensation was accepted.[20] Prior to this position, the Court had refrained from dealing with petitions directed against political negotiations leading to arrangements

17. HCJ 4481/91 *Bargil v. Government of Israel,* 47(4) PD 210 (1993); HCJ 3125/98 *Ayad v. Commander of IDF Forces in Judea and Samaria,* 55(1) PD 913 (1999); on the use of the threshold claim of "generality" for rejecting petitions which may have raised justiciability concerns, see also Yoav Dotan, "Ripeness and Politics in the High Court of Justice" 20 *Tel Aviv Univ. L. Revi.* 93 (1996) [Hebrew].

18. So, for instance, the Court has recognized the legitimacy of the consideration of protecting the settlements in the determination of The Security Barrier's route. See HCJ 7957/04. *Mara'abe v. The Prime Minister of Israel* (not yet published 15.9.2005) (hereafter the matter of *Mara'abe*). Thus, although theoretically the decision of the principle question of the legality of the settlements should have been relevant to the decision on The Security Barrier's route, because of the fact that if the settlement were recognized as illegal, then the discussion on the appropriate means to protect their inhabitants (that undoubtedly deserve protection) was supposed to consider this data.

19. See HCJ 4877/93 *Victims of Arab Terror v. Government of Israel* (Unpublished, 12.9.1993). The Declaration of Principles on Interim Self-Government Arrangements also known as the Oslo Process (1993) was a noteworthy step in Israel-Palestine conflict. The process provided for a framework of future relations between Israel and Palestine and a step towards resolution of all status issues.

20. See HCJ 1661/05 *Regional Council Gaza Coast v. Knesset of Israel,* 49 (2) PD 481 (2005) (hereafter *Gaza Coast*).

entailing territorial compromise,[21] or against decisions concerned with the release of security prisoners.[22] The only real example of judicial engagement with foreign policy conduct concerned a petition relating to the negotiations conducted by Prime Minister Ehud Barak in the period after his resignation and before the elections that followed it.[23] In this case, Barak J. gave a principled opinion in favor of the justiciability of the issue. However, eventually the petition was dismissed, and therefore it cannot serve as an example for an actual intervention in a political matter.[24]

The Court has also never intervened in the major decisions involving economic and social policy. The most prominent example can be found in the petition against significant reductions of welfare payments, which were part of the economic plan led by Benjamin Netanyahu as the Minister of Finance.[25]

B. Non-intervention by Other Means

The influence of justiciability considerations in a latent manner in which the court does not ignore the issues raised by petitions concerning controversial political issues but adopts a policy of limited intervention, without formally citing the justiciability doctrine, is another important phenomena.

Sometimes, the decision not to intervene is based on narrow applications of substantive rules. The dismissal of the petition against the expulsion of a large number of Hamas activists without prior hearing can

21. See, for instance, HCJ 4354/92 *Tenu'at Ne'emaney Har Ha-Bayit [Faithful of the Temple] v. The Prime Minister*, 47(1) PD 37 (1993).

22. See, for instance, HCJ 9290/99 *Mateh Mutkafey ha-Teror (Terror Victims Staff) v. The Government of Israel*, 54(1) PD 8 (2000); HCJ 1671/05 *Almgor the victims of the terror organization v. The Government of Israel,* 49(5) PD 913 (2005); HCJ 1539/05 *Mashlat Law Institute for the Study of Terror and Assistance of Terror Victims v. Prime Minister,* (Unpublished, 16.2.2005).

23. HCJ 5167/00 *Prof. Hillel Weiss v. The Prime Minister of the State of Israel*, 55(2) PD 455 (2001).

24. It is necessary to distinguish between judicial intervention in a specific decision, which has a political meaning, and judicial intervention in major crossroads which affects the path of public life in Israel. The court accepted the petition against the legality of the Elon More settlement [see HCJ 390/79 *Dweikat v. Government of Israel,* 34(1) PD 1 (1979)] but this decision did not negate the possibility of building future settlements in the territories. In another case, the court agreed to issue a meaningful interim order against the security forces' intention to enter the "Orient House" premises that had served as a center of Palestinian political activity in East Jerusalem. However, ultimately, the issue was never considered on its merits since the results of the elections that were held a few days later (in which Ehud Barak was elected Prime Minister in the 1999 elections) made the discussion redundant. See HCJ 3123/99 *Hilman v. Minister for internal Security* (unpublished). More details on these proceedings are available on the Supreme Court's website http://elyon1.court.gov.il/eng/siyur/index.html (accessed June 23, 2009).

25. HCJ 366/03 *Mechuyavut Association for Peace and. Social Justice vs. the Minister of Finance,* (Unpublished, 12.12.2005) (hereafter *Mechuyavut).*

thus be understood.[26] Rules of natural justice seemed to have compelled granting the expelled the right to a fair hearing prior to the expulsion. Nevertheless, justiciability considerations, which were never mentioned in the ruling, had cast a heavy shadow over the entire issue.[27] Formally, the High Court of Justice rejected the petition on its merits and allowed a hearing *post factum*. However, an analysis of the petition's legal aspect, unrelated to its context, shows that the judicial argument is persuasive only when examined in light of justiciability considerations. Thus, in the later decisions, justiciability considerations are only repressed, rather than eliminated.

One of the most effective ways of the dismissal of sensitive political petitions is a flexible application of the test of reasonableness, and the test of proportionality developed later. Intervention in administrative decisions on the ground of unreasonableness is based on their perception as deviating from the zone of reasonableness. Consequently, adopting the opinion that the authority's decision, although unsatisfactory in many ways, does not reach the level of unreasonableness which mandates the Court to intervene is an optional way of non-intervention. In practice, in very sensitive issues, the zone of reasonableness that stands at the disposal of the authorities is almost unlimited.[28] So, for instance, the Court has abstained constantly from intervention in petitions concerning Moslem and Jewish actions in the Temple Mount area (against violations of the law by the Moslem *wakf* and requesting that Jews be given access to the area). In the past, the Court showed readiness to withdraw from the non-justiciability approach in all that concerns the Temple Mount[29] but reality checks ensured a retreat into the position of non-intervention.[30]

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26. HCJ 5973/92 *Association for Civil Rights in Israel v. Minister of Defense*, 47(1) PD 267 (1993).
27. One might argue that orders sanctioned by security authorities, including orders of expulsion, were reviewed by the HCJ even prior to the broadening of the scope of justiciability. However, the scope of the decision in this case - regarding a few hundreds of Hamas people, signaled it and brought it closer to the area of political decision-making.
28. The rotation between the use of reasonableness and the use of justiciability sharpens in light of the decision of Barak J. in the *Ressler* decision, where he discusses some of the decisions which implemented the doctrine of justiciability in the past and concludes that he would have rejected these petitions as well, on substantive grounds, because the government decisions they dealt with were reasonable.
29. HCJ 4185/90 *Tenu'at Ne'emaney Har Ha-Bayit [Faithful of the Temple] v. The Attorney General*, 47(5) PD 221 (1993).
30. For the dismissal of the petitions regarding Temple Mount, see HCJ 7128/96 *Tenu'at Ne'emaney Har Ha-Bayit (Faithful of the Temple) v. The Government of Israel*, 51(2) PD 509, 528 (1997) ("the political echelon, not the court, must give content and meaning to the historical call: 'The Temple Mount is ours'"); HCJ 9474/96 *Tenu'at Ne'emaney Har Ha-Bayit (Faithful of the Temple) and the Hai ve-Kayyam Movement v. The Mayor of Jerusalem,* (Unpublished, 4.12.1997); HCJ 8666/99 *Tenu'at Ne'emaney Har Ha-Bayit (Faithful of the Temple) v. The Attorney General*, 54(1) PD 199 (2000); HCJ 530/01 *Yogev v. Major General Mikky Levy*, 56(1) PD 22 (2001).

In other cases, the rejection of politically sensitive petitions is enabled by the use of other threshold barriers, such as the generality test, which is frequently cited in such petitions (for instance, a petition regarding the policy of house destruction in eastern Jerusalem).[31] The objection to a general discussion on the issues, while demanding the petitioners to refer to separate petitions, results from the essence of judicial duty that obliges the Court to discuss every case while referring to the full factual basis therein. However, it also serves another purpose. When the Court discusses every case on its own facts, it does so outside the political context of the case and without reference to its public significance. For example, when the Court discusses every section of the security barrier (and not the decision to build the barrier, as such) it prevents in advance its ability to comprehend the political significance of the project in terms of the territorial continuity of the West Bank.[32] Likewise, when the Court referred the petitioners who argued against the reduction in their welfare payments, to individual proceedings in which every one of them would challenge the specific infringement of his or her human dignity,[33] the general social implications of the new economic policy stayed outside the Court's walls.

C. The Flexibility and Diversity of Judicial Remedies

The use of a more diverse set of remedies in a manner that enabled more flexible judgments is another transformation that can be traced in the case law. Traditionally, the typical remedy given by the Israeli Supreme Court, residing as the High Court of Justice, was an operative order that led to the cancellation of the illegal decision or to the halting of the action done according to it.[34] In contrast, the new case law has developed softer remedies. The most prominent among these new remedies is the emergence of the doctrine of relative voidness, which recognizes the possibility of practising judicial discretion regarding the results of the administrative or legislative illegality (including the possibility of acknowledging the validity of the illegal

31. See for instance HCJ 1901/94 *MK Uzi Landau v. Jerusalem Municipality,* 48(4) PD 403 (1994). On the use of the threshold claim of "generality" for rejecting petitions raising a problem of justiciability, see also Dotan, s*upra* n. 17.

32. See also Daphne Barak-Erez, "Israel: The Security Barrier – Between International Law, Constitutional Law and Domestic Judicial Review" 4 I•*CON* 540 (2006).

33. *Mechuyavut*, *supra* n. 25.

34. Excluding cases in which due to a "fait accompli" the court was forced to be satisfied with a declaratory remedy (see HCJ 22/49 *Sabo v. the Military Governor,* 2 PD 701 (1949)) or even with, in special cases, compensation [see HCJ 101/74 *Binoi ve-Pituach ba-Negev LTD v. the Minister of Defense,* 28(2) PD 449 (1974)].

decision, when the court holds that no injustice had been caused).[35] In other cases in which the court discusses highly sensitive issues, the judgment is drafted in the form of declaring the legal principles without giving an operative court order.

One area, which presents the gap between the principle of judicial capacity to review decisions and the weakness of the applicable remedies, is the case law on political agreements. Despite his view that political agreements are justiciable, Barak J. has stated that specific performance would be usually inconceivable. He also rejected the option of awarding damages to the affected party, in line with the reservations made regarding any link between political agreements and financial benefits. The practical result is that the law of political agreements remains to a large extent impractical, and the available remedies, if at all, will be mainly of public and symbolic nature.[36]

The same phenomenon could be traced in many of the rulings that review the Israel Defence Forces' (IDF) warlike actions. Often the judgment concerning the appropriate fighting norms does not include operative orders but is rather limited to declaring the principles, which should direct the military commanders (for instance, regarding the forbidding of shooting on Palestinian ambulances and medical teams).[37] Similarly, the decision in the *Targeted Killings* case[38] includes 'do and do not do' rules, in a format which resembles an advisory opinion more than an operative judgment.

D. The Limited Impact on Political Practice

The actual impact of the judgments of the Court on the new issues it began to deal with is another imperative question. More specifically, the question is whether an intervening court is indeed a more influential one, or to what extent the intensive judicial review of political decisions is effective and how far it influences the behavior of politicians and government bodies.

A discussion focusing on the effectiveness of court rulings, as opposed to their legitimacy, is currently an independent and diversified research area.

35. This is the case with the remedy of apology suggested by Barak J., whose meaning is mainly symbolic. See Daphne Barak-Erez, "Relative Voidness in Administrative Law: On the Price of Rights*" Itzhak Zamir Book: On Law, Government and Society* (Ariel Bendor and Yoav Dotan eds., 2005) 285 [Hebrew].

36. HCJ 1635/90 *Zarzevsky v. The Prime Minister*, 45(1) PD 749, 845-846.

37. See HCJ 2936/02 *Physicians For Human Rights v. The Commander of the IDF Forces in the West Bank,* 53(3) PD 3 (2002); HCJ 2117/02 *Physicians For Human Rights v. The Commander of the IDF Forces in the West Bank,* 53(3) PD 26 (2002).

38. HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel,* (Unpublished 13.12.2006) (hereafter *Targeted Killings*).

In 1974, Stuart Scheingold published his influential work on "the myth of rights,"[39] criticizing the unfounded belief in the law's power to bring about social change. Another significant landmark was the publication of Gerald Rosenberg's *The Hollow Hope*, referring to the expectation of change to be achieved through the courts.[40] Other studies, however, have pointed out that unqualified disappointment with the potential benefits of litigation has been exaggerated, and that courts did have influence in many cases, though perhaps not as extensive as had been hoped.[41] An evaluation of these positions as they apply to Israeli judicial rulings that expanded the borders of justiciability poses an interesting question: did they have any impact?

Following the expansion of the limits of justiciability, particular attention was devoted to the Court's intervention in areas bearing on the ethics of government and the norms applicable to government conduct. Yet, despite the appearance of a far-reaching influence on Israel's political life, there are grounds to argue that judicial review is probably much less effective than is usually assumed, and hence the mighty struggle that developed around it is, in a sense, much ado about nothing.

i. Disbursement of government funds:

The Supreme Court intervened in the practice of distributing "special allocations." For many years, government payments had been allotted to "well connected" institutions by earmarking budgets specifically for them rather than according to criteria. A High Court of Justice ruling forbade the allocation of funds except through clear, substantive, and egalitarian criteria.[42]

Following this ruling, government ministries made arrangements to set up standards. These criteria, however, are often "tailored,"[43] and at times

39. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press, 1974). Stuart Scheingold is Professor Emeritus of Political Science at the University of Washington.

40. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991). Gerald N. Rosenberg is Associate Professor in Political Science and Lecturer in Law at the University of Chicago.

41. See, for instance, Malcolm M. Feeley, "Hollow Hopes, Flypaper, and Metaphors" 17 *L. & Social Inq.* 745 (1993). An additional perspective on this topic, beyond the scope of the present discussion, relates to the influence of the legal struggle on the strengthening of social movements and the empowerment of their activists. See Idit Kostiner, "Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change" 37 *L. & Soc. Rev.* 323 (2003).

42. 166/84; HCJ 780/83 *The Tomkhei Temimim Yeshiva v. The State of Israel*, 38(2) PD 273.

43. See, for instance, HCJ 6634/94, HCJ Application 1017/95 *Yekutieli v. The Minister of Religious Affairs*, 49(5) PD 45 (in this case, the application of criteria resulted in granting benefits to only one body that met them. In the circumstances of the case, however, the majority judges were not persuaded that the criteria had indeed been "tailored"); HCJ 1/98 *Kabel v. the Prime Minister of*

are not kept[44] or even determined *ex post factum*.[45] In a decisive majority of the cases, the Court does not have suitable tools for testing whether the criteria were determined in good faith. In any event, sporadic judicial review linked to submitted petitions is clearly an unsuitable alternative to an administrative inspection mechanism working on an ongoing basis to monitor the criteria for disbursing these allocations.[46]

ii. Political appointments:

The *Dekel* decision, which determined that political appointments are not valid,[47] dealt with a petition submitted against the decision to appoint a political activist (who later on even became a government minister) to the prestigious chair of the Israel Electric Corporation. The Court explained in detail its doctrine regarding the invalidity of political appointments. Regarding the widespread practice of political appointments, the Court stated: "When a public figure appoints someone in the public service guided by irrelevant considerations of party interests, the appointment is flawed and betrays the confidence of the public that authorized the appointing body".[48] Yet, it added there was no evidence that the appointment at hand was indeed political. The problem arises because it is difficult to prove in court the real motives for making appointments. The Court's review is often limited to the question of whether the candidate in question has the relevant experience or qualifications for the job. This formulation, however, ignores the possibility that there are many other candidates with preferable experience and qualifications. Thus, judicial policy aimed at excluding candidates lacking appropriate qualifications is not sufficient. Such a critique will enable the disqualification of Caligula's horse but not other political appointments of mediocre and poor candidates. Indeed, political appointments since this ruling have certainly not stopped and examples are endless,[49] as the yearly reports of the Comptroller attest.[50]

Israel, 53(2) PD 241 (1999) (in this case, it was ruled that fitting the program of subsidized housing to a population with large families, a characteristic typical of yeshiva students but not of university students, was a "tailored" criterion).

44. See, for instance HCJ 5290/97 *Ezra–The National-Haredi Youth Movement in the Land of Israel v. The Minister of Religious Affairs*, 51(5) PD 410 (1997).

45. See, for instance, HCJ 8569/96, 7631/97 *Histadrut Ha-No'ar ha-Oved ve-ha-Lomed v. The Ministry of Education, Culture and Sport*, 52(1) PD 597 (1998).

46. See also, Amnon De Hartog, "State Support for Public Institutions: The Emergence of Special Allocations" 29 *The Hebrew Univ. L. Rev.* 89-93 (1998) [Hebrew].

47. HCJ 4566/1990 *Dekel v. The Minister of Finance,* 45(1) PD 28, 35. (hereafter the *Dekel* decision).

48. *Id.*

49. See, for instance: *State Comptroller Annual Report 39* (1989) 627-642; *State Comptroller Annual Report 41* (1991) 595-615; *State Comptroller Annual Report 43* (1993) 733-744; *State Comptroller Annual Report 47* (1997) 838-852; *State Comptroller Annual Report 48* (1998) 871-918.

50. As the Minister of Interior, Eli Suissa was quoted when asked about the appointment of SHAS people: "Who do you want me to appoint, Likud people?" See HCJ 6458/96, 8160 1996 *Abu Karinat v. The Minister of the Interior*, 52(2) PD 132 (1998).

The result is that the myth regarding the Court's omnipotence is far larger than what is justified based on the facts.[51] In order to change social and political norms, legal action in courtrooms is not enough. Appropriate administrative preparations are required (for instance, to monitor criteria for disbursing allocations), as well as public action leading to the internalization of flaws in these norms. As long as the public does not vigorously reject political appointments and assigned budgets, celebrated judicial rulings deploring such actions will not suffice. Thus, judicial review in such cases has significance, but this significance is limited.

E. The Limited Scope of Judicial Review of Legislation

The interpretation of the basic laws regarding the human rights as authorizing judicial review of legislation is, in many ways, an outcome of the gradual process of broadening the boundaries of justiciability, since the 1980s. However, there are on-going indications for the practice of restraint in judicial review of legislation and *de-facto* consideration of the problem of institutional justiciability.

The operative review of the Court in the form of judicial review of legislation is much more limited in comparison to the review of administrative actions. Thus far, the Supreme Court has invalidated legislative provisions based on constitutional grounds in five cases, among which only the minority discussed issues which lie at the heart of the public debate.[52] The petition

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For detailed descriptions on the frequency of political appointments in the civil service see Itzhak Galnoor, *No, Mr. Commissioner: Behind the Scenes of Politics and Administration in Israel* (Yediot Publications, 2003). [Hebrew] The book describes the period of Itzhak Galnoor's term in office as Civil Service Commissioner (1994-1996). Galnoor writes:

"I am particularly concerned about the invisible part in the iceberg of political appointments: the interference of ministers and director generals in the recruitment, promotion, and dismissal of civil service employees from non-political ranks, as the State Comptroller's Reports attest. Such cases are hard to locate, except for situations where workers dare to take risks by submitting a complaint or turning to the courts". *Id.* at 91-92.

51. For a broad presentation of this argument, see Daphne Barak-Erez, "The Justiciability of Politics" 8 *Pelilim: Israel J. Crim. Just.* 369 (1999) [Hebrew]; Daphne Barak-Erez, "Judicial Review of Politics: The Israeli Case", 29 *J. L. & Soc.* 611 (2002).

52. The judgments in which laws were invalidated are: HCJ 1715/97 *Israeli Investment Managers Bureau v. Minister of Finance*, 51(5) P.D. 367 (1997); HCJ 6055/95 *Tzemach v. Minister of Defense*, 53(5) P.D. 241 (1999); HCJ 1030/99 *Oron v. Speaker of the Knesset,* 56 (3) PD 240 (2002); HCJ 1661/05 *Regional Council Gaza Coast v. Knesset of Israel,* 49 (2) PD 481 (2005); HCJ 8276/05 *Adalah - The Legal Center for Arab. Minority Rights in Israel v. The Minister of Defense,* (Unpublished, 13.12.2006) (hereafter *The Government Immunity).* In addition to these cases, in HCJ 212/03 *Herut – The National Jewish Movement v Chairman of the Central Elections Committee for the Sixteenth Knesset,* 57 (1) PD 750 (2003) it was ruled that section 137 of the Knesset Elections Law (Consolidated Version) 1969 which denies the right to bring petitions to the HCJ regarding decisions of the Central Elections Committee infringes Basic Law: The Judiciary. However, in this case the petition was rejected by the majority opinion on its merits, and so, formally speaking, the discussion of this matter was part of the *obiter dictum*.

against the disengagement plan was accepted partly, but only with regard to the relatively consensual issues of awarding proper compensation to the settlers.[53] In fact, only the decision in the matter of law introducing government immunity from torts claims regarding military actions in areas which were declared as areas of confrontation proved to be really controversial.[54]

The significant restraint that the Court had practiced with regard to some other petitions can be observed in the following examples. For instance, in the petitions regarding the infringement of the right to human dignity by significantly reducing welfare payments, the Court defined a very high evidentiary standard of proof (of the infringement) which paved the way to the dismissal of the petition.[55] Similarly, the Court practiced a high level of restraint in deciding the petition against the amendment to the Citizenship Law, which prohibited family unification of Israeli citizens with their relatives who reside in the West Bank and the Gaza Strip.[56] The majority opinion stated that the legislature should be given time in order to draw conclusions from the temporary law in the matter.

F. The Partial Return to Institutional Justiciability and to Justiciability Rhetoric

In some contexts, though limited, renewed judicial willingness to use justiciability considerations even in the formal manner can be traced. The most prominent example of a conscious use of institutional justiciability considerations comes from cases of judicial review of parliamentary internal proceedings. Since the *Sarid* precedent,[57] the Supreme Court has recognized the possibility of reviewing internal parliamentary proceedings in cases which have significant impact on the so-called "web of parliamentary life" and the foundations of the constitutional order. The Court has supported an even broader policy of judicial review with regard to the process of removal of parliamentary immunity of Knesset Members in the *Pinhasi* case[58] and the *Gorolovski* case.[59] Nevertheless, here too the court has ended up by taking

53. HCJ 1661/05 *Regional Council Gaza Coast v. Knesset of Israel,* 49 (2) PD 481 (2005).

54. *The Government Immunity, supra* n. 52.

55. *Mechuyavut, supra* n. 25.

56. HCJ 7052/03 *Adalah - The Legal Center for Arab. Minority Rights in Israel v. Minister of Interior,* (unpublished, 14.5.2006). Indeed, this petition was rejected by a narrow plurality, in the majority of six judges against five. However, actually the recognition of the problematic character of the law, argued by many of the judges (including some of those who joined the rejection of the petition on the ground of judicial restraint) shows the on-going and indirect influence of justiciability considerations on the petitions that are discussed and ruled based on their facts.

57. HCJ 652/81 *Sarid v. Chairman of the Knesset*, 36(2) PD 197 (1982).

58. HCJ 1843/93 *Pinchasi v. The Israeli Knesset*, 48(4) PD 492 (1993).

59. HCJ 11298/03 *The Movement for Quality Government in Israel v. Knesset Committee,* 59(5) PD 865 (2005).

"half a step back," and has not intervened in internal Knesset processes that concern the issue of parliamentary immunity but only sparingly. The Court has repeatedly rejected petitions requesting that it intervene in voting arrangements in the Knesset concerning the status of a vote of no-confidence in the government,[60] the time set for a Knesset deliberation on bills calling for the dissolution of the Knesset,[61] and a decision of the Chairman of the house regarding the results of a vote.[62] This trend is better highlighted with regard to judicial review of legislative procedures of the Knesset.[63]

It is notable that even Barak J. himself, who had previously expressed reservations about institutional justiciability claiming it was incoherent, returned to praise it and stated: "We do acknowledge institutional non-justiciability; we acknowledge that not on every dispute the court is authorized to decide, it would be proper for the court to do so".[64]

IV. The Unpredicted Consequences of the Change

Indeed, the expansion of the boundaries of judicial review did not affect the decision-making of the court in the manner predicted by its early transformative precedents. However, it initiated important changes as indicated below.

A. The Influence of the Potential of Judicial Review

The most important result of the expansion of the boundaries of judicial review is the impact on administrative and legislative behavior. The influence is expressed not necessarily in the main route of correcting injustices by operative court judgments. In many cases, the judicial influence is reflected in the fact that the authorities act in the "shadow" of the potential of judicial decision-making in the matter. This potential is taken into account already

60. HCJ 9056/00 *MK Kleiner v. The Knesset Chairman*, 55(4) PD 703 (2003).

61. HCJ 9070/00 *MK Livnat v. Chairman of the Constitution, Law, and Justice Committee*, 55(4) PD 800 (2001) (hereafter *Livnat*).

62. HCJ 1401/01 *Sarid v. The Knesset Chairman MK Burg*, 55(5) PD 394 (2001).

63. HCJ 4885/03 *Israel Poultry Farmers Association v. Government of Israel,* 59(2) PD 14 (2004).

64. HCJ 9070/00 *MK Livnat v. Chairman of the Constitution, Law, and Justice Committee*, 55(4) PD 800 (2001). In one of his last decisions before his retirement Barak J. rejected a petition against a decision that was accepted in the finance committee in an inappropriate procedure (when an important vote was held before the formal time that was scheduled for the beginning of the meeting). See HCJ 1139/06 *MK Ardan v. Chairman of the Finance Committee,* (Unpublished 12.12.2006). In this case, Barak J. did not use the term justiciability, but he gave it expression when he argued: "one should prefer the principal of the independence of the legislature, and refrain from intervention in the inner-parliamentarian procedures." *Id.* ¶ 5.

in the phase of decision-making.[65] In addition, it is expressed in cases in which the parties are encouraged by the court to compromise. In fact, many of the petitions do not end with an actual decision, but rather in compromises, which take into consideration the court's view.[66]

B. The Impact on the Debate in the Public Sphere

Another influence of the broader scope of judicial review is expressed in the public sphere, which lies outside the court. In some of these cases, the judgment of the court functions as a social "compass". The Court does not shape reality but points to values one may hope to realize. This contribution is possible, obviously, only insofar as the tension between the values expressed by the court and the accepted social or moral norm is not too sharp. If this is not the case, the ruling might simply be "irrelevant." Thus, for instance, when the US Supreme Court rejected racial segregation in the educational system,[67] the ruling failed to influence practice for many years, but was still a significant landmark on the way to the abandonment of institutionalized racism in the United States.[68]

In addition, the very litigation of issues, which had been repressed in the public discourse can, at times, contribute to the revival of the public debate around them. A petition to the Supreme Court to decide a controversial public issue is never limited to the professional aspect of preparing a brief for the court. Litigation, bearing on a controversial public issue such as who is a Jew (for the purposes of the Law of Return, 1951) is

65. For the self-criticism of the Knesset regarding the compatibility of laws proposals to the Basic Laws, see, for an example, Amnon Rubinstein, "The Knesset and the Human Rights Basic Laws" 5 *Mishpat Umimshal* 339, 351-357 (1999) [Hebrew].

66. See Yoav Dotan, "Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice During the Intifada" 33 *L. & Soc. Rev.* 319 (1999); Yoav Dotan "Government Lawyers as Adjudicators: Pre-Petitions in the High Court of Justice Department 1990-1997" 35 *Isr. L. Rev.* 453 (2001); Yoav Dotan, "Pre-Petitions and constitutional Dilemmas Regarding the Role of the Attorney General's Office in Litigation Before the High Court of Justice" 7 *Mishpat Umimshal* 159 (2004) [Hebrew]. An interesting discussion on petitions that were settled in compromise in the context of the Separation Barrier could be found in the judgment of Barak J. In HCJ 5488/04 *A-Ram Local Council v. Government of Israel,* (Unpublished, 13.12.2006) (hereafter *A-Ram)* which regards the building of the Separation Barrier in the Jerusalem area, the opening paragraph includes this information: "since the Government of Israel has decided to build the Separation Barrier 115 petitions were submitted to this court. 28 of them ended in compromises between the parties or in cancellation of the petition. 41 petitions ended with a verdict. 46 petitions are still pending." *Id.* ¶ 1.

67. *Brown v. Board of Education*, 347 U. S. 483 (1954).

68. For discussion in the educational function of the judgment, in the context of the fight against racism, see Euegene V. Rostow, "The Democratic Character of Judicial Review", 66 *Harv. L. Rev.* 193, 208 (1952); Christopher L. Eisgruber, "Is the Court an Educative Institution?", 67 *N. Y. Univ. L. Rev.* 961 (1992).

always accompanied by discussions in the public arena and by attempts to capture public opinion. In other words, it opens the issue up for discussion outside the courtroom as well. *A priori*, public questions deserve to be discussed regardless of any legal proceedings. Various theories of democracy emphasize the importance of renewing the public discourse.[69] Public discourse is currently in decline in Israel. Loud slogans resonate in the political arena, instead of serious discussion based on orderly argumentation and supported by facts. By contrast, court litigation requires the parties to present a coherent argument and contend with counter-arguments. The public follows the arguments and, in this sense, litigation contributes to the revival of a meaningful public discourse.[70]

Indeed, the way to public discourse should preferably be not through the courtroom but, *ex post factum*, the substantive confrontation that the litigation imposes is a secondary gain that cannot be dismissed.[71] Thus, for instance, because of the frequent litigation on the question of "Who is a Jew",[72] questions that had been repressed concerning the essence of Judaism and the contemporary perception of Jewish identity had to be discussed. Similarly, the dispute on the question of shutting off Arab citizens from residence in communal settlements, which was discussed in *Ka'adan,*[73] confronted Israeli society with the tension between the ethos of settlement and the ethos of civic equality.[74]

The down side of this dynamic is that the litigation often fashions the

69. A representative instance is found in the writings of Jürgen Habermas. See, for instance, Jürgen Habermas, *Between Facts and Norm: Contributions to a Discursive Theory of Law and Democracy*, tr. William Rehg (MIT Press, 1996).

70. In this spirit, Dworkin wrote:

"When an issue is seen as constitutional, however, and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality. Legislators often feel compelled to argue for the constitutionality and not just the popularity of measures they support, and Presidents or governors who veto a law cite constitutional arguments to justify their decision. When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed, by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables." Ronald Dworkin, *Freedom's Law – The Moral Reading of the American Constitution* 345 (Harvard University Press, 1996).

71. In this context, note the writing supporting minimalist judicial rulings, which abstain from broad, precedent-setting decisions on questions of value and leave room for continued public discussion. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999).

72. See HCJ 58/68 *Shalit v. The Minister of Interior*, 23(2) PD 477.

73. HCJ 6698/95 *Ka'adan v. Israel Land Authority,* 54(1) PD 258.

74. As an instance of the discussions generated by the *Ka'adan* litigation, see the range of views exposed in the articles published in 6(1) *Mishpat U-Umimshal* (2001).

type of public dialogue that does take place. It silences social and cultural claims lacking formal legal status. It encourages "adversariness," and stresses "rights" as opposed to mutual consideration and dialogue[75]. Thus, for instance, concerning the decision to ban driving through a religious area in Jerusalem during prayer times on weekends and high holidays,[76] it was pointed out that the legal discussion encouraged a rights discourse, as opposed to an identity discourse, where the parties would relate to one another's desires and hardships.[77] Similarly, the petition of the Mizrahi Democratic Rainbow against granting broad rights to agricultural settlers on lands belonging to the Israel Land Authority shifted the focus to questions of contractual rights and blurred the ethnic rift pounding below the surface (as the petitioners were primarily descendants of Jews from Arab countries who were motivated by historical allegations of group discrimination in the original allocation of the lands). Indeed, the ruling of the Supreme Court placed a distributive justice approach at the center of the decision.[78] However, it allowed expression only to the class facet of the petition, without disclosing its ethnic dimension. A further danger is that the legal discussion could ultimately strangle the public one.[79]

C. Domestic Justiciability and International Justiciability

Beyond the considerations that moved the Court to broaden the limits of justiciability in the first place (mainly the motivation to protect the rule of law), today there is another dimension that significantly affects the setting of the limits of justiciability, even though it was not taken into consideration when the first precedents on this matter were formed – the international dimension. The judgment in the matter of *Ressler* was inward looking, while today the limits of justiciability are determined also by looking outside to the international community. More specifically, precisely the issues, which raise justiciability concerns in the Israeli political context (security issues, mainly regarding the West Bank and Gaza Strip), are regarded by the international community as highly suitable for judicial decision-making, from the perspective of humanitarian law and human rights law. Indeed, the

75. For the argument of the "take over" of the rights discourse over the public arena in the United States compare: Mary Ann Glendon, *Rights Talk – The Impoverishment of Political Discourse* (New York: Free Press, 1991).

76. HCJ 5016/96 *Horev v. Minister of Transportation* (E), 51(4) PD 1.

77. Avi Sagi, *Society and Law in Israel: Between a Rights Discourse and an Identity Discourse* (Ramat Gan: Zivion, Bar-Ilan University, 2001) [Hebrew].

78. HCJ 244/00 *Amutat Siah Hadash-Hakeshet ha-Demokratit v. The Minister of National Infrastructure*, 56(6) PD 25.

79. See Glendon, *supra* n. 75.

international community's perception affected the broadening of the boundaries of justiciability in ways that the court did not expect when it gave its decision in the *Ressler* case.[80] This is the broad context in which one should understand the willingness of the court to adjudicate highly sensitive petitions regarding military operations and security policy (including the decisions regarding the security barrier). In other words, the Court abstains from ruling on issues, which are potentially justiciable in international courts but are outside the reach of the court in Israel[81] .

The Court's decision-making regarding the security barrier demonstrates very clearly the linkage between the scope of the international justiciability and domestic justiciability. The first main decision of the Court in the matter, the *Beit Sourik* case,[82] was given when the issue of security barrier was pending before the International Court of Justice in The Hague, and actually only a few days before the International Court of Justice gave its advisory opinion in this matter. Later, when the Supreme Court continued to discuss issues concerning the security barrier, it did so with reference to the International Court of Justice's advisory opinion, trying to locate its decision-making in a framework that could be settled with this opinion, as is evident from the *Mara'abe* case.[83]

Expanding the limits of justiciability in the context of military-related petitions which draw international interest was evident also in other contexts, including the petitions which touched on military operations in the West Bank.[84] Prominent examples are the decision reviewing the legality of the

80. It is important to mention that the scope of domestic judicial review is a factor that affects the scope of review by international forums. See Orna Ben Nafatli and Keren Michaeli, "The Universal Judgment Authority and the State Judicial Discourse", 9 *Hamishpat* 141 (2004) [Hebrew].

81. At the same time, it can be seen that the court has a growing tendency to base its judgment regarding the IDF's activity in the occupied territories on the international norms. See Daphne Barak-Erez, "The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue", 2 I•*CON* 611(2004).

82. HCJ 2056/04. *Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 807 (2004).

83. *Mara'abe, supra* n. 18.

84. In principle, the court rejected as non-justiciable a petition requesting the army not to bomb civilian targets. See HCJ 3022/02 *Canon (Law)–The Palestinian Organization for the Protection of Human Rights and Ecology v. The Commander of IDF Forces in the West Bank*, 56(3) PD 9 (2002). But in this case as well, the court stated it was persuaded that the army refrains from harming citizens unnecessarily. When rejecting petitions in other cases, the court related to the legal norms compelling the army according to Israeli law and, even more so, according to international law. Among the subjects discussed: forbidding shooting against ambulances and medical teams (see *supra* note 36); the burial of bodies by the army (HCJ 3114 /02 *MK Barake v. The Minister of Defense*, 56(3) PD 11 (2002); rescue civilians from areas destroyed in battle (HCJ 3117/02 *Center for the Defense of the Individual v. Minister of Defense*, 56(3) PD 17 (2002)); providing food, water, and medical assistance to persons under siege (HCJ 3436/02 *Custodia Internazionale Terrae Sanctae v. The Government of Israel*, 56(3) PD 22 (2002); HCJ 3451/02 *Almandi v. The Minister of Defense*, 56(3) PD 30 (2002)).

use of "assigned residence" of terrorists and their aids[85] and the ruling concerning targeted killings of terrorists.[86] In the matter of *Targeted Killings* decision, Barak J. himself referred to the boundaries of international justiciability as a consideration that influences the formatting of the domestic boundaries of justiciability. As he said: "the type of questions that are discussed by us are also discussed by international courts...why an Israeli court can not make the same examination itself? Why would these questions, which are justiciable in international courts, cease to be justiciable in national courts?"[87]

At the same time, even in these cases, when the Court's intervention is cast by the shadow of the international sphere, the decisions are restrained. In the context of the security barrier, most of the petitions submitted were rejected eventually.[88] As far as the petitions touched on events of military fighting, the court's intervention was limited to giving general instructions, without operative orders, in circumstances in which it had no substantial ability to evaluate the factual basis of the litigation.[89] With regard to the *Targeted Killings* case, the court indeed set standards for distinguishing between permitted and forbidden actions, but in the end it left the issue for the decision of the military authorities (based on these standards).

V. Conclusion: A Different Balance and Not a Revolution

The primary question that arises from the discourse on case law of the Supreme Court is where do things actually stand? Has the Court indeed gone too far, as some of its critics claim? Or is this perhaps a case of much ado about nothing, as some precedents show? Has the removal of justiciability barriers changed anything? An overview of the case law proves the need for a nuanced analysis. The change has been significant, and yet many delicate issues remained outside the reach of judicial review, if not expressly then impliedly. Although the changes in the doctrine did not create a revolution, the scope of reviewable decisions was indeed broadened.

85. HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF* (Un-published, 6.10.2005).
86. *Targeted Killings, supra* n. 38.
87. *Id.* ¶ 53.
88. See for instance HCJ 5683/04, 9055/*05 The Beit Sira Village Council et al. v. The Government of Israel,* (Unpublished, 9.1.2006); HCJ 6336/04 *Mousa v. The Prime Minister,* (Unpublished, 10.1.2006); HCJ. 4825/04 *Alian v. Prime Minister, (*Unpublished, 16.3.2006); HCJ 386/05 *Elrazikat v. The Government of Israel,* (Unpublished, 6.7.2006); HCJ 6451/04 *Khalowa v. The Government of Israel,* (Unpublished, 18.6.2006); HCJ 1348/05*, Dr Shatia, Mayor of Salfit v. State of Israel,* (Unpublished, 17.7.2006); HCJ 6027/04*, Radad, Head of Village Council of Alzawia v. Minister of Defense,* (Unpublished, 17.8.2006); *A-Ram, supra* n. 66.
89. For instance, the petitions regarding the shooting on Palestinian Ambulances, see *supra* n. 37.

In many ways, the revolution that has occurred can be described as a revolution of discretion.[90] The question of review has become a matter of degree – in principle all decisions are reviewable, but in practice major political decisions are free from review, except in extreme circumstances. The decision in the question of institutional justiciability is no longer taking place in the binary format of choice between "justiciable" and "non-justiciable". In the vast majority of cases, the question of justiciability does not get either a positive or negative answer, but rather a relative and contextual answer. Politically sensitive issues are less justiciable, but not completely unjusticiable. Thus, there is a sequence of justiciability and accordingly a sequence of intervention.

90. It is worthwhile to mention here that the concept of judicial discretion has indeed been at the heart of the theory of judging of Barak J. See: Aharon Barak, *Judicial Discretion* (Yale University Press, 1989).