ATTACKS ON THE SUPREME COURT AND ITS ROLE SAFEGUARDING HUMAN RIGHTS:

Background and Status Report

The Association for Civil Rights in Israel (ACRI)

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Introduction

In every substantive democracy, the judiciary – particularly the Supreme Court – constitutes a central pillar in the protection of human rights. Yet in recent years in Israel, the Supreme Court has served as one of the main targets of the assault on the democratic foundations of the state, an assault that has other fronts as well – legislative and public efforts to constrain freedom of expression, violate the rights of Israel's Arab minority, and weaken civil society organizations.

On the surface, the main argument against the Supreme Court or High Court of Justice relates to its "activism" or even "leftwing bias". The claim about judicial activism stems from the power of the Court to nullify laws or provisions in laws; thus, the Court is accused of arrogantly overturning decisions made by the Knesset, decisions that "express the will of the majority". In actuality, the Supreme Court generally refrains from interfering in Knesset legislation, with a few exceptions, and can hardly be called activist. Nevertheless, public debate about this matter – and about relations between the Supreme Court and the legislature in general – is appropriate and important.

If the Court has actually not been very activist, why is it the target of so much aggression? The accusation that the Court is "leftist" is the real source of the stepped-up attacks against it by the government and the Knesset. The claim that it is "leftwing" is a code word for the clash between the current political majority, with its aspiration to strengthen the nationalist-Jewish aspects of Israeli identity and life, and the values of equality. Those who stand up for the latter discover themselves to be obstacles in the way of the majority with all its political clout.

Thus, efforts to undermine the Court are not a response to its "over-activism", but an assault on the legal analysis of the Supreme Court, its human rights perspective, and its constitutional interpretations, which are inconsistent with the values, worldview, and political outlook of its critics. Legitimate discourse about the Supreme Court's "judicial activism" actually serves as a cover for the real critique, which has to do with the content of the judicial rulings. Thus, the real reason for the clash – the efforts to limit the power of the Supreme Court, to influence its structure and composition, and even to subordinate it to the legislative or executive branch – is the judicial decision-making, which takes into account equality, human rights, and constitutional rights, considerations that, in the opinion of the current Knesset majority, thwart the realization of its nationalist-Jewish-political agenda.

The Attack on the Supreme Court: Reasons and Repercussions

In recent years we have witnessed harsh criticism and aggressive political attacks on the Supreme Court. Before looking at this more closely, we would like to state clearly: Public criticism, particularly of the courts, is not only legitimate and reasonable, but vital and natural in a democracy. The judiciary is not immune from criticism, and we ourselves in the Association for Civil Rights in Israel (ACRI), like other human rights organizations, have trenchant criticism of the Court. Discussion about the power and functions of the judiciary is necessary and proper. However, there is a difference between legitimate criticism and political attack.

A variety of claims have been made against the Supreme Court, but all stem from one basic argument: that the Court has a political agenda (left-liberal), and that it does not "represent the people" in Israel, who therefore no longer trust it. Other arguments against the Supreme Court concern its homogeneous composition (leftist-Ashkenazi – on the ethnic issue, the claim is completely correct), but primarily it is argued that the Court is "activist" and promotes a specific agenda through its activism.

The claim of "judicial activism" began toward the end of Meir Shamgar's term as Supreme Court President and peaked under President Aharon Barak. During these years, rulings were issued that expanded the right of public standing, narrowed the doctrine of non-justiciability, and annulled several legislative initiatives (laws or specific provisions in laws) on the grounds of unconstitutionality or a broad interpretation of the Basic Laws, including the right to equality as implied by the right to dignity.

But the image is far removed from the reality. The Supreme Court's "activism" – at least with respect to nullifying laws, which is the most heavily criticized aspect – was and is very limited in scope and essence. In fact, over the years, the Supreme Court struck down very few laws (or legal provisions), and generally preferred, when it deemed a law unconstitutional or problematic, to send it back to the legislature for reconsideration.

Nevertheless, judicial activism is perceived as illegitimate by the Court's critics, who view it as abuse of a judicial tool in order to promote a worldview and/or agenda that neither the executive branch (the government) nor the legislature (the Knesset) wishes to promote.

In recent years, this criticism has often deteriorated into efforts to delegitimize the Court – to diminish its authority and affect its decisions and agenda. This appears to be motivated by an attempt to promote a specific political agenda, which, in the view of these critics, the Supreme Court does not share and even thwarts.

In such cases, the target is not really the "activism" of the Court, but the judicial analysis, human rights perspective, and constitutional interpretations in the cases it adjudicates. This illegitimate and extremist critique focuses on the decisions made by the Supreme Court, which are inconsistent with the values, worldview, and political beliefs of its detractors. The Court's considerations drawn from legislation,

constitutionality, human rights, equality, etc. are viewed as secondary by these critics, who would advance a nationalist, Jewish, and specific political agenda in Israel.

This form of criticism is illegitimate and improper; it is a deliberate political strategy designed to circumscribe the authority of the Supreme Court so that its decisions do not interfere with promotion of a specific political agenda.

To illustrate, note the words of MK Yariv Levin (Likud), Chair of the Knesset Committee, in an October 2011 interview with "Our Land of Israel", in which he stated:

> *In the current reality of the legal system, there must be real change to restore the legal system to a more Jewish and democratic course. A situation exists in which the nationalist and religious camp wins the election, but often cannot implement the policies for which it was elected. This is because the judiciary shackles it in a clearly anti-democratic way, draws upon a left-wing agenda, and above all endangers our ability to ensure our survival. It is no secret that an extremist, left-wing minority has taken control of the judiciary, primarily the Supreme Court, and is trying to dictate its values to the entire society.*

As an example, Levin cites the Supreme Court ruling on the Qadan case in 2000:

> *In the past, Zionism was based on the Judaization of the country in the Negev, the Galilee, Judea and Samaria, and everywhere. According to the High Court ruling, efforts to Judaize the country constitute improper discrimination and undermine equality, which amounts to liquidation of the Zionist enterprise.*

In other words, in the conflict between "Judaization" and equality, Levin chooses "Judaization", while the High Court ruled in favor of equality – and must therefore be put back "on course". In other examples, Levin cites the Supreme Court's ruling on the disengagement from the Gaza Strip, in which Levin claims that the Supreme Court did not take into consideration "our rights over the land as the Jewish people"; and the Supreme Court's ruling on evacuating the Migron outpost, about which Levin explains, "When the Arabs build illegally, demolition is obviously prohibited…but when Jews build illegally, there is one decision: demolish it at once, destroy it" – this is, of course, a distortion of the reality, as the settlements, particularly "illegal outposts", enjoy state support and are almost never evacuated, while demolitions of homes among the Arab population throughout Israel and the Occupied Territories take place almost daily as sanctioned by the law and the courts.
http://www.haaretz.co.il/news/law/1.1521582
http://www.sos-israel.com/index.asp?pageID=57087&siteLang=3

Statements no less explicit appear in the position paper "Changing the System of Choosing Judges in Israel" published in August 2011 by the Institute for Zionist Strategies. This paper sets forth a systematic political doctrine of why the judiciary should be "changed", addressing the issue openly, without recourse to the usual complaint about over-activism:

> *The damage wreaked by the existing system on the identity of Israel as the national state of the Jewish people: The relative isolation of the judiciary from the moral world of Israel's citizens and elected representatives harms not just the democratic character of Israel, but also its Jewish identity. Throughout Israel's history, its legislators have been more committed to the values of the national state of the Jewish people than its judiciary has been. In general, the legal parameters of Israel as a nation-state were set by its legislators, while legal rulings issued by the courts detracted from it. This seems to stem from the deep commitment of the Jewish people to the Zionist idea, as opposed to the judiciary's commitment to universalism, with judges who are not appointed by the elected representatives…In light of the above, there is a paramount Zionist and democratic interest* ***change the method of choosing judges in Israel to ensure the loyalty of the judiciary to the moral world of the voters in the national state of the Jewish people*** (emphasis added). **http://izsvideo.org/papers/Bakshi_Judge_Selection.pdf**

In contrast with those who criticize these aspects of the Supreme Court's functioning, others support this approach, believing that the Supreme Court, when it chooses to act, can fulfill its most important function: protecting human rights, realizing basic rights, safeguarding minority rights, and ensuring the human rights of Palestinians in the Occupied Territories.

The Position of the Association for Civil Rights in Israel (ACRI)

It is the position of the Association for Civil Rights in Israel (ACRI) that the critique of the Supreme Court, particularly when it strays from the discourse of judicial activism and engages in delegitimization of the Court, seeking to curtail its power and influence its rulings, raises several troubling concerns.

The first concern relates to over-politicization of the ***Committee for Selection*** of Judges in its task of considering judges and their identities. Over-politicization could do damage to the separation of powers in Israel, which is a parliamentary system, and even undermine Israeli democracy. The separation of powers is critical to democracy, as is well known, but is even more important in a parliamentary system where the executive branch (the government and its coalition) has a majority in the Knesset/Parliament, making democratic principles vulnerable to the tyranny of the majority. In a parliamentary democracy, the independence of the judiciary is crucial for restraining and balancing the power of the other two branches of government.

The second concern relates to efforts to limit the ***right of standing***, circumscribe the authority of the Court, and curtail its power to rule on the constitutionality of legislation. These measures could diminish the capacity of the Supreme Court to safeguard human rights, above all those of all types of minorities against arbitrary power and the tyranny of the majority in a democratic state.

Review of the Proposed Legislation against the Supreme Court

One repercussion of the critique of the Supreme Court has been the intensive effort to enact laws that seek to change the character of the Court. In recent years, a series of legislative initiatives that aspire to make such change have focused on the following areas:

1. Changes in the composition of the Court: Bills that deal with membership in the Committee for Selection of Judges, as well as bills and/or demands to ensure "diversity" or "representativeness" of the judges.
2. Changes in the power of the Court: A range of bills that propose changing the authority of the Court with respect to the matters and subjects that are justiciable.
3. Changes in the power of the Court to nullify legislation: Many bills seeking to prevent or limit the power of the Court to nullify legislation that is in conflict with a Basic Law.
4. Changes in the right of standing: Bills that attempt to narrow the right of standing, particularly of organizations and public petitioners.

The following specific bills are currently tabled in the Knesset, bills that appear in green offer links to more information on ACRI's website (other bills on these issues may also exist):

1. ***Basic Law: The Judiciary (Amendment – Public Petitioner*** **(Yariv Levin and Danny Danon, from the 18th Knesset):** This proposed amendment seeks to substantially curtail the right of human rights and social change organizations to file petitions to the High Court of Justice, thereby limiting the sensitive public issues that can reach the Supreme Court. The bill would restrict "public petitioners" – organizations and bodies that file petitions against state authorities even though they are not directly affected by the matter in question. This bill is yet another seeking to delegitimize civil society, particularly human rights organizations, that is being advanced by this Knesset. **Status:** Tabled on 28 February 2011, scheduled to be brought soon before the Ministerial Committee on Legislation.
2. Several bills are currently in the legislative pipelines that would introduce political considerations into the procedure for selecting Supreme Court justices in an attempt to influence the composition of the Court. These bills would severely undermine the separation of powers, which is a fundamental principle in a democracy: Separation ensures that the Court will be independent of the political majority because of the Court's role in protecting the human rights of individuals and minorities from harmful decisions made by the majority. It is important to distinguish between the legitimate and important demand that Supreme Court justices be representative of the various groups in the population, which should be ensured by the procedure for selection of judges, and political involvement in their selection.

    a. ***The Courts Law (Amendment – Transparency of Procedures to Appoint Supreme Court Justices and Appoint the President and Vice-President of the Supreme Court – 2011*** **(Yariv Levin and Ze'ev Elkin):** This bill would require the approval of the Knesset's Constitution Committee after a public hearing for candidates to the Supreme Court. **Status:** The Prime Minister decided to not support this bill.

    b. ***The Courts Law (Amendment – Appointment of a President) – 2011*** **(Yaakov Katz et al., from the 18th Knesset):** This bill lowers the minimal tenure for a Supreme Court President from three to two years, enacted to permit the appointment of the current president. **Status:** The law passed on 2 January 2012, enabling the appointment of Justice Asher Grunis as Supreme Court President in February 2012, even though he would have just under three years to serve until retirement.

c. ***Bill regarding Bar Association Representatives in the Committee for Selection of Judges (Amendments) – 2011*** **(MK Robert Ilatov et al.):** This bill seeks to change the composition of the Committee for Selection of Judges to ensure that the head of the Bar Association will have influence over the selection of one Bar representative on the Committee, in order to affect the (then upcoming) selection of the new Supreme Court justices. **Status:** Received government backing, passed the preliminary plenary reading on 14 November 2011 and the first reading on 21 November 2011. During the course of the legislation and before the second and third readings, the Bar Association had already elected two members to the Committee for Selection of Judges, therefore the bill submitted for the second and third reading was changed to stipulate that the law would take effect retroactively, i.e., that the election would be canceled and new elections held. This legislation was harshly criticized even within the Coalition, and not yet brought for a vote in the plenary. Because of the recent appointment of new Supreme Court justices by the Committee for Selection of Judges, the bill is not likely to advance. It should be noted that the wording of the bill was changed in the Constitution Committee to require a two-thirds majority of the Bar Association's National Council for the Selection of Representatives so that the coalition in control of the National Council would have to take into consideration the views of the opposition to the Bar Association head.

3. ***Basic Law: The Judiciary (Amendment – Judicial Review of the Validity of a Bill)*** **(Yaakov Katz et al., from the 18th Knesset):** According to this proposal, if the High Court rules that a particular bill is unconstitutional and therefore should be nullified, the ruling will take effect only a year after the Court ruling. **Status:** Tabled 2 February 2010, rejected by the Ministerial Committee on 18 October 2010.
4. ***Basic Law: Judiciary (Amendment – Power of the High Court of Justice)*** **(Yaakov Katz et al., in the 18th Knesset):** This bill seeks to undermine the validity of High Court rulings about security-related matters, stipulating that the High Court may not issue injunctions on matters of security or involving human life, although it may express its view on the issue. **Status:** Tabled on 25 January 2010, rejected by the Ministerial Committee on 30 May 2010.
5. ***Basic Law: Constitutional Court*** **(David Rotem, from the 18th Knesset):** This bill seeks to rein in the Supreme Court, which currently also serves as a Constitutional Court in Israel. A number of measures are proposed for establishing a Constitutional Court that could harm democracy, human rights, and the separation of powers. These include the proposed composition of judges, who would be required to take a loyalty oath to a Jewish state, the requirement that decisions be unanimous, and curtailed powers to nullify unconstitutional legislation. **Status:** Tabled on 1 April 2010, not advanced due to lack of coalition agreement.
6. ***Basic Law: Human Dignity and Liberty (Amendment – Citizenship and Entry to Israel Law)*** **(David Rotem et al., from the 18th Knesset):** This bill proposes that the Supreme Court not have the authority to deliberate the Citizenship and Entry to Israel Law (Temporary Order) or the validity of any law that replaces it. **Status:** Tabled 5 November 2009, rejected by the Ministerial Committee on 20 December 2009.
7. ***Draft of Basic Law: Legislation*** **(Zevulun Orlev, from the 18th Knesset):** M.K. Orlev is currently promoting a bill that would "regulate relations and establish the boundaries of domain, authority, and responsibility for each branch of government". The core of this proposal is the provision that the Court would have the authority to nullify legislation that contravenes a Basic

Law, but that the Knesset could then declare that the law is valid for five years despite its nullification. This bill would also set rigid procedures for the enactment, amendment, or nullification of Basic Laws. **Status:** This bill is in the earliest stages of recruiting support among MKs, and has not yet been tabled.

8. ***Report of a bill to be submitted by Prof. Yaakov Neeman, Minister of Justice***: In December 2011, the media reported that the Minister of Justice intends to complete enactment of the Basic Law: Legislation. According to this bill, the Supreme Court could still nullify laws, but the Knesset would be able to override such nullification under specified circumstances and could re-legislate nullified laws. The bill calls for a majority of 70 MKs to override nullification of a law, while the Supreme Court justices had called for at least 80 MKs to override nullification, in an effort to prevent easy bypass of Supreme Court rulings.