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*Rationality and Society* 2010 22: 55

DOI: 10.1177/1043463109346469

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# THE RELATIONSHIP BETWEEN THE SUPREME COURT AND PARLIAMENT IN LIGHT OF THE THEORY OF MOVES: THE CASE OF ISRAEL

Assaf Meydani and Shlomo Mizrahi

## ABSTRACT

The relationship between the Supreme Court and the legislature has been studied from various angles. This paper develops a dynamic model using the Theory of Moves. The model is then applied to a path-dependence analysis of the relations between the Supreme Court and the parliament in Israel between 1970 and 2007. While at the beginning of this period the Supreme Court limited the ability of citizens to appeal in matters concerning decisions of the parliament and the government, by the end of the period it had expanded this ability significantly, thus implementing an informal policy of procedural judicial activism. More specifically, the empirical analysis traces three turning points in the path-dependence analysis, which can also be explained and understood as temporary equilibria in the dynamic interaction ultimately leading to a stable equilibrium.

KEY WORDS • Israel • law and politics • new institutionalism  
• Supreme Court • Theory of Moves

## 1. Introduction

The relationship between the Supreme Court and the legislature has been studied from various angles in recent decades (Schubert 1965; Jabbari 1992; Tate and Vallinder 1995; Gilman 1996–7; Baum 1997; Flemming and Wood 1997; Feeley and Rubin 1998; Clayton and Gillman 1999). Besides sociological explanations (Parsons 1962; Nonet 1976) which can be traced back to the 1960s, the latest research attempts to analyze the strategic interactions between these players. Various studies apply empirical methods to characterizing Supreme Court decisions and generalizing about the required conditions for applying the preferred

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<http://www.sagepub.co.uk/journalspermissions.nav>, Vol. 22(1): 55–82.  
<http://rss.sagepub.com> DOI: 10.1177/1043463109346469

strategy (Landes and Posner 1975; Mishier and Sheehan 1993; Kilwein and Brisbin 1997; Voight and Salzberger, 2002), while others develop static game models for predicting the equilibrium in these relations given certain structural conditions and behavioral assumptions (Gely and Spiller 1990; Eskridge and Ferejohn 1992; Segal and Spaeth 1993; Epstein and Walker 1995; Epstein and Knight 1997; Segal 1997). Yet, such studies have rarely created a dynamic model which can capture historic moves in a way that illuminates the impact of structural changes on the moves of players and vice versa. In this paper we develop such a dynamic model using the Theory of Moves framework (Brams 1994). The model is then applied to an analysis of the relations between the Supreme Court and the parliament in Israel.

The Theory of Moves (TOM) suggests a rationale for a dynamic process analysis within a static game (Brams 1994). Given a certain preference ordering presented in a game matrix, the approach provides several basic rules for analyzing the sequence of moves of the players in a particular interaction. One of its main features, as compared to 'standard' game theory, is the endogeneity of the order of moves (Brams 1994; Goyal 1997; Woerdman 2000). Practitioners of the standard theory recognize that outcomes in games are sensitive to the order of player actions. However, the specification of any particular sequence of moves requires the modeler to acquire a great deal of information about the players and structural factors, a requirement which is typically not satisfied in practice. In TOM, the order of moves is endogenous, meaning that the moves and counter-moves are decided by the players given the structure of the game and their preference ordering. This characteristic is especially important for modeling and explaining strategic interactions which spread over long periods of time. In such cases we can hardly construct the order of moves in advance and thus any strategic model may be incomplete. On the other hand, traditional approaches of path-dependence analysis developed in the context of historical institutionalism focus on structural explanations while the strategic interactions between players are relatively marginalized (North 1990; Pierson 1995; 2001; Pierson and Skocpol 2002; Katzenelson and Weingast 2005). Applying TOM to the analysis of long-term historic relations between two players provides us with the foundations of a game theory for a path-dependence historical analysis at the macro level. Furthermore, a path-dependence institutional analysis is usually case-sensitive while a game theoretical modeling allows generalizations. In that respect we follow Weingast (2005) who integrated rational choice institutionalism and historical institutionalism (Katzenelson and Weingast 2005).

These analytical tools will be applied to the explanation of the transformation of the relations between the Supreme Court and the parliament (Knesset) in Israel between 1970 and 2007. While at the beginning of this period the Supreme Court limited the ability of citizens to appeal in matters concerning decisions of the parliament and the government, by the end of the period it had expanded this ability significantly, thus implementing an informal policy of procedural judicial activism (Mautner 1993; Barzilai 1998; Mizrahi and Meydani 2003; Cohn and Kremnitzer 2005). In effect, during this period the relations and the institutional equilibrium between the Supreme Court and the parliament were significantly transformed.

The paper develops as follows. In the next section, we review the literature regarding TOM analysis and its integration in institutional analysis. We describe the relations between the political system and the Supreme Court and give common explanations specifically for the case of Israel. In the third section, we discuss the TOM framework and outline the game theory model that describes the relations between the Supreme Court and the parliament. In the fourth section we present an empirical application of the model to the Israeli case up until 2007, citing rulings and central events which shed light on the turning points in the relations between the Supreme Court and the Knesset. We conclude with some future scenarios.

## **2. Theory of Moves, new institutionalism and the relationship between law and politics**

This section presents the theoretical background for modeling the relationship between the Supreme Court and the legislature using TOM. We first present the new institutional approach and then discuss the core aspects of TOM. We suggest that an analysis using TOM can bridge the gaps between historical and rational choice institutionalism. In the second part of this section we discuss the relationships between law and politics. We conclude by presenting the central arguments regarding these relationships relevant in the Israeli case.

### *Theory of Moves in the context of new institutionalism*

In recent decades new institutionalism has evolved as a central theoretical approach in the social sciences. The premise of the institutionalist perspective is that existing policy design constrains policy development

through 'policy feedback' processes that allocate resources, shape incentives, and generate interpretive frameworks (Pierson 1995). An existing coalition of interests in favor of a certain status quo, for example, may create a 'lock-in effect' that impedes significant institutional changes (Pierson 1995). Significant institutional changes occur when a society reaches a critical juncture in its historical development (Streeck and Thelen 2005). Scholarship has focused on the relationship between institutional change and powerful economic, political, and ideological forces as well as their impact on policy outcomes (Béland 2007). There are two main institutionalist branches – rational choice and historical institutionalism.

Historical institutionalism is grounded in the assumption that unique initial conditions which then develop over time construct a set of institutional constraints and opportunities that affects the behavior of political actors and interest groups involved in the policy process (Orloff 1993; Pierson 1995; Orren and Skowronek 2004). Historical institutionalism focuses on asymmetrical power relations and the impact of long-term institutional legacies on policy making and applies path-dependence analysis (North 1990; Steinmo et al. 1992; Hall and Taylor 1996). Rational choice institutionalism focuses on rational actors pursuing their preferences within political institutions in order to strategically maximize their interests and utility (Weingast 2005).

It follows that historical conditions are essential for analyzing strategic interactions between players, while explaining these interactions is necessary for understanding long-term processes. In other words, historical processes and structural conditions clearly affect the players' preferences and the initial conditions of each strategic interaction at a given point in time, yet these historical conditions alone cannot provide sufficient explanations for the players' strategic moves. Furthermore, a path-dependence institutional analysis is often case-sensitive, meaning that the possibility of generalizations is relatively limited. This interpretation points to a gap between historical and rational choice institutionalism that is well recognized in the literature. In this paper, we suggest that TOM can help bridge this gap because it allows the integration of processes, structural factors, individual interests and strategic moves. Such integration has been used by various scholars to explain institutional change (Katzenelson and Weingast 2005; Weingast 2005). The model developed here offers a link between structural and social factors, studied in the context of historical institutionalism (Pierson and Skocpol 2002; Streeck and Thelen 2005), and individual rational behavior studied in the context of rational choice institutionalism and public choice theory.

TOM provides unique tools for institutional analysis in three ways (Brams 1994). First, it takes into consideration the history of a particular interaction and sets an initial state for the analysis. Second, it provides rationales for a dynamic analysis within the framework of a static game matrix. Third, the dynamic analysis helps explain long-term historical processes that ordinary game theory models cannot. As explained above, historical institutionalism tends to focus on macro-level structural explanations, thus neglecting micro-level political explanations.

According to this approach, the relationship between two players and their preferences is first described by a static game matrix (Brams, 1994: 24–8). The dynamic analysis of the game starts with an existing result called the initial state. This state is set by the equilibrium in the standard static matrix. The definition of the initial state depends in part on the process we want to analyze and on the time frame in question. At this point, each of the players can independently alter his or her strategy, thereby changing the initial state to a new state. The player who changes a strategy is called player A. Player B can respond with an independent change of strategy, thereby shifting the game to a new state. The responses and counter-responses continue until the player whose turn it is to move decides not to change strategy. When that happens, the game ends in a final state, which is the equilibrium of the game. A rational player will not alter the initial state if such a move (a) leads to a final state which is less preferable, or (b) returns the game to the initial state. Assuming that each player has full access to information on the preferences of the other player, each player takes into account the rational moves of the other and weighs them before deciding on his or her moves. A game in TOM is solved by means of backward induction on the basis of those rules. The resulting stable outcome is called a Non-Myopic Equilibrium – NME (Brams 1994: 33). The stability of this equilibrium demands that neither player has the incentive to change to a different strategy, as long as the other player does not switch. From each initial state there is an outcome of the move–counter-move process.

In TOM, the order of moves is endogenous, meaning that the moves and counter-moves are decided by the players given the structure of the game and their preference ordering. This characteristic is especially important for modeling and explaining strategic interactions which extend over long periods of time. In such cases we can hardly construct the order of moves in advance and thus any strategic model may be incomplete. We suggest utilizing that insight, which is particularly important for a path-dependence institutional analysis.

TOM has been criticized on a variety of counts. Goyal (1997) argues that the analysis of dynamic games in standard theory certainly allows for players to calculate the implications of their moves for their opponents' moves and so on. It is important to mention, however, that dynamic games usually do not assume a certain historical initial state and thus the application for real-world situations is limited. Goyal (1997) also criticizes the NME for being sensitive to the initial state, claiming that TOM does not provide a satisfactory account of how the initial state is determined.

Vincent (1995) criticizes the impossibility of simultaneous moves in TOM, and Furth (1995) criticizes the lack of mathematical rigor and consistency in trying to deal with the shortcomings of traditional game analyses. To a large extent, most of these criticisms and limitations of TOM can be regarded as advantageous for using game theory in an historical–structural analysis. Such analysis requires general models with enough flexibility so they can be applied to various situations.

An important critical assessment of the rationality concept and the solution concept in TOM is offered by Woerdman (2000). Concentrating on the analysis of the Prisoner's Dilemma Game (PDG), Woerdman (2000) argues that Brams's (1994) analysis of PDG includes interpretations which are not necessarily consistent with the concept of individual rationality. Specifically, Brams shows that in the PDG mutual cooperation will emerge in TOM from all initial states, except the initial state of mutual defection (2, 2). However, this conclusion is reached by introducing Two-Sidedness Convention (TSC) and the concept of magnanimity. According to TSC, a player is advised to make a (one-sided) irrational move in order to avoid a Pareto-inferior precedence move by the other player. The concept of magnanimity is closely related to TSC. It can be defined as an outcome  $M$  in which one player receives his or her next-best payoff and the other receives a payoff superior to the status quo (Brams 1994: 75). Woerdman (2000) then argues that the TSC and magnanimity are not based on individual rationality but, rather, introduce an element of collective rationality into TOM. However, he argues that the conflict between individual or one-sided and collective or two-sided rationality is the very essence of the PDG. It follows that these two concepts add a certain interpretation to the six basic rules of TOM, while other interpretations may lead to other results. In the current paper, we base our analysis on the six basic rules of TOM, avoiding further interpretations or solution concepts suggested by Brams (1994).

Thus, in this paper we suggest an integration of TOM into institutional path-dependence analysis in a way that allows us to analyze both

strategic calculations and moves and historical and structural conditions. We now discuss the relationship between law and politics as a basis for our model.

### *The relationship between law and politics*

The relationship between law and politics has been studied since the time of the ancient Greeks. The traditional literature has discussed the place and role of law in human society, usually from a normative perspective. The sociological approaches developed in the second half of the twentieth century see the law and the legal system as social phenomena which should be analyzed using sociological methods. The scope of approaches ranges from those who view the law and the legal system as one of the instruments of the ruling class to those who view them as originating from common social rules independently of the state, while others view them as decisions made by state institutions (see for example: Llewellyn 1962; Holmes 1984). Others view the Supreme Court as an interest group that attempts to advance its own sectorial goals (Schubert and Danelsky 1969; Tapp and Levine 1974; Schubert 1985). From a sociological perspective, the Supreme Court is often viewed as contributing to a certain social equilibrium (Parsons 1962; Becker 1964; Black 1972; Nonet 1976). Parsons (1962) argues that since Supreme Court rulings are often on controversial issues, politicians and interest groups may try to restrain it. Indeed, Turk (1976) argues that the Supreme Court does not solve conflicts but, rather, creates and even intensifies existing conflicts, identifying the conditions that contribute to such situations. Thus, most of the sociological literature does not regard the Supreme Court as a political player with an independent agenda.

These approaches have two main shortcomings. First, by assuming that social structures determine individual behavior these approaches significantly marginalize the role of individuals and their impact on social reality. Second, this marginalization of the impact of individuals on outcomes leads to a deterministic analysis. In this paper we develop an approach that emphasizes methodological individualism.

Indeed, researchers of law and politics have gradually been moving towards the individualistic approach. This tradition began with the studies of Pritchett (1948) and Murphy (1964) but became central in the field of law and politics only during the 1990s (Segal and Spaeth 1993; Epstein et al. 1994; Epstein and Walker 1995; Gilman 1996-7; Baum 1997; Epstein and Knight 1997; Feeley and Rubin 1998; Smith 1998).



These studies combine judges' preferences and strategies with extra-judicial structural and institutional influences, thus explaining the ways in which institutional structures shape judicial policy.

From an individualistic (or rational choice) perspective, Supreme Court judges may certainly have interests independent of those of certain social groups or elites. Since they are part of a bureaucratic organization, they are most likely interested in preserving their organization's power and authority (Weber 1958; Downs 1967; Bendor 1990; Breton 1995). Yet, due to the separation-of-powers principle that gives the Supreme Court a monopoly on interpreting the law, the Supreme Court is not an ordinary bureaucratic organization. Rather, due to its unique role, the Supreme Court is often a political player – usually as a result of socio-political processes that create incentives for the Supreme Court to become an active political player (Mautner 1993; Edelman 1995; Barzilai 1999; Dotan and Hofnung 2001; Mizrahi and Meydani 2003). Since the authority of the Supreme Court and the structure of the system differ from one country to another, it is difficult to make generalizations regarding Supreme Court behavior without referring to the structural variables in a particular setting.

New positive theories of the judiciary suggest two widely accepted conceptions of Supreme Court behavior (Segal 1997; Hausegger and Baum 1999). The 'attitudinal model' suggests that justices vote for the positions most consistent with their personal policy preferences, given that the institutional structures allow sincere voting (Segal and Spaeth 1993). In contrast, rational choice theory views High Court justices as players who act strategically to advance their goals (Gely and Spiller 1990; Eskridge and Frickey 1994; Schwartz et al. 1994; Hausegger and Baum 1999). In order to minimize the possibility of congressional override, justices often adjust the Supreme Court's doctrinal positions and do not vote according to their sincere preferences. Within this framework, Yadlin (2002) suggests viewing judicial activism as a strategic move which attempts to increase the Supreme Court's independence and strengthen the norms derived from the Supreme Court's rulings.

Epstein and Knight (1997) found that in more than half of the cases judges change their decisions in a way which does not reflect their personal preferences. They conclude that judges generally follow their personal preferences but they are constrained by various structural factors – both intra-organizational interests, such as the necessity to build coalitions, and extra-organizational factors, such as the limitations placed upon them by state players and the general public. Overall, however, judges strive to maximize their interests. In contrast to this study,

Feeley and Rubin (1998) suggest that judges may change their attitudes and preferences due to structural and institutional influences.

Segal (1997) compares the sincere and sophisticated models of voting behavior by Supreme Court justices using a variety of tests on the votes of US Supreme Court justices in statutory cases decided between 1947 and 1992. He finds some evidence of sophisticated behavior, but most tests suggest otherwise. Segal then concludes that justices overwhelmingly engage in rationally sincere behavior. That is, justices are not sincere players by nature. Rather, when they adopt sincere behavior, it is because the institutional structures allow them to do so and still keep their interests unharmed. Segal limits his conclusions to the US Supreme Court, making it clear how differences in structural conditions can explain differences in the behavior of Supreme Court judges.

In comparison, Israel has a parliamentary system with relatively strong party control over its members. For many years the country had a single majority party and the judiciary does not have constitutional powers (Shetreet 1994; Mautner 2002). Yet, although the Israeli Supreme Court is expected to adopt strategic behavior and restrain itself, since the 1970s it has adopted an orientation of judicial activism, increasing its involvement in policymaking and in politicians' decisions. In the following sub-section we describe the various approaches for analyzing the relations between the Supreme Court and the political system in Israel.

### *The Supreme Court and the political system in Israel – central arguments*

The Israeli Supreme Court is one of the most significant political power groups in Israel, yet its real power is less than its potential power. In recent decades the Supreme Court has gradually increased its involvement in public and political issues, taking a much more activist approach during the 1990s (Barak 1993; Shamir 1994; Barzilai 1999; Hofnung 1999; Mautner 2002; Barak-Erez 2003). The number of appeals and bills of rights initiated by judges grew significantly, thus triggering controversies over the role and place of the Supreme Court in Israel. This trend can be exemplified by Supreme Court rulings in cases such as the 'Torture Case' (Public Committee against Torture in Israel v. The State of Israel – 1999) and the 'Land Case' (New Discourse Movement et al. v. Minister of National Infrastructure et al. – 2002). Furthermore, in many cases politicians themselves appeal to the Supreme Court, calling for its intervention in the activity of the legislative and

executive authorities. By doing so, they actually weaken the political system and hence also weaken their own power. This behavior seems to contradict politicians' self-interest.

Specifically, Supreme Court rulings in cases such as the 'Moshavim Case' (United Mizrahi Bank v. Migdal Cooperative Village – 1995), the 'Israel Investment Managers' Case' (Investment Managers' Bureau v. The Minister of Finance – 1997) and the 'Zemach Case' (Sagi Tzemach v. Minister of Defense – 1999) show the transformation in the delicate relations between the legal and the political systems. In these cases, the Supreme Court, which did not have constitutional authority of any kind, decided to abolish a parliamentary law, thus signaling its activist approach. This activism was also expressed in the flexible attitude towards the question of *Standing* and the Supreme Court's willingness to hear appeals in areas that had been left to social bargaining in the past. This willingness also led to several debated rulings as, for example, in the case of Ka'adan (Ka'adan v. Israel Land Authority – 1995), Alice Miller (Alice Miller v. Minister of Defense – 1994) and the recruitment of yeshiva students (Rubinstein and Ressler v. Minister of Defense – 1997, 1998).

The question of judicial activism in Israel has fomented a major controversy among legal scholars who concentrate on formalistic aspects. In practice, legal terminology can be interpreted by the Court according to its interests or ideology and therefore, the Court's behavior is determined by one legal term or another. Good examples are the legal terms *Standing* and *Justiciability*, which have been conservatively interpreted in the past, while since the 1980s, they have been liberally interpreted. The term *Standing* expresses the right to be heard by the Supreme Court. During the 1950s and 1960s people who filed a petition were required to show that they had a real and direct personal interest in the issue and Courts were very strict in interpreting this requirement. Similarly, the Court interpreted very strictly the question of whether a certain appeal could be judged in a Court or was instead a matter for political decision making. As mentioned, since the 1980s these two criteria have been interpreted very broadly, meaning that they have no longer served as effective filtering mechanisms (Gavison et al. 2000). The model developed later in this paper will explain these transformations.

The sociological analysis of Israeli reality does not provide comprehensive explanations of judicial activism. Researchers tend to focus on the efficiency of the positive law as expressed in the Court rulings vis-à-vis the legislators' intent, the behavior of policy implementers, and social interests and conflicts. Three emphases can be identified: the

emphasis on social values and partisan–structural factors (Barzilai, 1998); the emphasis on relations and interests among the ruling elite (Higley and Field 1980; Shapiro 1984; Etzioni-Hallevey 1997); and the emphasis on cultural factors (Mautner 2002).

The diversity in legal–political literature points to the complexity of the reality and to the fact that Supreme Court–Knesset relations should be understood as part of the interaction between a number of players – bureaucrats, politicians, interest groups and the general public – operating in the context of particular structural and cultural conditions (Mizrahi and Meydani 2006; Doron and Meydani 2007). We now suggest a dynamic game theory to describe these relations.

### **3. The relationship between the Supreme Court and the Parliament in Israel – an analysis based on the Theory of Moves**

In this section we model the complex dynamic interaction between the Supreme Court and the Israeli parliament (Knesset) using TOM (Brams 1994). The game and analysis developed here are clearly applicable to any system with proportional representation and other structural conditions similar to those of Israel.

#### *Game description*

The active players in the game are the Supreme Court, composed of 14 judges, and the Knesset, which includes 120 members elected by a proportional voting system. These institutional players have operated since the establishment of the State of Israel in 1948; however, over the years they have changed their strategies. In this section we model their strategies and preferences and explain the theoretical rationale behind their moves, while in the next section we demonstrate how these moves were actually carried out.

Let us begin with the Supreme Court, which can adopt two possible strategies in its relationship with the Knesset: the implementation of judicial activism (C1) and the judicial middle ground (C2), i.e., the implementation of judicial activism in certain issues, such as human rights (freedom of expression), religion (membership of women in religious councils), together with judicial self-restraint on issues of security (occupied territories, military operations) and the Israeli Knesset (practical immunity, regulation of the Knesset). In principle, the Supreme

Court can adopt a third strategy of complete judicial self-restraint, but then it cannot be regarded as a political player with independent interests. Therefore, we do not include this strategy in the game.

Politicians also have two possible strategies in their relationship with the Supreme Court. They may adopt a tough-minded approach towards the Supreme Court, meaning that they restrain Supreme Court activity through legislation (P1), or a flexible approach, meaning that they allow judicial activism to a certain degree, which occasionally may be very high (P2). By being flexible, politicians allow partial judicial independence through legislation that would permit petitions to the High Court on certain issues. Laws such as Basic Law: The Dignity and Freedom of Man and Basic Law: Freedom of Occupation are examples of legislative activism. Such laws contrast with the one granting jurisdiction to rabbinical courts in matters of marriage and divorce, which limits the role of the High Court in this area. Clearly, legislators may also allow widespread judicial activism through permissive legislation. However, by doing so they completely give up their independent political status, so they cannot be regarded as autonomous legislators. Therefore, we do not include this strategy in the game.

Given these strategies, the interaction between the two players creates a  $2 \times 2$  game matrix with four possible outcomes. In ordering the players' preferences for these outcomes, we follow several basic assumptions.

The relationship between the Supreme Court and the Knesset is not formally specified in Israeli law. Tension and potential conflict between these players arise when the Supreme Court is asked by various petitioners to intervene in the legislative activities of the Knesset. By doing so, the Supreme Court dons a political hat, the hat of the authority that allocates values or sets priorities (Posner 1993). The struggle over the allocation of values is a struggle between powers. Furthermore, one can certainly assume that the Supreme Court, like the political system itself, is interested in obtaining power and gaining dominance in the setting of policies.

Given that the two players seek power and control over policy making processes, both of them also need public support and legitimacy for their operation. With regard to public attitudes, there are indications that the Israeli public backs the principle of a separation of authorities and is aware of the role and importance of the independence of each authority (the legislative, the executive, and the judiciary) as well as its contribution to the balance and equilibrium of powers (Barzilai et al. 1994). Therefore, the outcome that would be the most preferable for the public

		P (Politicians)	
		P1 Tough	P2 Flexible
C (Supreme Court)	C1 Implementation of activism	(2, 2)	(4, 1)
	C2 Middle judicial approach	(1, 3)	(3, 4)

Figure 1 includes dashed arrows indicating preferences: a horizontal arrow from (4, 1) to (2, 2), a vertical arrow from (2, 2) to (1, 3), a horizontal arrow from (1, 3) to (3, 4), and a vertical arrow from (3, 4) to (4, 1).

**Figure 1.** The players' preferences and the game matrix of the relations between politicians and the Supreme Court – a dynamic analysis

is one that creates a delicate balance between each authority. Too much permissiveness on the part of the politicians will be viewed as a desire to limit the Knesset's power. The reverse is also true – too much legislative restraint will be regarded as an attempt to limit the power of the judiciary.

With regard to the players' cost–benefit calculation, we assume that both players seek dominance in policy-making processes, want to maximize public support, and to minimize the risk of conflict with the other player. Since the Supreme Court is primarily influenced by public opinion, interest groups and politicians themselves, it is in the Court's interest to increase its public support as long as the risk of possible conflict with politicians is small (see also Voight and Salzberger 2002; Yadlin 2002). For the politicians, gaining dominance in policy-making processes outweighs a decline in public support and an increase in the risk of conflict combined. Such dominance enables politicians to meet voters' demands and increases public support, while the balance of influence among powers has only an indirect and weaker influence on public support. In other words, a voter whose demands are met by the politicians cares little about potential harm to the balance of power. Thus, politicians will favor public support in the present over a potential future risk.

The ordering of the players' preferences for the four outcomes of the game is presented in a game matrix in Figure 1. Based on the assumptions given above, the ranking of politicians' preferences from best to worst is C2:P2; C2:P1; C1:P1; C1:P2 (ranking number 4, 3, 2, 1

respectively). The worst outcomes from the perspective of the politicians will utilize the strategies of C1 (judicial activism implemented by the Supreme Court). These outcomes express the loss of dominance in the setting of public policy from the point of view of the politicians. Given judicial activism (C1), politicians are better off adopting a tough-minded approach (P1) towards the Supreme Court rather than a flexible approach (P2). The politicians receive their best payoffs when selective judicial activism is implemented by the Supreme Court (C2). Under this condition they are better off being flexible (P2) than being tough-minded (P1) towards the Supreme Court. Although these outcomes imply some loss of dominance, politicians who use a flexible approach earn public support and reduce their levels of conflict with the Supreme Court.

The ranking of Supreme Court preferences from best to worst is C1:P2; C2:P2; C1:P1; C2:P1 (ranking number 4, 3, 2, 1 respectively). The Supreme Court is better off when politicians adopt a flexible attitude towards the Court. In that case, it can benefit from both public support and reduced conflict. Given politicians' flexibility (P2), the Supreme Court is better off exercising judicial activism (C1) than adopting a judicial middle ground (C2) because in the former case it also maintains its dominance in policy making. A similar rationale applies when politicians adopt a tough-minded approach (P1) towards the Supreme Court. In that case as well the Supreme Court is better off exercising judicial activism (C1) than adopting a judicial middle ground (C2) because in the former case it has public support for maintaining the balance of power between authorities.

### *Equilibrium analysis using the Theory of Moves*

A simple analysis of the normal form of game theory shows that the Supreme Court (C) has a dominant strategy, C1, while politicians do not have a dominant strategy. Yet, given complete information, politicians can anticipate that the Court will choose its dominant strategy and then choose P1 as their preferred strategy leading to a unique Nash equilibrium (2, 2).

Since the relations between the players formally began with the establishment of the State of Israel in 1948, we have to determine the historic conditions at that point in time. Yet, given the high level of political and bureaucratic centralization in Israel until the late 1960s, the Supreme Court did not play an effective independent political role (Witkon 1965; Shapiro 1984; Horowitz and Lissak 1990).

However, since the structural conditions changed in the late 1960s, the Supreme Court has become a political player with independent interests. At that point in time it performed judicial middle ground (C2) while politicians had been tough towards the Supreme Court (P1). Thus, the initial state can be historically set at (1, 3). As shown in Figure 1, this outcome is the worst one for the Supreme Court, which can improve its payoff by changing its strategy from C2 to C1. Politicians are not expected to change their strategy in response because then they will receive their worst payoffs (1) while the Court will receive its best payoffs, meaning that it will not move further. Thus, TOM analysis predicts that starting from (1, 3) as the initial state, when the Court moves first the outcome will be (2, 2). However, when politicians move first, they acknowledge that by changing from P1 to P2 they improve their outcome from 3 to 4. Since the Court also improves its payoff from 1 to 3 and can expect counter-moves to lead to (2, 2), the Court prefers to stay at (3, 4). We thus expect that when politicians move first the stable outcome (3, 4) will be achieved when the Court performs judicial middle ground (C2) while politicians are flexible towards the Supreme Court (P2). We may assume that the Court anticipates the moves of politicians and prefers not to move first, reaching the payoff 3 instead of 2.

As will be demonstrated in the next section, these moves indeed occurred in Israeli society during the 1970s and 1980s. The equilibrium is expected to remain at point (3, 4), although players may try to improve their payoff locally, as demonstrated by the broken-line arrows in Figure 1. The Court may attempt to improve its payoff from 3 to 4 by moving from C2 to C1, but politicians are expected to respond by moving from P2 to P1, thus reducing the Court's payoff from 4 to 2. Under these conditions, the Court would return to C2 and politicians would return to P2, meaning that in spite of temporary local moves the equilibrium strategies are C2:P2 and the stable equilibrium of the game is (3, 4).

In the next section we analyze legislation and Court rulings to demonstrate the moves made by the various players.

#### **4. Historical analysis of the relationship between the Supreme Court and the political system based on the Theory of Moves (TOM) model**

This section demonstrates the four stages of transformation in the relationship between the Supreme Court and the Knesset as reflected in the TOM analysis of the game matrix. Our main purpose is to



		P (Politicians)	
		P1 Tough	P2 Flexible
C (Supreme Court)	C1 Implementation of activism	(2, 2)	(4, 1)
	C2 Middle judicial approach	1* (1, 3)	2* 3* 4* (3, 4)

**Figure 2.** The order of moves in the relations between the Supreme Court and the Knesset 1967–2007

- 1\* Initial State – the Supreme Court carries out an activist move in High Court Bergman although it does not complete the maneuver.
- 2\* High Court Rubinstein.
- 3\* Fundamental legislation: Human rights and freedom of vocation
- 4\* High Court Moshavim, High Court Investment Managers' Bureau. Supreme Court carries out steps towards activism but does not complete the move.

demonstrate the applicability of the Theory of Moves to the analysis of historical processes, usually analyzed by historical institutionalism, and the way in which this theory can help explain the strategies of political and social players. The empirical analysis is graphically represented in Figure 2. As explained in the previous section, the first period of Israel's history (1948–67) was characterized by over-centralization of the government meaning that the Supreme Court did not play an independent political role. The next period in Israel's history is marked by social and institutional changes as detailed below.

#### *From the Case of Bergman to the Case of Rubinstein (1970–82)*

In 1969, Bergman petitioned the High Court to void the Knesset and Local Council Elections Law 1969 (dealing with the funding of limited expenses and oversight of such spending) because it contradicted the Equality Clause [4] of the Basic Law: Knesset, and had not been approved by the necessary majority. The decision by the politicians and Attorney General Meir Shamgar not to dispute the Court's jurisdiction or right of standing led the Court to rule that the law was not valid. The Bergman case was a watershed decision that demonstrated

the willingness of the Supreme Court to intervene in issues dealing with values. In this ruling, the Supreme Court took another step in the direction of activism and threatened the very sovereignty of the Knesset. From the standpoint of the politicians, the Supreme Court had signaled its desire to expand its power, not just to gain the public's trust.

In the terms of the model presented in Figure 2, the Court ruling in the Bergman case clearly indicated that the Supreme Court was adopting a middle-of-the-road judicial approach as its stable strategy (C2), thus setting the dynamic relations at point 1\* in the game matrix. The model shows that under these conditions, politicians are likely to change strategy from P1 to P2 in a desire to improve their payoff from 3 to 4. Such a move is not only rationally supported by the model but also reflects significant political and social processes in Israel.

Israeli society and its political culture began changing in a significant way following the Six Day War (Horowitz and Lissak 1990; Naor 2001). The change of atmosphere in the social and cultural sphere from a country under siege to a victorious nation was expressed by successful attempts by religious groups to set up settlements in the West Bank. Interest groups began appearing in the political arena in a much more institutionalized manner and tried to intervene in the setting of public policies (Yishai 1987). Furthermore, the weakness of various party leaders was exposed through a series of committees of inquiry, whose power increased (Dror 1989; Eisenstadt 1989). The lack of governance led to the formation of a national unity government comprised of the Mapai and Likud parties (Arian 1997). As the stature of the politicians fell, the status of the Supreme Court rose, giving it a base of support that would last for years to come.

These socio-political developments deepened in the 1980s (Eisenstadt 1989), spurred on by the continued decline in the prestige of the political leadership and the media (Mautner 1993) as well as the expansion of extra-parliamentary politics by groups such as Peace Now, Gush Emunim, and the settlers in Judea and Samaria (Yishai 1987). At the same time, on certain issues such as security and religion, the Supreme Court continued to exercise restraint, as evidenced by its decisions in the cases of *Sheikh Soliman Hussein Oda Abo Hilo v. State of Israel*, 1972; *Motti Ashkenazi v. Minister of Defense*, 1975; *Bara'ad v. Meder*, 1974; *Gonen v. Yom Kippur War Committee of Inquiry*, 1974; *Grinstein v. the Chief Military Attorney*, 1980 (security) and *Waatad v. Minister of Finance*, 1983 (religion).

During this period, the public's sense that it was unable to influence the government was shared by some of the left-wing parties, leading

both groups to approach the Supreme Court. In light of the Court's rulings and confident that the politicians would not object to decisions rendered on certain issues, the left-wing turned to the Supreme Court in an attempt to advance its agenda (Dotan and Hofnung 2001). In this spirit, the Supreme Court made its ruling in the Rubinstein case, and it was not coincidental that Knesset Member Amnon Rubinstein of the left-wing Shinui party, a legal professor, was the one who submitted the case. The Supreme Court approved the petition and ruled that the Funding Law was invalid. The Knesset adopted the Court's ruling fully, unlike its response to the Bergman ruling (Shetreet 1994).

The Rubinstein case (1982), like the Bergman case (1969), also dealt with a petition to cancel the Knesset and Local Council Elections Law of 1981 because it contradicted the Equality Clause [4] of the Basic Law: Knesset, and had not been approved by the necessary majority. However, this case marked a shift in the stance of the politicians from a restraint of activism (P1) towards a middle-of-the-road approach (P2). In the Rubinstein case the Supreme Court accepted the petition and voided the law, stating for the first time that the more the Supreme Court invalidated the laws of the Knesset without dealing with the justifiability of the case, the more its ability to invalidate laws would be institutionalized. The politicians accepted the Court decision without even amending the law (Shetreet 1994). The search for public legitimacy, so badly needed by the politicians, caused them to make the shift denoted by 2\* in the game matrix in Figure 2.

*From the Case of Rubinstein to the Basic Law: Human Rights and the Basic Law: Freedom of Occupation (1982–92)*

The phenomenon of lack of governance intensified at a heightened pace throughout the 1980s. The feeling of a lack of governance on the one hand, and the development of channels of influence through the Supreme Court on the other led the public, various interest groups and the politicians to the doors of the Supreme Court (Yishai 1987; Dror 1989). The Supreme Court began hearing cases in areas which heretofore it had avoided such as involvement in Knesset decisions (*Mia'ari v. Chairman of the Knesset*, 1985); intervention in religious matters (*Leah Shakdiel v. Minister of Religious Affairs et al.*, 1987; and *Poraz v. Mayor of Tel-Aviv*, 1987); and intervention in matters of security (*Miller v. Minister of Defense*, 1990; *Morcus v. Minister of Defense*, 1991; and *Turkman v. Minister of Defense*, 1992).

The involvement of the judiciary enjoyed public support as well as political legitimacy (Barzilai et al. 1994), as politicians preferred to place responsibility on the shoulders of the Supreme Court. At the same time, on diplomatic and military issues the Supreme Court showed restraint (Hofnung 1991; Kremnitzer 1999), as demonstrated in its decisions in *Federman v. Minister of Defense*, 1991; *Bargil v. Government of Israel*, 1991; and *Temple Mount and Eretz Yisrael Faithful Movement v. Prime Minister*, 1992.

According to the model presented in Figure 2, we see that the politicians benefited from their shift towards P2, which increased their position from 3, where they were when the Supreme Court took a middle-of-the-road approach and the politicians showed restraint in their activism, to 4. This is true even more so when the politicians' benefit was 2 and the Supreme Court signaled a shift towards C1, i.e., the initiation of activism. The politicians' move towards P2 is marked by 3\* in the game matrix in Figure 2.

From the Court's perspective, it is preferable to move together with the politicians in the direction of (3, 4) because the benefit to the Court will increase from 1 to 3. In this way, the Supreme Court profits from the politicians' stance, meaning that it receives political legitimacy and can, at the same time, enhance its standing among the public and the policy makers without having to fear that the politicians will stab it in the back (see *Shalit v. Minister of the Interior*, 1968).

*From the Basic Law: Human Rights and the Basic Law: Freedom of Occupation to the Case of Bureau Investment Managers (1992-7)*

As stated earlier, the shift made by politicians was completed with the legislation of two Basic Laws in 1992. If up to this point the Supreme Court was seen as the guardian of human rights, the legislation of these two Basic Laws passed this guardianship to the Knesset. Through this legislation the Knesset signaled its ability to make decisions to the general public in the face of the problem of a lack of governance (Nachmias and Sened 1999). The search for public legitimacy caused politicians to make this shift. Another development in the relationship between the Supreme Court and the politicians found expression in an amendment made to the Court Law which was approved in 1992. The amendment gave the Supreme Court judges a more important role in managing the mechanisms of the Supreme Court. The initiative was made by the Justice Ministry and Justice Minister Dan Meridor (Meridor 1995). In the absence of governance, which was

recognized by the government and the Likud Party, all Meridor had to do was search for independent sources of public support. He found them in the Supreme Court. This policy clearly expressed a stable middle-of-the-road strategy adopted by politicians (P2), as indicated by 4\* in the game matrix in Figure 2. The relative stability of the outcome (3, 4) was also expressed in the Hamoshavim (the Hebrew word for cooperative settlements) case (United Bank Hamizrahi 1993) when the Supreme Court ruled for the first time that it was authorized to declare a regular law invalid if its values and content contradicted a Basic Law, in this case, Human Dignity and Freedom of Occupation. Three years later, in the Court ruling in the Investment Managers' case (1997), the Supreme Court made use of that authority, though the Court exercised caution, defending its position from limitations that the Knesset itself tried to impose upon it.

#### *The moves around the equilibrium point (1997–2007)*

Once relative stability was achieved, from that point onward, the relations between the Knesset and the Supreme Court were characterized by local moves around the equilibrium point (3, 4), represented by the broken-line arrows in Figure 1. In other words, the Supreme Court signaled a move towards activism (C1), attempting to improve its payoff from 3 to 4, while the politicians adopted a strategy of restraint in these situations (P1) in order to put the Court back on the right track. Since 1997, the Court has made several activist moves in which it invalidated various Knesset laws. For example, in 1999, the High Court panel of 11 judges ruled that a clause to a law that contradicted the Basic Law: Dignity of Man and Liberty was invalid (Sagi Tzemach, first filed in 1995). In March 2002, in the Oron v. Chairman of the Knesset case (first filed in 1999), the Court ruled that an amendment to the Bezeq Law, which was designed to legitimize the pirate broadcast signals of Channel 7, was invalid, claiming that it violated the Basic Law: Freedom of Occupation. Three years later, in September 2005, the High Court ruled invalid the 'Intifada Law' (an amendment to the Civil Damages Law), which denied Palestinians who live in the occupied territories the right to sue for damages in Israel (Adalla and others v. Minister of Defense and others, 2005). An additional ruling was made to cancel clauses in the Disengagement Application Program Law, 2005, known as the 'Evacuation Compensation Law' (Gaza Coast Regional Council et al. v. The Knesset et al. 2005).

These rulings represent a march by the Supreme Court towards further activism, in the direction of C1. According to the model, its benefit grew to 4, far greater than the former 3. For the politicians, this movement did not bode well, as it reduced their benefits to 1. Accordingly, if

the Supreme Court makes a move towards C1, the politicians will have no choice but to opt for P1, a restraint of activism. In other words, the politicians must restrain the Court, knowing that as it moves back to a middle-of-the-road approach, the politicians will also be able to return to such an approach, leading them both to a point of equilibrium (3, 4). The expectation is that the Court, which values how it is perceived, will make the effort to move in this direction. However, the politicians have not attempted to hide their intentions and in a number of instances have signaled their intention to limit the activism of the Court. So, in 2000, Knesset members decided to submit a law to set up a constitutional court and in 2002 the Knesset defeated a bill proposing the creation of a constitution. In doing so the Knesset signaled to the Court that the strategy of constraining steps was not realistic.

According to the model the Knesset will take action to return to the preferable point of (3, 4). As noted earlier, in 2007 Justice Minister Daniel Friedman proposed institutionalizing the Court's authority to invalidate a law, a step that would seem to contradict the model which sets the point of equilibrium on judicial activism C1. However, Friedman's proposal had an additional section allowing the Knesset to enact a law that would void a Supreme Court decision. Thus, Friedman sought a middle-of-the-road approach designed to return to the point of equilibrium, and heading in the direction of (3, 4). Given the circumstances, structures, and cultural conditions in Israel, the model forecasts that this type of equilibrium will indeed take place.

## 5. Conclusion

This paper attempts to explain the reciprocal relations between the Supreme Court and the Knesset using a dynamic analysis of a game matrix. The analysis illustrates the usefulness of TOM for analyzing long-term socio-political processes and explaining the actions of the players. In that regard, TOM can serve as a bridge between rational-choice institutionalism, which focuses on static interactions at the micro level, and historical institutionalism, which emphasizes macro-level socio-political processes (Weingast 2005).

The theoretical model and the empirical analysis focused on the direct reciprocal relations between the Supreme Court and politicians in Israel. Social factors such as the public's positions, the activities of interest groups, the processes of cultural change and structural–institutional changes have found expression in the interests and preferences of the

players. For example, the fact that politicians are dependent on public support and that the Israeli public prefers a balance between the powers influenced the order of politicians' preferences. Furthermore, the combination of these factors goes a long way to explaining the unique character of the terms judicial activism, restraint, and middle-of-the-road approach in Israel.

In this paper we identified a general trend of judicial activism that has taken a middle-of-the-road approach, both by the Supreme Court and the Knesset. The Court has displayed juridical activism on certain issues such as human rights and religion, while at the same time exercising judicial self-restraint with regard to issues of security and the functioning of the Knesset. This cautious approach is evidenced by the response of the Supreme Court to various petitions, a response that also safeguards the Knesset's special position as the shaper of values in Israel. The Knesset, too, has adopted a middle-of-the-road approach, evidenced by selectively permissive legislation alongside petitions to the Supreme Court on some matters.

However, since the 1990s we have witnessed a change in trends in relations between the Supreme Court and the Knesset. Unlike previous patterns of conduct, the Court has begun to flex its muscles, invalidating laws and making decisions about ethical issues that it had previously avoided, such as the drafting of yeshiva students and General Security Service interrogation techniques. Surveys of public trust show a marked decline in public trust in the Supreme Court (Vigoda-Gadot and Mizrahi 2008), inviting various politicians to attempt to institutionalize a different structural arrangement in the relationship between the Supreme Court and the Knesset.

Indeed, there are indications that in recent years the Supreme Court has tried to circle around the point of equilibrium to obtain immediate gains or to determine their space for maneuvering. In any case, these attempts were designed to position the Court at an optimal starting point for the expected bargaining process over structural changes in the legal system, the legal status of the Supreme Court, and its power. In the absence of a change in the rules of the game, it is expected that the Supreme Court will restrain its involvement and role to avoid creating a situation in which legislation is enacted that will harm it. Nevertheless, any institutionalization of the Supreme Court–Knesset relationship which strays from formal institutional regulations is unlikely to be accepted by the legislators in Israel. The analysis in this paper suggests that the process will result in a middle-of-the-road approach that will be adopted by the Supreme Court and the politicians.

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### ISRAELI HIGH COURT OF JUSTICE (HCJ) DECISIONS

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 HCJ 1661/05. Gaza Coast Regional Council et al. v. The Knesset et al.

## BASIC LAWS

Basic Law: Human Dignity and Liberty

Basic Law: Freedom of Occupation

Basic Law: The Knesset

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