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

RONEN SHAMIR

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

II. ISRAEL'S HIGH COURT AND THE OCCUPIED TERRITORIES

A. Background

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

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

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

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

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

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

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

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

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

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

B. Land Confiscations: The Elon-Moreh Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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