

Judicial Review Mechanism in Israel and Japan as Agents of Democratization

Sigal Ben-Rafael Galanti, Alon Levkowitz

Stimulated by Western liberal thinking and values, liberal democracy came into being, underscoring freedoms and rights as well as mechanisms to restrain the governing branches. Notwithstanding, regarding democratization outside the classical West, many contend that without a well-rooted pre-democratic liberal tradition, it is doubtful if a democratic regime could develop as more than décor.

In the present paper we argue however that adopting liberal democratic mechanisms in non-Western societies could encourage changes in the political behavior in this vein. We demonstrate it through the cases of Israeli and Japanese societies - that are not natural outcomes of liberal values - but for different reasons became democratic.

Specifically, we focus on those societies' attitudes toward their adopted patterns of judicial review, which is considered a most liberal tool among democratic institutions and a main guardian of human rights. This tool, in fact, permits people's access to judicial instances in order to set limitations on their governing branches by revoking laws and policies.

Moreover, while in Israel the pattern for judicial review is explicitly autonomous and easy to approach, the Japanese one is much more dependant and less accessible to citizens. Hence we assume that an adaptation to make use of the judicial review mechanism - when more or less liberal - indicates adopting the spirit of liberal democracy. Likewise, it can also indicate the existence of a structural democratization model.

The strong Israeli tendency to approach the High Court of Justice - "Bagatz"

The Jewish pioneers, who established Israel and most of those who joined them later on, came either from Eastern Europe or Moslem countries - which were never part of the classical West. Nevertheless, the founders of the organized Zionist movement, as well as the UN, expected the Jewish state to become democratic. Hence, following the declaration of statehood, among

other institutions, the judicial branch was established with the Supreme Court at its head. This court is the authorized interpreter of the laws enacted by the Israeli parliament, the Knesset. Among its tasks, it has the power of judicial review. Individuals, as well as institutions, have the right to approach the Supreme Court with the aim of clarifying the legitimacy of laws and policies. When discussing such applications, it does so in panels of three judges each, and is referred to as the "High Court of Justice" (to be called here the "High Court") or in its Hebrew acronym - "*bagatz*".

In addition, the High Court is considered to be very autonomous and powerful. After all, the Israeli justices are chosen by a mixed and not a purely political committee, of judges, politicians and lawyers. The lack of a constitution permits the judges far-reaching interpretations of the laws. Petitions are submitted directly to the High Court, which is the first and last instance to rule on them. And finally, though formerly plaintiffs had to prove injury when applying against a law or a policy, since the 1990's this obligation was annulled, and anyone is now entitled to appeal against any governmental branch. This empowerment of the judicial branch naturally encouraged politicians to try and restrict it, but so far they have had negligible success.

Given this context, quite rapidly Israelis became accustomed to exercising their right to seek judicial review. Over time, petitions to the High Court have been filed in a huge range of issues - granting the Supreme Court a true status of guardian of human rights.

The most important petitions to the High Court are indeed concerned with human rights. Worthy of mention is one of the first appeals related to the freedom of speech that earned the name "*Bagatz Kol Ha'am*." This appeal was filed following a government's decision to close down *Kol Ha'am* - a Communist newspaper - after it publishes an article criticizing the possibility of Israel's participation in the Korean War. In this case, the court overturned the government's stance and declared for the first time that Israel is a democracy respecting the right to free speech. Other appeals of this kind dealt with censorship, discrimination against the homo-lesbian community, and conversely, against the homo-lesbian annual Gay Pride parades, and for and against demonstrations of all kinds. Notably, since the Israeli Occupation of 1967, appeals are regularly made against violations of human rights in the Occupied Territories.

Other popular applications combining human rights and security deal with torture during investigations, the right of Palestinians for compensation

due to injury caused by the IDF, the path of the Security Fence between Israel and the West Bank, against prisoner exchange deals, expulsion of Hamas members from the Territories, the demolition of houses in the Territories as a means of punishing terrorism, and the evasion of ultraorthodox Jews from military service.

Furthermore, many applications deal with societal inequality. For example, there are applications against refusal to accept Arab residents to Jewish settlements within Israel, refusal to recognize homosexual couples, and discriminatory policies against women. The High Court has also heard applications regarding discrimination in schools, such as refusal to admit Jewish girls of Oriental and Ethiopian origin to religious schools of different kinds, as well as the lack of schools in East Jerusalem.

Nevertheless, as noted, these are only a few examples of the wide range of subjects debated in the High Court. And thus, we conclude that in Israel - which adopted a highly liberal and an approachable judicial review mechanism - a dynamic of frequent use of this mechanism has taken shape.

Japan's use of its limited judicial review mechanism

It is well-known that Japan displayed hesitancy regarding liberal values ever since it became modern. Nevertheless, following WW2 it found itself challenged by democratization and under the American occupation it formally adopted the democratic regime. Yet, unlike the Israeli example and though few of Japan's democratic institutions were granted much power, its judicial branch as well as its judicial review procedure were shaped as weak mechanisms.

To be more precise, on the one hand, the Supreme Court at the top of the judicial branch serves as a final instance in all types of appeals, including in constitutional matters. Nevertheless, on the other hand, its autonomy tends to be limited mainly since the government is deeply involved in appointing the judges. Moreover, judicial review is sought only in a regular judicial procedure which can take years, while the plaintiffs must prove injury caused by the law or policy for which they seek a review. Finally, it is only since the 1993 enactment of the Administrative Procedure which clarifies the government's responsibilities that there exists an effective possibility for reaching reviews of governmental policies.

Even so, in many matters the Japanese tend to promote judicial review against their governing branches. Due to Japan's pacifist constitution notable

applications to courts are concerned with security issues. Hence, already in 1952, Suzuki Mosaburo, the chairman of the Left-Wing Socialist party, appealed directly to the Supreme Court demanding to recognize the unconstitutionality of Japan's new military forces, the National Police Reserve. Suzuki who referred directly to the highest instance, desired to emphasize that it should be perceived as Japan's constitutional court, but it was this very step he took that paved the court's evasion from discussing the NPR's legitimacy. Other milestones are appeals against the constitutionality of land confiscation for the benefit of Japanese and American bases within Japan, and legislation allowing Japan's participation in UN forces and in overseas wars, such as the Second Gulf War.

As part of the struggle over Japan's post-war identity, many apply to courts demanding that the government take responsibility for the country's WW2 actions against Asian peoples. Consequently, since the enshrinement of WW2 war criminals in Yasukuni shrine, alongside the souls of Modern Japan's soldiers, suits are filed against officials who visit the shrine. Thus, despite many failures, the Supreme Court ruled that Prime Minister Nakasone's 1985 official visit to the shrine was indeed unconstitutional.

Citizens have also applied to courts against formal requirements to express solidarity with national symbols related with Japan's militaristic past. Major milestones are the appeals following the 2003 Tokyo Board of Education's decision to oblige pupils to sing the national anthem in front of the raised national flag at graduation ceremonies. Many educators found this unacceptable and in a rare statement even the Emperor expressed his objections. Accordingly, since 2004 suits against Tokyo local government have been filed by teachers, achieving remarkable success.

Discussions of matters at the heart of democracy are also frequently conducted in courts. Following every election - and even after the electoral reform of 1994 - thousands of anti-governmental suits protest the under-representation of urban constituencies. Over the years, plaintiffs have repeatedly failed, but on a few occasions the Supreme Court admitted their claims. Another example is the successful judicial struggle by Japanese citizens living abroad to recognize their right to vote for both houses of the Diet.

In addition, people turn to courts to clarify their basic human rights, such as the freedoms of speech and conscience, the right to vote, the issue of death penalty, and regarding minority rights. Important examples are the

ever-growing number of applications against the discrimination of minorities in workplaces. Other cases are the applications to courts by the Ainu people of Hokkaido, which were recognized in 1991 as an "indigenous minority" and are keen to prove this in court each time this status is ignored by the authorities. Finally, applications concerning environmental matters are quite popular. In the cases of the outburst of the Minamata disease due to water pollution by mercury waste, and noise pollution by the Shinkansen, the courts recognized the government's responsibility.

Consequently, one could say that - though very limited - as in the Israeli case, in Japan too, the existence of a judicial review mechanism encouraged a dynamic of perceiving it as a democratic tool which has a power to constrain the governing authorities.

Conclusion

We have shown here that in Israel as in Japan the adoption of a judicial review mechanism - whether liberal and easy to approach to or less autonomous and more complicated to reach - was accompanied by an adaptation to make use of it. Even more so, people do not hesitate to turn to courts on matters at the heart of democracy and human rights.

Thus our ultimate conclusion is that in many ways those specific societies perceive democracy as part of their *raison d'être*.

Considering the fact that both societies under investigation did not stem from a liberal context, it seems that their attitudes towards judicial review can lead to the conclusion that adopting democratic organs - even partial ones - outside the classical West may encourage a change in the political culture towards supporting democratization. Hence, it seems too that there is indication for the existence of the structural model of democratization.

Sigal Ben-Rafael Galanti is a Senior Lecturer at Beit Berl College, and teaches at the Hebrew University of Jerusalem. She is interested mostly in Japan's postwar democratization and militarization.

Email: lian25g@gmail.com

Alon Levkowitz is the Asia Program Coordinator at Bar Ilan University. His research includes security and international relations in North East Asia.

Email: levko@smile.net.il