Crusades against Corruption and Institutionally-induced Strategies in the Israeli Supreme Court

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In his last public address prior to departure, the recently retired Israeli Supreme Court Justice, Mishael Cheshin, emphasized that the prevention of corruption was the single most important thing he would like to leave as his legacy. In more than one case, Cheshin did not shy from acting upon this principle. A prime example is *The Movement for Quality Government in Israel v. PM Sharon.*

In October 2003 the Israeli High Court of Justice (HCJ) delivered a lengthy opinion concerning the appointment of Mr Tzahi Hanegbi, to the position of minister of public security in Prime Minister Ariel Sharon’s recently formed cabinet. Despite petitioners’ contentions and the criminal proceedings against Hanegbi, respondents (Prime Minister Sharon, the attorney-general and Mr. Hanegbi) stressed Hanegbi’s proven executive skills and failed to see how this appointment was repugnant to the rule prohibiting a conflict of interests. Seven months prior to the final decision, in March 2003, the case was heard by a three-justice panel. This panel, which consisted of Justices Rivlin, Cheshin and Beinisch, applied for expansion in August of that year. An expanded seven-justice panel heard oral arguments in late August and on 9 October Justice Rivlin delivered the majority opinion. Interestingly, a majority of the original panel dissented from the decision of the expanded panel.

Justice Cheshin registered a meticulous dissenting opinion, and Justice Beinisch joined him emphatically. Cheshin took full advantage of the platform he was given as a dissenter in a broadly covered controversial case, to discuss broader constitutional and ethical considerations—‘this . . . is a
matter of basic principles, running deep to the very foundations of our...way of life as individuals and as a society.  

What motivated the original panel to apply for expansion? After all, the expansion left them on the losing side. Is it possible that strategic considerations were underlying this decision? This article seeks to answer that question for this particular case. In addition, it argues that justices on the Israeli Supreme Court operate in an institutional environment that presents them with incentives to act strategically not just in one case but also in a systematic way.

Scholars have studied strategic behaviour in the Israeli judiciary. Yet, unlike the case for the American Supreme Court, relatively little attention has been given to strategic behaviour in the Israeli Supreme Court at the level of the collegial game. This project closely examines the institutional platform of the court, and asserts that it is conducive to the strategic behaviour of individual justices in their interactions with their brethren.

The influence of strategic thinking on the part of individual justices is not limited to the collegial game. Such behaviour has important consequences for how policy making unfolds as well as for the upshots of this process. As will be demonstrated in this article, some of the most consequential decisions of the Israeli Supreme Court were at least partly a product of strategic decision making on the part of individual justices. Policy making in diverse domains (national security, state and religion and separation of powers, *inter alia*) was fundamentally affected by strategic thinking.

To make this argument, a theory about institutional prescriptions (and proscriptions) for judicial decision making is developed in the next section. Then, a formal model is constructed for the internal institutions on the Israeli Supreme Court and the incentives they create for justices to act strategically. This model is the first of its kind for the court. Predictions of the theory and the model proposed are juxtaposed with competing theoretical accounts in the two following sections. Finally, the internal institutions of the US Supreme Court are well studied, which makes it a good reference point. The analysis of decision making in the Israeli Supreme Court thus leads to a cross-sectional comparison with its American counterpart. In closing, this article demonstrates how the explanatory power of the proposed theory sheds new light on fundamental questions of universalistic versus contextual perspectives in social sciences in general and in comparative judicial studies in particular.

THEORY

The neo-institutional literature acknowledges the central role of institutions in political processes. Yet institutional analysis has focused on the effects of formal and informal institutional arrangements predominately on social
outcomes, for instance in elections, collective action problems, and property rights arrangements. The fact that institutions define a particular path for individual behaviour is largely overlooked. Most institutions, in particular those that govern the functioning of collegial bodies, not only define solutions to decision-making problems but while doing so also prescribe courses of action. Rational agents’ utilities, therefore, should not be defined by outcomes alone.

Institutions shape individual strategies with strings of actions they prescribe. Institutions define an action space through formal and informal constraints on individual behaviour. Rational agents who interact through the institution structure their actions accordingly. A secondary benefit from the path chosen (as opposed to the primary benefit from the outcome itself) is not inherently related to the outcome and may be of various natures. Those secondary benefits sway players’ utility, sometimes considerably.

In decision-making bodies in democratic systems diametrically opposed preferences are always present. In terms of individual utility, the final outcome of a decision-making process thus upsets at least a minority of the members. When the Supreme Court reaches a final disposition or when a bill passes, the final decision is rarely unanimous.

Through secondary benefits, institutions create a manoeuvring space for individuals. Using this space, individual players may change their utility functions. They might lose on the final outcome, but still gain (a great deal sometimes) from their actions earlier in the decision-making process. For members of a collegial body, therefore, the process of decision making and the secondary benefits it offers are consequential to their utility.

Strategic individuals would consider the final outcome alongside the paths that lead to it. For example, if legislative roll-call votes are recorded and made public, legislators might be motivated to vote rather than abstain even if their most preferred option has no chance of winning. Voting will serve as an identifier that allows them to secure secondary benefits in the form of campaign contributions, media coverage or the sympathy of voters. Likewise, even if in a minority, judges often prefer to express their views. Despite their costliness, dissenting opinions often carry significant secondary benefits. The types of secondary benefits are consequential to the kinds of strategic behaviours developed. For instance, as will be demonstrated shortly, in the Israeli and American supreme courts, disparate internal institutions prescribe different paths. Those in turn induce quantitatively as well as qualitatively dissimilar strategic judicial behaviour.

In the analytic framework offered, strategic behaviour in the same type of institution (courts in this case) would vary as a function of the specific institutional design and the particular action space it provides for actors. This is what will be referred to as institutionally induced strategic behaviour.
LEGAL, ATTITUDINAL AND STRATEGIC MODELS

To place the theory with respect to existing approaches, this section briefly describes the three major models of judicial decision making. The Legal Model of judicial decision making is what some would also call the Law School Model. People in the legal community tend to believe that this model explains how justices make decisions. Plain meaning of the constitution and the statutory texts, the intent of the framers (or the legislators), and stare decisis influence judicial decision making in this model. Under this doctrine, courts adhere to precedent. This ensures certainty, consistency and stability in the administration of justice.

Judges in the appellate or trial courts should find the legal model (and stare decisis in particular) binding. Supreme Court justices, on the other hand, might have more leeway for several reasons. Among other things, they serve on the court of last resort, their public accountability is tenuous, and they seldom have ambitions for higher posts. All these factors make it harder to constrain justices from voting according to their preferences. The Attitudinal Model, well established for the US Supreme Court (USSC), takes this last point a step further. Attitudinalists argue that judges’ ideological preferences are the major predictor of their votes. The notion of justices voting according to their preferences was disputed within the academic community. Both legal scholars and political scientists have found it hard to accept the attitudinal argument.

Despite some attempt to find a middle ground between the attitudinal and the legal models, Separation of Powers (SoP) scholars take yet a different view. Given the constitutional structure of checks and balances, in order to understand how judges decide cases one has to inspect the interrelations between ‘the legislative, executive and judiciary departments’. Justices are not free to vote according to their preferences. The various players and the court itself are rational, and therefore strategically rational. Unlike attitudinalists, SoP scholars claim that a utility-maximizing court takes the possibility of Congressional override into account when making decisions. The strategic model applies to courts of appeals, the US Supreme Court, and foreign courts.

Controversies concerning the fit of strategic models to describe how the court acts on the inter-branch level are omnipresent in the literature. Yet when it comes to the level of the collegial game, there is compelling evidence for the constraints imposed on justices. Constrained justices act strategically with their brethren, for instance during opinion assignment and opinion drafting.

The focus of this article is strategic behaviour at the level of the collegial game. The next section presents a formal model of the internal institutions of the Israeli Supreme Court and how they induce strategic behaviour when justices interact with each other. Given this model, the fourth section
includes an evaluation of the three models of judicial decision making presented here.

THE FORMAL MODEL

This section formalizes the collegial game on the Israeli Supreme Court (ISC), which illustrates how the institutions of the court and the decision-making paths they prescribe induce certain types of strategic behaviour. It also shows that the extent of this institutionally-induced strategic behaviour is bounded by the importance of the case.

Background, Overview and Assumptions

The model presented in this article is based on assumptions drawn from the literature and on the specific institutional platform in the ISC. In Israel, the judicial branch is divided into general-jurisdiction civil courts and special tribunals with specified jurisdictions. The ISC hears appeals from lower courts. In its capacity as the High Court of Justice the ISC sits as a court of first instance and final appeal. In this capacity it reviews the actions of the other branches. In the lack of an agenda-setting mechanism the HCJ usually hears more than 1,000 cases annually (the entire docket of the ISC exceeds 10,000 cases a year). Judges enjoy substantive independence and immunity as illustrated in the Basic Law: Judicature, and officially appointments are assured to be impartial. Nonetheless, various administrative aspects of the judiciary such as the budget are in the hands of the executive.

The fragmented Israeli political system in which contentious issues abound is conducive to a dominant court. Indeed, the ISC is second in power only to the almighty executive. The ISC is sometimes requested to review the actions of the other branches. With the level of adjudication of politics in Israel this is not rare. Movement for Quality Government v. Sharon is one example of the wide review powers the ISC exercises in its capacity as the HCJ.

The court has a pivotal position in the eyes of the public. Its influence on the other branches via its extensive review powers is also substantial. Consequently, the court perceives its function not only in settling disputes, but also as a guardian of the rule of law and fundamental values and as designer of substantive components of Israeli democracy.

Internal institutions, which are of particular interest for us, govern the collegial game on the ISC. Other than in special cases the Supreme Court sits in panels of three justices. Assignment to three-justice panels has been determined in recent years by a computer. The most senior justice is the President of the Court (PC), who is also the head of the Israeli Judiciary. The practice of Additional Review in the ISC enables the justices or potential petitioners to apply for Additional Review of a case previously
decided by the court. According to the Courts Act of 1984, Sign A, Article 30, Additional Review may also deal with a particular topic out of several discussed in a case. What is more, pursuant to the same Act, the PC, the Vice PC, and the original panel may order the expansion of the panel to an odd number of justices greater than three. Given this institutional design, the following assumptions are presented:

Assumption 1: Procedures of the court that extend beyond the original three-justice panel or individual actions such as opinion writing are costly.28

Assumption 2: A dissenting opinion is valuable.29

Assumption 3: A unanimous opinion is more consequential in political and jurisprudential terms.30

Assumption 4: Information about the court’s procedures as well as about preferences of the brethren is costless.31

FORMALIZING THE COLLEGIAL GAME—A GAME THEORETIC MODEL

The game is a two-player multi-stage game with perfect information. The behaviour of justices and the PC will be modelled when a majority (at least two justices) of the original panel disagrees with the PC. For simplicity this panel majority is modelled as an individual player called Maverick Justice (MJ). Notably, the conclusions remain unchanged when the collegial game is modelled as a three-player interaction, differentiating the two MJs who disagree with the PC.

The two players in the game are:

(1) President of the Court
(2) Maverick Justice—representing the majority of original panel members whose preferences on the case’s final disposition are opposite to those of the PC.

The extended form of the game is shown in Figure 1 and the game flows as follows: MJ first faces a choice between writing a sincere opinion (Write) and applying for an expansion (Apply). If MJ chooses to write a sincere opinion (i.e. MJ wins on the merits in the original panel), PC may choose to convert the final disposition (Convert) by deciding on an Additional Review. Alternatively PC may opt not to convert ( ~ Convert). The latter amounts to conceding to the original panel’s decision.

The prerogative of the PC to add justices to an existing panel (either in Additional Review or when expanding a panel) is consequential in terms of the final disposition. The ability to modify the panel’s personnel means influence on the final disposition. This is true even if the PC is not on the panel.
If MJ applies for an expansion, PC either expands the panel so that the expanded panel would decide to her (or his) liking (i.e. the PC acts to convert \((\text{Convert})\)), or expands the panel so that the expanded panel would decide in the same direction as the original panel would have (i.e. PC does not act to convert \((\neg \text{Convert})\)). If PC acts to convert \((\text{Convert})\) then MJ is left with a choice between registering a dissenting opinion \((\text{Dissent})\) and conceding to the new majority \((\text{Concede})\). If PC does not act to convert \((\neg \text{Convert})\) the game ends.

The utility of the players is a function of the following:

\(F_i\): The importance of the case to justice \(i\), \(i \in \{PC, MJ\}\), and \(0 < F_i \leq 1\). As a justice deems a case more weighty, \(F_i\) approaches the value of 1. Each actor has a private importance value, which is common knowledge.

\(V_i\): The value of the final decision of the court for player \(i\). The value of the decision is dichotomized.

\[
V_i = \begin{cases} 
1, & \text{if final decision is favorable to } i \\
0, & \text{if final decision is unfavorable to } i 
\end{cases}, \quad i \in \{PC, MJ\}
\]

\(U\): Value of a unanimous decision for the PC \((0 < U < 1)\)

\(D\): Value of writing a dissenting opinion \((0 < D < 1)\)

\(C_D\): Cost of writing a dissenting opinion \((0 < C_D < 1)\)

\(C_A\): Cost of Additional Review. This cost is the same for both players \((0 < C_A < 1)\)

\(C_E\): Cost of expanding a panel. Cost is uniform across justices \((0 < C_E < 1)\)
Additional Review involves added procedures. It may not only substantially delay the final decision, but, even worse, require the court to deal with cases it has previously decided and disposed of (i.e. those cases should be removed from the overcrowded docket). Returning these closed cases or settled issues for Additional Review entails substantial lingering of the processing of cases in a system whose justices are overworked as it is. Furthermore, overruling a previous decision of the court due to Additional Review introduces undesired inconsistency. I thus impose the following condition:

\[ 0 < C_E < C_A < 1 \]

The payoffs at the terminal nodes are calculated as follows: the importance of the case determines the utility from a particular decision of the court. Case importance also determines utilities from a dissenting opinion (for MJ) or from unanimity (for PC). Hence, in the utility function \( \Phi_t \) is multiplied by \( V, D, \) and \( U \). However, costs associated with expansion of the panel and writing opinions are not related to the importance of the case. Thus, cost parameters appear as additive terms.

**Proposition 1**

For \( \Phi_{MJ} > (C_D/D) \) and \( \Phi_{PC} > C_A \) the collegial game has a sub-game perfect equilibrium where the MJ applies for expansion, PC expands the panel and MJ writes a dissenting opinion.

**Strategy Induced by Institutions**

Proposition 1 illustrates the strategic interaction between MJ and PC. MJ applies for expansion instead of writing a sincere opinion because s/he knows that PC will expand the panel so that the expanded panel makes a decision favourable to the PC (if necessary via Additional Review) to secure her (or his) favourable final disposition. Since writing a dissenting opinion has value and \( C_A > C_E \), s/he prefers to apply for expansion. In turn, the PC expands the panel to convert its final disposition.

This finding fits in very nicely with the institutional theory in the first section. Strategic interaction on the ISC is possible because the institutions that govern decision making create two types of secondary benefits. Writing a dissenting opinion is one such benefit and the other is the ability of a justice to choose a decision path where s/he avoids being overruled. Two terminal nodes (apply–convert–dissent and write–convert–dissent) are Identical in terms of the final outcome—the MJ dissents from a disposition s/he dislikes. Yet the utilities in each differ. MJ’s utility is greater following expansion s/he initiated than following Additional Review. Because of the path taken, PC is better off at this terminal node as well. This is institutionally-induced strategic behaviour. The action space set by the institutional design prescribes certain paths and outcomes. Both paths
and outcomes influence utilities, which entails the specific strategic behaviours observed.

Strategy Bounded by Importance
One critical feature of the model is that the value of each case is endogenous to agents. Agents value outcomes and secondary benefits differently. Different justices, therefore, may engage in different strategic behaviours even in the same case. Formally, the equilibrium in Proposition 1 depends on costs and on subjective importance for agents. Costs \((C_D, C_A\) and \(C_E\)) are approximately fixed across cases. Thus, it is the relative importance of the case that determines whether apply–convert–dissent is a sub-game perfect equilibrium. When importance parameters are not sufficiently large, agents would settle on an unfavourable decision.

This observation too is in support of the institutional theory. A collegial setting as such does not intrinsically induce strategic behaviour. Only when (1) there are alternative paths to reach an outcome, (2) secondary benefits are available to amass along those paths, and (3) agents amply value the outcome and the secondary benefits to offset additional costs, should we expect strategic interaction.33

The importance of the case for MJ and PC determines the extent of strategic behaviour. With costs incurred regardless of case importance, whether a justice is willing to pay any additional cost (e.g. from registering a dissenting opinion) depends on the case’s weight in policy, jurisprudential and doctrinal terms. Since the importance of the case moderates the utility drawn from a dissenting opinion, MJ will play the equilibrium strategy only as long as

\[ F_{MJ} \ast (D) > C_D. \]

**Proposition 2**

For \(F_{PC} < (C_A / 1 + U)\), the collegial game has a sub-game perfect equilibrium where MJ always writes a sincere opinion and PC always accepts the decision of the original panel.

When a case is not sufficiently important to PC (relative to the cost of Additional Review), s/he would accept the decision of the original panel. If \(F_{PC}\) is sufficiently small, then, MJ will write a sincere opinion knowing that PC cannot afford \(C_A\). Taken together, propositions 1 and 2 define the range of strategic behaviour in the collegial game. Increased importance not only leads the PC and MJ to accept the costs associated with expanded panels, but also leads them to act strategically in order to minimize those costs (i.e. incur \(C_E\) instead of \(C_A\)) and maximize potential benefits (D). Alternatively, when \(F_{PC}\) is sufficiently small, MJ can afford to write a sincere opinion because s/he need not fear being overruled (PC does not deem the costs associated with Additional Review worth paying).
The analytic advantages in the Neo Institutional theory offered are now clear. The next section takes advantage of this approach to conduct a comparative analysis of the US and the Israeli Supreme Courts. Further, it demonstrates the superiority of the strategic account to competing Legal and Attitudinal models.

A CROSS-SECTIONAL ANALYSIS

The courts’ final disposition is a binary outcome. On this element of judicial decision making, different courts would greatly resemble each other. However, in the neo-institutional perspective employed here, it is the dissimilar paths of judicial decision making, induced by the difference in internal institutions, which are a key variable in accounting for differences in judicial strategic behaviour between courts.

The collegial game on the US Supreme Court is extremely well studied. A comparison of institutionally induced strategic behaviour in the Israeli and the American courts would not only show the benefits in the neo-institutional theory proposed here, but would also further illuminate aspects of decision making in the Israeli court.

This sort of comparative judicial work is original and markedly different from existing scholarship that structurally or functionally analyses courts and judiciaries as political institutions. Likewise, the approach employed here is dissimilar to other types of work such as those defined by Gillman as interpretivist and post-empiricist, or to studies dealing with cross-sectional analyses of the effect of public support and the court or more general analyses of the collegial game on courts.

Before delving into the cross-sectional analysis of the courts’ internal institutions it is necessary to make some brief comments about comparing these two courts. Both courts function as powerful elements with sizeable spheres of influence in their respective political systems. The exercise of judicial review is pivotal in both cases. Still, the constitutional structure in which each operates is different. Unlike the relatively coherent American presidential system, the Israeli parliamentary constitutional structure is an amalgam of basic laws and court-created institutions. Both judicial systems have taken from British traditions. However, here too there are considerable differences in the degree and types of influence of British law. Further, the Israeli system was influenced at its inception by additional legal traditions such as that of the Ottoman Empire.

Comparing Institutionally-induced Strategic Behaviours

In both the USSC and the ISC justices act strategically. Still, there are vast disparities between the meaning of strategic judicial behaviour in each. The reason lies with the dissimilar institutions that induce this strategic
conduct. Paying heed to the paths of decision making, and to the secondary benefits associated, provides insights into the workings of each court.

Decision making in panels, as opposed to decisions made by the whole court, is the single most important discrepancy in internal institutions, causing differences in strategic behaviours between the two courts. In the US court, decisions are made by the entire bench (i.e. in conference). The rest of the institutions are derivatives of the ‘conference’ institution. The primary benefit in this court would be winning on merit. The two major internal institutions producing secondary benefits that induce strategic behaviour are the Rule of Four (and related institutions such as dissents from denial) and opinion drafting.

In the Israeli court the forums in which decisions are made are panels. The rest of the internal institutions are offshoots of the ‘panels’ institution. Here, too, the primary benefit would accrue to justices from winning on the merits. Yet, the secondary benefits are ostensibly dissimilar. The two major internal institutions discussed here were the privilege to expand panels and the prerogative to decide on Special Review. As the formal model establishes, these institutions combined with the institution of dissenting opinions create secondary benefits, which in turn induce strategic behaviour.

The different internal institutional designs in the two courts prescribe disparate action spaces, paths of decision making and utility functions. As a result, the strategic behaviour of justices in each of the courts takes different forms. Secondary benefits in the US court relate to case selection, opinion assignment, and opinion writing. Secondary benefits in the Israeli counterpart relate to the possibility of writing a dissenting opinion and the ability to avoid Additional Review (and the potential inconsistency it entails) by applying for expansion.

This being said, there is some similarity in the strategic behaviours observed. Even if it was not purely driven by strategic considerations, Burger’s ability to suggest deterrence as the rationale for the Exclusionary Rule in his dissenting opinion in Bivens later facilitated the majority’s acceptance of this argument in Calandra. Burger’s goal was to narrow the scope of the Rule, which bore fruit in Leon and Nix with the ‘Good Faith’ and the ‘Inevitable Discovery’ exceptions respectively.

The ability of justices to use dissenting opinions to register their viewpoint, which they hope would transform into a controlling approach, is in many ways similar in both courts. Still, the value of the secondary benefit in dissenting opinions relative to the general incentive structure is different. In the Israeli court, where over 10,000 cases are decided each year, voluntarily adding another opinion to write would happen only when the payoffs are particularly high. With only 80 cases on their docket annually, American justices would be much more likely to register such opinions. Consequently, the frequency of dissenting opinions in the
American court is high whereas they are atypical in the Israeli counterpart. This lends further support to the contention that strategic behaviour will be substantially different (in frequency as well as in kind) in courts with dissimilar internal institutions.

A powerful theory would lend itself to testing with refutable hypotheses. The next subsection focuses on The Movement for Quality Government in Israel v. PM Sharon. Several refutable hypotheses are derived using this case, and the theory is juxtaposed with alternative Attitudinal and Legal accounts.

**Deriving Refutable Hypotheses – Juxtaposing the Models of Judicial Decision Making**

In light of Cheshin’s career-long crusade against corruption, which culminated in his abovementioned public address, it is argued that Cheshin acted strategically in *The Movement for Quality Government in Israel v. PM Sharon.* The institutional perspective does an excellent job explaining not only his behaviour in this case, but also the collegial interaction as a whole.

Let us take advantage of the formal model presented above and compare the predictions in this case from the three different models introduced above—the Legal, the Attitudinal and the Strategic. In the Legal Model voting is straightforward—one votes according to what one believes to be the governing law in the case.

**The Prediction of the Legal Model:** in the first stage of the game Cheshin would write a sincere opinion. This would be a two-to-one majority opinion in the original three-justice panel stating that Hanegbi should not be appointed. Let us empirically test this prediction—in this consequential case, the HCJ is asked to blatantly interfere with an internal matter of the recently elected executive. As the game demonstrates, in all likelihood such a sincere opinion would be overruled by an Additional Review. Indeed, such an opinion is never written.

**The Prediction of the Attitudinal Model:** in this case is indistinguishable behaviourally. If for different reasons (ideology rather than legal reasoning), Cheshin would write a two-to-one majority opinion striking Hanegbi’s appointment. Predictions of both the Legal and the Attitudinal models are refuted not only by the model but also by what actually took place in reality.

**The Prediction of the Strategic Model:** if Cheshin were strategic he would aim to maximize his utility in policy and jurisprudential terms (in terms of establishing his legacy as a fighter against corruption). Cheshin was determined to use the secondary benefit of a dissenting opinion (D) to promote his viewpoint. Jointly with Beinisch he realized early on that he was going to be on the losing side. The path taken, then, was crucially important. The cost Cheshin would incur due to an Additional Review
overruling his original sincere opinion \( C_A \) would greatly exceed the cost of panel expansion \( C_E \). The difference in utilities (despite identical outcome) determined how the institutionally induced strategic behaviour unfolded. Cheshin, the MJ, opted to apply for expansion and then published a resounding dissent without the risk of being overruled in an Additional Review. The MJ strategically secures substantial secondary benefits. This is exactly what we observe in reality. Through the testing of falsifiable hypotheses, it became clear that the explanation provided by the strategic model was far superior to the Attitudinal and Legal models.

CONCLUSIONS

Numerous ISC cases would lend themselves to analysis within the strategic framework offered here. In two cases decided less than a year apart the Israeli HCJ dealt with the military service of Yeshiva students. Is it possible that the PC changed his strategy after the first case \( \text{Rubinstein} \)? In \text{Rubinstein},\textsuperscript{51} somewhat similarly to \text{Movement for Quality Government}, as a member of the original three-justice panel, Cheshin applied for expansion and then wrote a lengthy opinion in addition to the majority opinion delivered by the PC for the expanded eleven-justice panel. In the next case, \text{Tzemach},\textsuperscript{52} possibly hoping for a unanimous opinion, the PC seem to have taken a pre-emptive action in the form of expanding the panel to eleven justices right from a very early stage in the decision-making process. Interestingly, this did not deter Kedmi from registering a dissenting opinion.

Strategic behaviour of Israeli justices was not limited to a single case. The scope of this article does not allow a thorough discussion and complete modelling of all such cases. Yet cases in which, at least prima facie, justices behaved strategically run the gamut of policy areas from national security and state and religion to separation of powers (e.g. \text{Ajuri, Public Committee Against Torture, Horev, Station Film Co.}, and an ‘expansion leading to conversion’ in \text{Hamas Deportation}).\textsuperscript{53}

Granted, in run-of-the-mill cases, strategic behaviour is unlikely—the stakes are too low (values for \( \Phi_{PC} \) and \( \Phi_{MJ} \) are too small). That said, employing the insights from the formal model does provide a fresh analytical perspective on a host of the court’s landmark decisions. Furthermore, the strategic behaviour has ramifications for policy making that went well beyond the collegial game.

In sum, the institutionally-induced perspective sheds new light on decision making on the ISC (with potential to serve as a fruitful analytic framework more generally, for instance for cross-sectional analyses). Furthermore, in sufficiently important cases it proves to be superior to alternative accounts. The effects of strategic thinking on the part of individual justices are not limited to the collegial game. Some of the most
consequential decisions in the history of the court were at least partly a product of strategic decision making on the part of individual justices. Policy making in diverse domains was fundamentally affected by the strategic thinking of individual justices. Including secondary benefits in modelling the utility of Israeli Supreme Court justices is thus vital to our understanding of their behaviour. What is more, in both the USSC and the ISC, focusing exclusively on the effect of the final outcome (the final disposition) on strategic behaviour and disregarding the path may be inaccurate.

In the broader context of the social sciences, and particularly in the context of comparative judicial studies, this work helps in shedding new light on a fundamental controversy. On the one hand, one finds the universalistic assumption ‘that institutions and individuals are naturally disposed to behave in certain ways under certain conditions’, and on the other hand is the understanding that ‘political behaviour is . . . embedded in particular historical and cultural contexts’—that is, ‘we can only begin to understand or explain behaviour if one takes into account the actual intention states of participants . . . and [their] circumstances’. Whether justices worldwide are strategic or not is not for this article to answer. Yet the institutional perspective offered here is a powerful tool to analyse differences in behaviour. It might be the case, as has been shown for the US and Israeli courts, that justices in both systems are strategic in the sense that their present actions are influenced by what they deem likely down the road. This behaviour, however, is institutionally induced and therefore may take more than one form. Under dissimilar institutional designs, acting strategically would connotate different things in different systems even in the same type of institution (courts in this case).

NOTES

1. HCJ 1993/03.
2. HCJ 1993/03, see p. 434.
15. Epstein and Knight, *Choices*.
28. Given the size of the ISC’s docket, it is fair to assume that Israeli justices have their hands full. Because of the heavy workload, any additional task or procedure implies costs in terms of time and other resources. Additional Review, panel expansion and opinion writing are thus all costly.
29. Opinions can have an impact not only on jurists, but also on public officials, public opinion, interest groups and political parties (Murphy et al., Courts, Judges, and Politics). Dissenting opinions are potentially as consequential (e.g. Brandeis's dissenting opinion in Olmstead).

30. A dissenting opinion indicates disagreement on the panel. The norm of unanimity is meaningful to justices, Lee Epstein, Jeffrey A. Segal and Harold Spaeth, 'The Norm of Consensus on the US Supreme Court', American Journal of Political Science, Vol. 45, No. 2 (2001). And the pristine example is the adoption of this norm in the Marshall Court (see also Warren’s unanimous Court in Brown). A dissenting opinion, therefore, while valuable (Assumption 2 above), is also costly by virtue of the deviation from the unanimity norm it entails.

31. Hammond et al., Strategic Behaviour.

32. Proof of proposition 1: Since the collegial game is modelled as a perfect information multi-stage game I can employ sub-game perfection as my solution concept. Proposition 1 defines a sub-game perfect equilibrium where MJ applies, PC expands and MJ dissents. For this strategy profile to be a sub-game perfect equilibrium, players should not expect higher payoffs if they found themselves off the equilibrium path. This requires that PC expands if MJ writes. Therefore I must have \( \Phi_{PC}(1) - C_A > 0 \) and \( \Phi_{PC}(1 + U) - C_A > 0 \). Since \( \Phi_{PC}(1 + U) - C_A > (\Phi_{PC}(1) - C_A) \) for all \( U > 1 \), I need \( \Phi_{PC} > C_A \) for PC never to play 'not Convert' if MJ writes. By the same token, for PC never to play 'not Convert' if MJ applies, I need \( \Phi_{PC}(1) - C_E > -C_E \). This is always true for all \( C_E > 0 \).

Now, for the MJ, MJ should find dissent profitable if PC expands the panel. This gives two conditions: \( \Phi_{MJ}(0 + D) - (C_A + C_D) > -C_A \) and \( \Phi_{MJ}(0 + D) - (C_E + C_D) > -C_E \). Then, \( \Phi_{MJ} > (C_D / D) \) guarantees that MJ will dissent.

33. Granted, agents might act strategically without alternative paths or secondary benefits. This, however, is true only as long as the subjective value of outcomes alone is sufficient to offset costs.

34. Proof of proposition 2: Similar to the proof of proposition 1, I just need to show that PC will always accept if MJ writes. Since MJ will always prefer his sincere opinion being accepted by the PC, as long as he knows PC will not expand to convert via Additional Review, he will play Write. Then I need, \( \Phi_{PC}(1 + U) - C_A < 0 \) and this gives us the condition \( \Phi_{PC} < (C_A / 1 + U) \). As long as this condition is satisfied, strategy profile described in proposition 2 is a sub-game perfect equilibrium of the collegial game.

35. This might be part of the reason why past comparative judicial work structurally or functionally analysed courts and judiciaries as political institutions.


37. Murphy, Elements; Maltzman et al., Crafting Law; Hammond et al., Strategic Behaviour; Lax, ‘Constructing Legal Rules’.

42. Eskridge, ‘Reneging on History’; Yadlin, ‘Judicial Discretion and Judicial Activism’.
43. 403 U.S. 388.
44. 414 U.S. 338.
45. 468 U.S. 897.
46. 467 U.S. 431.
47. HCJ 1993/03.
48. Ibid.
49. Segal and Spaeth, The Supreme Court and the Attitudinal Model; Segal and Spaeth, ‘The Influence of Stare Decisis’.
50. It goes without saying that justices on the majority or the PC himself did not endorse a different viewpoint on corruption. Yet in the greater scheme of things it seems that Barak deemed avoiding collision with the executive more important than the corruption issue in this case.
51. HCJ 3267/97 Amnon Rubinstein v. Minister of Defense.
52. HCJ 6055/95 Sagi Tzemach v. Minister of Defense.
53. HCJ 7015/02 Ajuri v. IDF Commander; HCJ 5100/94 Public Committee against Torture v. The State of Israel; HCJ 5016/94 Horev v. Minister of Transportation; HCJ 4804/94 Station Film v. The Film Review Board.