

## **Costs Rulings and Substantive Judicial Review in the Israeli High Court of Justice**

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The Supreme Court of Israel (SCI), in one of its functions, acts as the High Court of Justice (HCJ) and has original jurisdiction as a court of first instance in matters related to the constitutionality of Knesset (Parliament) laws and the legality of decisions of administrative authorities. Alongside its constitutional and administrative roles, The SCI is a civil and a criminal appellant jurisdiction, altogether, an extremely busy institution.

The HCJ is unique amongst other courts in common law jurisdictions, among other reasons, being especially inviting towards public interest petitioners, i.e. petitioners who submit a petition on behalf of a general public interest and without having any personal claim. Despite of the significant role of the HCJ in the Israeli legal system, there is no clear rule regarding costs in the HCJ and the current costs rulings are far from being consistent. Since 2010, the HCJ judges have started a stream of new case law that marked a strong tendency of costs rulings against public interest petitioners, as part of a bigger procedural trend of managing the caseload of the court. This new case law – led by the former Chief Justice of the court (and reinforced by other new liberal justices) – raises a prominent question that is related to the interaction between substantive and procedural Public Law: even though costs ruling is considered to be a part of the legal procedure in the HCJ, legal scholars have claimed that the use of costs by the judges in the HCJ has in fact a hidden purpose of changing the substantive law, namely the currently wide Standing right of public interest petitioners.

Our project examines the fundamental question of costs ruling against petitioners in the HCJ using a doctrinal analysis of the court's decisions in view of the classical theory of judicial review and an empirical analysis based on data we have collected from 716 HCJ decisions in which the court ruled costs against petitioners. The decisions we studied are of a panel of judges in petitions submitted both by private petitioners and public interest petitioners since the 1960's and until 2017. We have quantified several variables that would help characterize the nature of costs rulings against petitioners in the HCJ. Among those variables are: the institutional identity of the petitioner and the respondent (for example, a private litigant, an NGO, a corporation), the identity of the judges, the reasoning for the costs ruling (when such reasoning exist), the amount of the costs ruled, and more.

We suggest a theoretical analysis that draws the line between procedural efficiency and changes made to substantive judicial review. We then offer a comprehensive theory regarding costs rulings against petitioners in the HCJ that allows the use of the costs tool in order to improve the litigation in the HCJ, while maintaining the wide standing right of the petitioners.