Regulation & Governance

Regulation & Governance (2023) 17, 1021–1040 doi:10.1111/rego.12479

General courts, specialized courts, and the complementarity effect

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Among the major decisions any legal system must make is deciding whether to establish general courts with broad jurisdiction, or specialized courts with limited jurisdiction. Under one influential argument—advanced by both judges and legal theorists—general courts foster coherence within the legal system. This Article identifies a distinct effect of establishing general courts: the "complementarity effect." In the case of complementarity, general courts strategically apply different principles in different fields, such that litigants losing in one sphere (e.g., public law) are compensated in another (e.g., private law). We support this conjecture by analyzing three case studies.

Keywords: combat immunity, equality, freedom of expression, general and specialized courts, public and private law.

1. INTRODUCTION

Specialized courts are courts that have limited, and often exclusive, jurisdiction in one or more fields of law. In recent years, there has been a growing trend to establish specialized courts (Gramckow & Walsh, 2013). An extensive literature has evaluated the pros and cons of this trend (Baker, 1994; Baum, 2011; Legomsky, 1990; Nathanson, 1971; Stempel, 1995; Zimmer, 2009).[1] Among other considerations, it was claimed that specialized courts can develop better expertise in their respective fields, and also contribute to the efficiency of the legal system (Damle, 2005; Dreyfuss, 1989). Yet, it was also argued that specialized courts may be isolated or detached from general developments in the legal system and may become captives of professional interest groups promoting sectarian agendas (Cheng, 2008, pp. 549–556; Zimmer, 2009). Further, specialized courts are more likely to become ideological in their decisions and may promote particular worldviews (Millers & Curry, 2009) or advance the objectives of particular interest groups (Frankfurter, 1926, p. 592; Nathanson, 1971, pp. 1012–1013).

This ambivalence is also reflected in the conflicting positions of eminent judges and scholars with respect to specialized courts. Some prominent judges such as Diane Wood and Richard Posner have been critical of specialized courts and praised the virtues of the generalist judge (Posner, 1983, p. 761, 777–789; Wood, 1997, 2015)[2]; others have equally emphatically called for the establishment of specialized courts (e.g., Dreyfuss, 1989; White et al., 1999). Still, others have argued that a general judge is merely a myth. As judges in general courts often specialize in particular fields of the law, even general courts are in many ways specialized (Cheng, 2008, pp. 519–522). This article identifies a new consideration that may bear on this question and demonstrates its relevance by examining the decisions of the Israeli Supreme Court.

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Accepted for publication 2 June 2022.

One of the most familiar concerns raised by scholars who examine the operation of specialized courts is what has been labeled judicial isolation. The judicial isolation argument rests on the conjecture that there is cross-fertilization among different fields of the law, namely, that principles used in one field are imported to other fields (e.g., Revesz, 1990; Wood, 1997, 2015). We shall label it below as the "coherence argument." It has been argued that:

"Specialized court judges, by having to focus on a particular set of legal issues at the cost of all others, are removed from the mainstream of legal thought. […] Such judges, as specialists, are not part and do not fit in the mainstream of generalist judges. […] There is little opportunity for the cross-pollination that fosters, tests, refines and improves new ideas and novel approaches in interpreting and applying the law." (Zimmer, 2009, p. 48).

The term "coherence effect" denotes the process by which principles applied in one area of the law are used in other areas, thereby rendering the legal system more coherent. Some legal philosophers, most eminently Ronald Dworkin, regard coherence as a major virtue of the legal system (Dickson, 2001; Dworkin, 1986). Under this view, the coherence of different fields of the law is dictated by principles such as equality and integrity.

Coherence is not merely a theory about substantive law; it also has important institutional implications. It has often been contended that general courts are more likely to facilitate consistency among different fields, or, at times, also in the very same field. In various contexts, this argument has been confirmed empirically. For instance, it was shown that the establishment of specialized courts focusing on domestic violence led to disparity in sentencing between cases of domestic and nondomestic violence (Kramer, 2016).[3] Hence, to the extent that coherence is regarded as an ideal that the legal system should strive for, it provides a reason to establish general rather than specialized courts as the former are more likely to result in greater coherence.

This article identifies a related, but distinct, effect that the establishment of general courts may bring about: "the complementarity effect." General courts can render decisions benefitting a certain group of litigants in one field of the law in order to "compensate" them for costs they bear from less favorable decisions in another field. General courts thus operate in a holistic manner (see, e.g., Guttel, Dasht and Procaccia, 2021). Complementarity denotes a phenomenon that is the opposite of coherence. In the case of coherence, courts use *similar* principles in different fields; in the case of complementarity, they use *different* principles in different fields such that litigants losing in one sphere (e.g., public law) are compensated in another (e.g., private law). The establishment of specialized courts may thus disrupt such balancing.

In considering the complementarity effect, we examine cases taken from the Israeli Supreme Court. We argue that the fact that the Court is general rather than specialized provides it with the opportunity to use private law, and in particular tort law, to benefit litigants whose constitutional or administrative law petitions were dismissed. In its role as a constitutional court, it often rejects petitions that it regards as having merit. It does so either in response to public pressure, or because it wishes to refrain from interference in the decisions of executive bodies. However, rejection of these petitions does not imply that suits by the very same petitioners are rejected when they become plaintiffs in civil litigation. The Court is willing to be particularly receptive to plaintiffs whose petitions against the state were rejected on public law grounds. Accordingly, civil litigation provides an opportunity for the Court to "complement" and "correct" its decisions in the public law sphere, thereby compensating litigants (typically through financial remedies) for the reluctance to provide relief (typically injunctive remedies) in the public law context.[4]

To support our hypothesis, we examine three case studies. We first examine the treatment of constitutional and administrative petitions by Palestinian residents (namely, noncitizens) seeking an injunctive relief against the Israeli military. Such petitions are often rejected. Yet we show that when the same litigants seek compensation in private law litigation, the Court is highly receptive to their claims. They prevail even when ruling in their favor requires deviation from entrenched legal doctrine. We then turn to two additional examples. One example refers to claims of discrimination raised by Palestinian citizens (and other minority groups). We show that while the Court's approach to such claims is restrictive in the constitutional sphere, it is far more willing to grant a private law remedy, even when doing so requires a departure from conventional principles of compensation. Last, we examine the Court's approach to freedom of expression, particularly in matters relating to indigent individuals who lack the means to take a meaningful part in public discourse. While the Court standardly rejects constitutional petitions aimed at instructing the government to fund the speech of indigent litigants, it promotes the very same objective through innovative adjustment of private law principles.

More broadly, we argue that general courts may use public law and private law strategically. An extensive literature has demonstrated that courts employ various tactics to maintain the appearance of legitimacy and impartiality while at the same time advancing their normative agendas (Bybee & Narasimhan, 2013). Such tactics include, for example, the selective use of references (Braman, 2009, pp. 4–5; Bybee & Narasimhan, 2013), motivated reasoning when analyzing the application of precedents (Braman, 2009, p. 86), and usage of legal jargon to mask personal preferences (Epstein & Knight, 1998). The complementarity theory points to an additional venue by which general courts can maintain the appearance of judicial restraint while pursuing an activist approach.

While our evidence comes from the courts, the phenomenon we identify is likely to be of a broader scope. We maintain, for example, that our reasoning is applicable also to regulatory agencies (and perhaps to other organizations that can be structured in general or specialized forms). We provide, at the end, some examples of regulatory agencies that provide fertile material for future research concerning the complementarity effect.

Before turning to present our argument, two cautionary comments are in order. First, our argument uses illustrations from a particular jurisdiction and particular fields of the law. As any given decision is made either by a general court or a specialized court, one cannot consistently compare a treatment group to a control group. Generalization of the argument thus requires caution and merits further research. Second, the normative consequences of our argument largely depend on one's perception of courts' obligations and powers. While the complementarity effect may be regarded by some as beneficial, others may consider it harmful. We discuss the implications of complementarity and a number of central considerations bearing on its overall desirability.

The remainder of the paper is structured as follows. Part II presents the conventional argument that general courts promote coherence, while documenting cases in which the Israeli Supreme Court sought to secure coherence across the public and private law spheres. Part III introduces the complementarity argument and demonstrates it through three case studies. Part IV discusses the phenomenon of complementarity in adjacent fields as well as its relation to the design of the judicial system. Part V investigates several normative implications emerging from this analysis.

2. COMPLEMENTARITY AND THE ISRAELI SUPREME COURT

The Israeli Supreme Court operates in two capacities. On the one hand, it is the highest appellate court. It is in charge of rendering decisions in appeals on judgments of lower courts concerning private law, criminal law, and other fields. On the other hand, it is also the High Court of Justice (HCJ). When it operates as HCJ, it makes decisions in administrative and constitutional law. There it operates often as the first and last adjudicatory body. Like other courts in Anglo-American systems (and, in contrast to courts in many Continental systems), the Israeli Supreme Court is a general court.

The notion that the Court's decisions in one capacity influence its decisions in another capacity is hardly surprising or new. It follows inevitably from the coherence effect identified by scholars investigating the pros and cons of specialized courts. As argued above, according to the coherence argument, general courts are more likely to develop coherent jurisprudence by applying matching principles in different fields of the law or, at times, also in the very same field.

In a long line of cases, the Israeli Supreme Court itself emphasized the importance of "legal coherence" between judgments in its different capacities.[5] The Court's effort to align the principles underlying adjudication in public and private law—particularly tort law—has taken several forms. A prominent example is the reshaping of the boundaries of tort law following the enactment of the Basic Laws in the early 1990s. The Basic Laws transformed Israeli public law by elevating the legal status of fundamental liberties to the level of constitutionally protected rights, most notably the right to "human dignity." While the Basic Laws' immediate effect was in the areas of administrative and constitutional law, shortly after their adoption it was suggested that their ambit should transcend further into private law (Barak, 1996; Kretzmer, 1990; Navot, 2007). It was important, so it was suggested, to redesign private law to render it consistent with the values now advanced by the Basic Laws. As the following examples illustrate, this approach was embraced by the Court.

First, the enactment of the Basic Laws led to the recognition of a new cause of action in torts. In its constitutional jurisprudence, the Court viewed the protection of "human dignity" as encompassing the right to individual autonomy. This interpretation then quickly carried over to the Court's jurisprudence in torts, whereby the Court

recognized the violation of autonomy as an independent cause of action (Wisenberg, 2016). Particularly, it led to the imposition of liability for failure to disclose information, even when disclosure would not have altered the victim's ultimate choice.[6] The mere violation of the right to reach an informed decision (rather than its consequent effect on the victim's actual choice) has been deemed a harm in and of itself, for which victims can recover.

Another area in which the Court acted to advance coherence concerned suits brought by individuals against the state. Traditional tort law recognized such suits only when the state acted *unreasonably*. By contrast, administrative law recognized a petitioner's (limited) right to an injunction even in cases where the public entity acted reasonably (Barak-Erez, 1994; Berenson, 1989; Dotan, 1994). Acknowledging the divergence in the standard applied in each area, the Court has indicated a willingness to apply the administrative law standard in tort law cases, namely, to award damages even when the public entity was not negligent.[7]

The emerging picture thus reflects a transition to greater consistency between tort law and administrative and constitutional law (Barak, 2017; Barak-Erez & Gilead, 2009, p. 11, 24–25, 36). This does not imply that the criteria of reasonableness in public law are identical in both fields (Dotan, 1995, pp. 279–281). Yet, there is an effort on the part of the courts to bring about greater coherence. The Court's endeavor to achieve coherence across the legal system is consistent with the conventional theory about the nature of general courts. In the remainder of this article we suggest, however, that the relations between the various fields can also take the opposite form, that is, they can be relations of complementarity rather than coherence. General courts may refer to private law as a means to "compensate" for their decisions in the public sphere. The next section advances this claim.

3. THE COMPLEMENTARITY THESIS

The complementarity thesis posits that general courts develop policies in private law (in particular, tort law), whose function is to compensate groups that were denied a remedy in the public law sphere. Public law petitions are often rejected not for lack of substantive merit, but because intervention would require the Court to over-step its bounds vis-à-vis the Executive. But when a petitioner is channeled to the domain of private law, the Court enjoys a freer hand in addressing the grievance. As the typical private law case does not require a sweeping review of government policy, the institutional limitation underlying the denial of the petition is largely absent.[8]

To provide evidence for this hypothesis, we discuss several major developments in Israeli tort law. The general trend has been to expand liability beyond its traditional scope (Gidron, 2012, p. 443, 453–455; Gilead, 2009). While the conventional explanations focus on parameters that are internal to tort law, we argue that the expansion is connected to public law litigation. Particularly, it relates to the conscious or sub-conscious desire on the part of the Court to benefit petitioners whose public law claims were rejected. Further, our thesis also explains exceptional cases in which the Court refused to attribute liability, thereby narrowing the scope of tort law. We show that our theory may account for these cases as well. What is particularly supportive of the complementarity thesis is that many of the private law doctrines used by the Court are novel and have no analogs in other legal systems. More importantly, they stand in stark contrast to the longstanding principles of Israeli law itself. We suggest that the key to understanding the emergence of these developments is the recognition of their function as a means to complement the Court's adjudication in the public law sphere. Let us now demonstrate this claim by looking at the three case studies.

3.1. Liability of the Israeli Military

Traditionally, the Court has largely refrained from granting administrative injunctions in cases involving military decisions (Libman, 2018). This judicial deference to the decisions made by military officials stems from several considerations. First, such decisions are perceived to have a dominant political aspect, and therefore the Court prefers leaving them to the discretion of the executive branch. Second, given the complexity of the issues involved, the propriety of the military action is often hard to assess. Third, such decisions require expertise that the Court is lacking, or at least believes that it is lacking. Hence, security matters typically do not give rise to judicial activism (Cohen & Cohen, 2012, pp. 143–173). This reluctance is not without exception. A notable counter-example is the Court's intervention in the demarcation of the separation barrier erected on the West Bank. The

Court struck down significant parts of the barrier's planned route, reasoning that it did not appropriately balance the state's security interest with the injury inflicted on local Palestinian residents (Cohen-Eliya, 2014; Davidov & Reichman, 2018). Such interventions, however, are uncommon. This is especially so in the cases we mostly focus on here, in which the action in question involves direct and immediate use of force.[9]

The Court's deference to the military most notably affects Palestinians residing in the West Bank and the Gaza Strip. As the military is especially active in these areas, residents in both locations are particularly vulnerable to harm caused by military action. While the Court has been reluctant to grant protection in the form of constitutional or administrative remedies, it has been highly receptive to claims for compensation in torts. Thus, what it refused to do in its capacity as the HCJ, it did in its capacity as the highest appellate court. In doing so, the Court extended the reach of tort law beyond the conventional liability principles pertaining to combat activity (Jacob, 2003).[10]

The Court's deferential approach in the context of public law has been consistent across different types of military activity. Notable examples include the rejection of petitions seeking to set judicial guidelines for protecting civilian casualties[11]; to amend military protocols concerning the use of lethal force[12]; to limit the use of particular types of ammunition[13]; to increase the minimal distance between artillery targets and civil communities[14]; to cease the practice of house demolitions of those convicted of terrorism[15]; to open additional gates within the separation barrier[16]; to alter investigation protocols of parties injured by military gunfire[17]; and many others.

It is against this background that the Court's expansive approach in tort law should be considered. The Court has amended basic rules of liability to allow victims to recover for harm stemming from military action. We demonstrate this with reference to three major legal doctrines. The first pertains to the longstanding common law doctrine of "combat immunity." This immunity provides that harm inflicted in the course of military activity does not give rise to liability.[18] We show, however, that the Court's interpretation of the doctrine rendered it largely devoid of any practical bite. The second pertains to the factors examined by the Court when evaluating negligence by military personnel. In nonmilitary cases involving the use of force, an injurer's negligence is examined on the basis of her *subjective* evaluation of the setting, even when the evaluation is mistaken. Conversely, in the military context, the Court held that the propriety of the use of force would be measured against the *objective* setting. Thus, when the use of force is justified when examined through the lens of the injurer's perception, but is unjustified in view of the actual circumstances, the military is held to a higher standard. The third doctrine pertains to the rules of evidence applied in military cases. Such cases typically raise major challenges for the state: contentious relations with local residents make it less likely to obtain exonerating testimony from witnesses. In addition, the frequent presence of multiple military units at the scene makes it difficult to trace the accurate turn of events, especially when considered several years in retrospect. Despite legislation designed to ease the burden levied on the state, the Court nevertheless adopted a strict approach, under which the state is held to a high evidentiary threshold. In each of these contexts, the Court's expansionary approach in the domain of torts stands in stark contrast to its restrictive approach in the domain of public law.

The concept of combat immunity has been a subject of an ongoing struggle between the Israeli parliament (Knesset) and the Court. The immunity was originally codified in legislation in the early 1950s. The Palestinian uprising in the late 1980s resulted in a surge of tort claims against the military, which triggered a reexamination of the immunity's scope by the Court. In a landmark decision, the Court substantially narrowed the immunity's boundaries, particularly by re-conceptualizing the distinction between military action and policing.[19] Based on this distinction, the Court characterized much of the military's activity in the West Bank and the Gaza Strip as mere "policing," to which the immunity does not apply. Consequently, actions such as arrests of suspects, deployment of road stops, and quelling of protests were all considered as lying beyond the immunity's ambit (Mersel, 2005).

The Court's interpretation provoked an immediate response by the legislature, which sought to broaden the scope of the immunity. A dynamic then ensued in which the Court attempted to retain its restrictive interpretation of the immunity, while parliament, time and again, responded by enacting amendments designed to shield the military from liability.[20] Ultimately, despite the legislative effort, the immunity was largely emasculated by the Court.

To substantiate this conclusion, we examine empirically the entire body of court decisions concerning military tort liability between 2002 and 2019 (for the full list of cases see Supporting Information). Note that the

immunity carries practical significance only in cases in which the military failed to comply with the standard of reasonable care. Namely, the immunity comes into play only if, in the absence of immunity, the military would have been found liable. We find that in most cases, courts separately examined whether the military acted negligently and whether the immunity applied. This enables us to assess the immunity's actual impact on court outcomes. In particular, it allows us to measure the extent to which the denial of liability was based on the classification of the act as falling within the bounds of the immunity.

The following two charts summarize the results (Charts 1 and 2). Out of 196 tort suits brought against the military, the military raised an immunity argument in 191 cases. While the Court recognized the applicability of immunity in 151 cases, in 113 of them (74.8%), it also concluded that the military force behaved non-negligently. Thus, the large majority of the cases in which it was held that the immunity applied were also cases in which it was effectively redundant—as liability would have been denied even in the absence of immunity. In an additional 37 cases (24.5%),

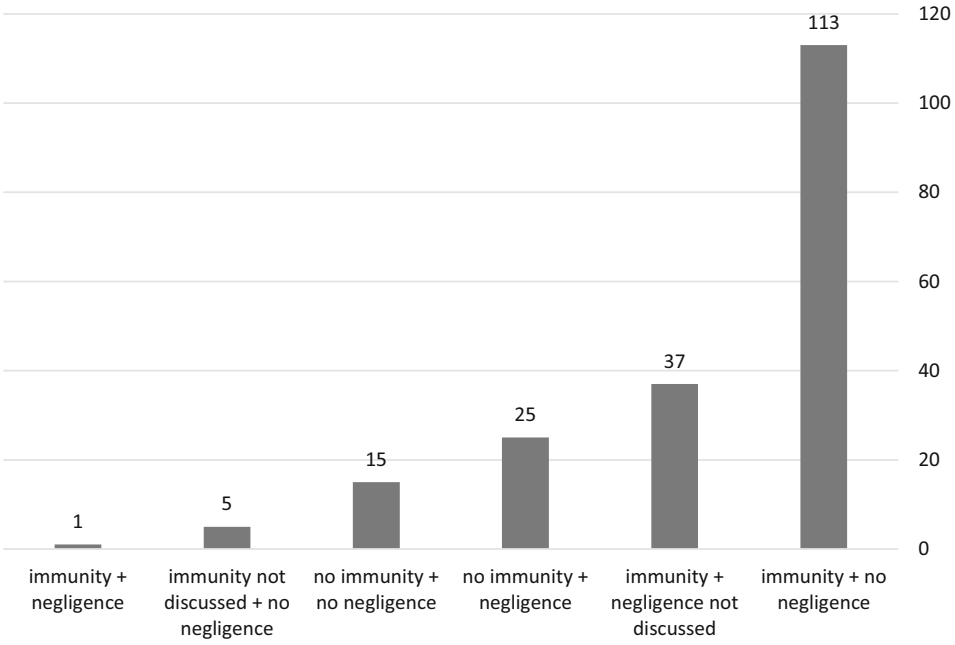

CHART 1 Classification of cases: findings of immunity and negligence

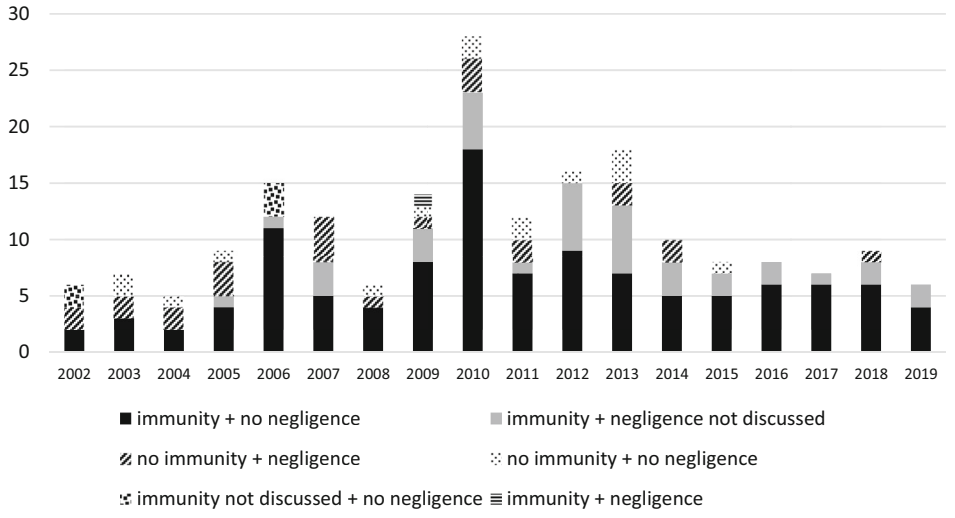

CHART 2 Findings of immunity and negligence by year

the Court recognized the immunity argument without addressing the question of negligence. Most importantly, there is only a *single* case (0.7%) in which the Court found negligence, yet denied liability based on the immunity.

These findings suggest that under the Court's interpretation, combat immunity carries little weight. State responsibility in this context largely follows ordinary tort standards, as applied to other injurers. Irrespective of the immunity, liability is imposed when the military failed to meet the standard of reasonable care.

Another context in which the Court expanded the military's liability relates to the Court's standard of negligence, particularly in cases of a subjective mistake. In the heat of hostilities, soldiers may decide to use force in response to a misperceived risk. In such cases, the use of force may be justified when examined through a soldier's subjective perception of events, yet negligent when measured against the actual risk that was posed. A question then arises as to whether the negligence determination should be guided by the reality as perceived from the perspective of the soldier or by the objective facts. In resolving this question, the Court deviated from principles it adopted in analogous, nonmilitary cases. Whereas in nonmilitary cases a subjective standard applies, the standard applicable to military conduct is objective.

To illustrate, in a leading case concerning a nonmilitary setting, the defendant shot a trespasser. The defendant mistakenly believed that the trespasser was a burglar who pointed a gun at him. This belief, however, turned out to be unfounded. Following the longstanding approach of the common law, the Court determined that the assessment of the defendant's behavior should be made with reference to the defendant's subjective perception of events.[21]

The Court's position varies dramatically when considering the use of force by military personnel. One prominent case considered the tort liability of a tank commander who shot a number of innocent bystanders. The commander opened fire in the mistaken (but reasonable) belief that the tank had been ambushed and hit by a landmine. The state argued that, in line with the approach taken in the nonmilitary context, "the case should be evaluated from the commander's point of view, and the court should accordingly hold that his action was reasonable given his perception of events."[22] The Court, however, found the commander liable, holding that "when we examine negligence, the examination must be objective rather than subjective. […] The question is what a reasonable commander would have done under the circumstances, rather than what he would have done given his mistaken belief."[23]

A third manifestation of the Court's expansionist approach in military matters concerns the applicable rules of evidence. As noted, the state faces special difficulties in responding to tort claims raised in military matters. Witnesses are often unwilling to support the state's case by providing testimony, and the complexity of the events makes it difficult for the courts to render an informed judgment. The legislature responded to these difficulties by requiring plaintiffs to meet stricter evidentiary demands. In particular, it significantly restricted the use of rules allowing a shift in the burden of proof from victims to the state.[24]

Despite this legislation, the Court adopted rules that ease plaintiffs' burden of proof, even beyond the standard applied in nonmilitary matters. An illustrative example concerns a case in which a West Bank resident claimed to have been shot by soldiers, sustaining an injury to his head.[25] The plaintiff filed a complaint with the Israeli police, but the police failed to conduct a thorough investigation that would have produced conclusive evidence regarding the bullet's source. Given this failure, the plaintiff could not prove the factual causal relation between his injury and the soldiers' alleged behavior. The state denied the plaintiff's charge, providing evidence that at the relevant time, soldiers were not engaged in any incident in which they opened fire.

Contrary to conventional principles of evidence, the Court held that the police's failure to investigate triggered a shift in the burden of proof from the plaintiff to the military. Although it was the police rather than the military that was responsible for the negligent investigation, the military was ultimately held responsible for the plaintiff's injury—an injury that was not proven to have been caused by military action. In reaching this conclusion, the Court applied the rules of burden-shifting in a manner that is unparalleled in nonmilitary cases. In nonmilitary cases, the rule has been applied when the defendant's *own* negligence prevented the plaintiff from obtaining potential supporting evidence. By contrast, in military cases, the Court expanded the scope of this evidentiary rule, by holding the military responsible for negligence committed by the police.

The overarching conclusion emerging from the three examples is that what the Court refuses to do in the context of administrative and constitutional cases, it is willing to do in tort cases. Furthermore, in considering military liability in torts, the Court goes beyond what is customary in other legal systems, as well as beyond the prevailing principles of liability in Israeli law. We suggest that it is precisely the Court's unwillingness or inability to act in the public law sphere that drives its expansive policy in the domain of tort law.

3.2. The jurisprudence of discrimination

A major justification for judicial review of executive decisions is to protect minorities against discrimination. This lies at the very core of the Court's purview in its capacity as the High Court of Justice. At the same time, decision-making in the realm of budgetary priorities lies at the core of the prerogative of the executive and the legislature. But when the Court is called to intervene to guarantee equality, it must often interfere in budgetary priorities. In such cases, the Court faces a dilemma: it can either fail to provide a remedy to victims of discrimination, thereby retreating from its duty to ensure equality; or it can intervene, but step into a domain that is conventionally perceived as lying within the purview of other branches of government.[26]

The task of protecting minorities against discrimination is challenging for a number of additional reasons. First, the question of whether a particular policy is discriminatory could itself be a complicated interpretative question. The public entity may argue that disparate treatment of different groups is justified on the basis of a relevant distinction between them (Barak, 2014, pp. 692–693). However, the criteria defining a "relevant distinction" may hinge on one's political ideology. Further, even when the public entity's policy can be supported on the basis of a legitimate distinction, the Court cannot discern whether the motivation for the entity's decision was in fact grounded in that distinction, rather than in an illicit, discriminatory motive. Second, judicial review is highly limited when the alleged discrimination is "structural," that is, discrimination arising not from a concrete governmental action that is the subject of the petition, but rather from a pattern of long-term institutional practices or from discriminatory preferences of private entities. Intervening in such cases requires not only the overriding of a single discriminatory decision, but also the correction of past discrimination, by ordering a restructuring of budgetary priorities. Judicial review in such cases is particularly restrained, as it runs against the fundamental principle of separation of powers.

These constraints indeed feature prominently in the Court's reasoning in discrimination cases, many of which involve petitions brought by members of the Arab minority. While the Court sympathizes with many of those claims, it is often reluctant to grant remedies in the public law sphere. Thus, for example, in a petition brought against the Minister of Religious Affairs, the petitioner showed that although Arabs constitute 19.1% of the population, their share in the Ministry's budget was only 1.86%.[27] The Court recognized that this allocation is discriminatory but refused to grant a remedy. As one of the Justices explained, "[t]he Court does not possess the information required to determine the appropriate budget or its adequate allocation, in view of the particular needs of every religious group. Such an examination is a core function of the legislature and the executive—their core function, not the Court's."[28] Accordingly, the Court rejected the petition not due to its lack of merit, but due to a perception of its own institutional limitations.

In another case, the Court examined decisions to fund extended school hours in Arab and Jewish educational institutions. At an initial stage, the Education Ministry's program included only a few Arab institutions.[29] At a later stage, the Ministry allocated 8% of the program's budget to Arab institutions, although their share in the system exceeded 20%.[30] The state responded that the allocation was not discriminatory; instead, it was based on a policy giving priority to municipalities that were located in proximity to the border. The different allocation emanated from the fact that these municipalities were close to the border rather than from the fact that they are predominantly Jewish. The Court accepted this argument and rejected the petition.

Other petitions concern discrimination of the "structural" kind. Following a decision to construct a new Jewish neighborhood in Jerusalem, petitioners demanded that the Court instruct the government to invest in new housing for the city's Arab community. The Court did not deny the petitioners' claim that the Arab minority suffers from continuous underfunding of housing, yet refused to condition the construction of the Jewish neighborhood on a governmental obligation to also construct an Arab neighborhood. As the Court noted, "[the petitioners] do not argue that the plan violates any zoning ordinance, or fails to comply with relevant regulation. Their sole claim is that Respondents have not allocated sufficient resources to meet the needs of the Arab community for housing, industry and commerce. […] The petitioners' claim refers to construction policy in the Jerusalem metropolitan area over the past 30 years." The denial of the petition on this basis thus demonstrates the limits of judicial intervention in decisions concerning public law when the alleged discrimination is structural. As the decision to construct the Jewish neighborhood was not legally flawed, the mere fact of persistent discrimination does not constitute a sufficient cause for judicial intervention.

When examining matters of equality, the Court must therefore pay heed to a number of institutional considerations limiting its judicial purview. As one of the Justices wrote "Even though discrimination is illegal, it may

nevertheless exist. The discrepancy between law and reality is especially manifest with respect to equality. […] Although the Israeli legal system is pledged to equality, in reality Arabs are not treated equally" (Rubinstein, 2001, 2003; Zamir, 2006, pp. 11–13). And as another Justice observed, "[t]he resources available to the Court are limited. By not entering into the political arena and respecting the other branches of government in appropriate cases, the Court does not seek to amplify the power of those branches, but rather to preserve the viability of the judicial branch. This is the dilemma faced by any constitutional or administrative court" (Askelasky & Cherni, 2015). Thus, with few exceptions,[31] the Court tends to deny injunctive relief when faced with grievances of structural discrimination. When shifting from public law to private law, the Court's outlook on discrimination, particularly structural discrimination, takes a different form. In a seminal tort case, an Arab minor was injured in a car accident, and brought a claim against the driver and his insurer.[32] The main controversy concerned the assessment of the harm caused to the minor, arising from losses of future earnings. The defendant argued that harm should be assessed with reference to the average income of Arab women in the village in which the minor resided. The plaintiff argued that it should be assessed with reference to the average income of the entire population. The damages under the latter approach were significantly higher, as the average earnings of women in the plaintiff's village were especially low.

As a doctrinal matter, the defendant's claim is consistent with conventional compensation rules. Compensation for loss of earnings is designed to reflect the most accurate assessment of the harm emanating from the tortious act. In principle, the calculus should include any relevant factor bearing on the actual magnitude of the harm. The assessment should therefore be derived from the victim's individual attributes, rather than those of the general population.[33]

Furthermore, the Court has recognized the significance of the difference between Jews and Arabs in related matters. Particularly, in assessing the loss of earnings of minors, it is assumed that Jewish minors would begin earning their income only at the age of 20 (for women) or 21 (for men), after completing their mandatory military service. By contrast, for Arab minors (who are not required to serve), the assumption is that they would enter the labor market at the age of 18. Thus, consistent with the defendant's approach, existing compensation rules already distinguish between Arab and Jewish minors.

Nevertheless, the Court decided in favor of the plaintiff. Despite the substantial gap in the average income of Arabs and Jews, the Court held that this gap ought to be ignored. In the absence of specific evidence concerning the vocation that the plaintiff would have chosen absent the injury, her ethnic affiliation should not detract from her compensation. As the Court explained, "[e]very boy and girl in Israel—whether rich or poor, and regardless of origin or ethnicity—all […] can pave their way to the various income opportunities existing in Israel. All have the right to do so." Hence, even when statistical differences predict disparities in expected income by minors of different backgrounds, the Court disregards those differences, and thereby promotes the equality of opportunity.

The Court's decision refers to structural discrimination. The discrepancy between the income of Jews and Arabs stems from reasons that are different and diverse, but are unrelated to the conduct of the individual driver. Yet, as the Court is limited in its powers to provide a remedy in the domain of public law, it uses private law to protect vulnerable groups. When doing so, it does not encroach upon the powers of other branches of government. It need not set budgetary priorities or determine the allocation of public resources. Harnessing tort law to cope with structural discrimination stands in tension with some of the fundamental principles of liability, most notably the principle that compensation should equal the harm. However, where public law falls short, private law is called upon to assist.

3.3. Freedom of expression

Similar to the right to equality, freedom of expression has been regarded as one of the most central and fundamental liberties. The Court perceives it as having "a supreme status among the basic rights,"[34] as being "a precondition for the realization of all other liberties"[35] and "central to maintaining the very soul of democracy."[36] At its core, freedom of expression is a negative right—the right to be free from censorship or from limitation on one's ability to express herself (e.g., Harel, 2012; Schauer, 2008). Yet, freedom of expression also gives rise to certain positive rights (Barak, 2014, pp. 726–728; Kenyon, 2014). For example, the Court held that the state is obligated to protect individuals who are attacked as a result of their views,[37] to provide access to information it

holds,[38] to allow public spaces to be used for protest,[39] and even to provide security for demonstrations and cover their cost (Medina, 2016, pp. 571–573).[40]

Yet, despite the positive aspects of freedom of expression, the public authority still has broad discretion in determining how much to invest in protecting speech and how to allocate its resources. Not every wish of a person to express herself imposes a duty upon the state to provide financial support to facilitate it (Schauer, 1994). As the Court emphasized: "[t]he positive duty implies that the state must allocate the necessary means required for the realization of the right, within reason and in accordance with its priorities."[41] The state's duty to protect expression is limited in terms of both size and scope. As a general rule, when allocating its resources, the state's primary duty is to do so in a nondiscriminatory manner.[42] Particularly, it must do so without regard to the content of the speech.[43] Once these restrictions are met, however, the Court rarely intervenes in the chosen allocation.[44]

The fact that exercising the right to free expression often requires resources—which the state is not generally obligated to provide—implies that wealth significantly affects one's ability to exercise one's freedom of expression. Effective exercise of the right to free expression often requires a "platform" and access to means of communication. While the wealthy can use their own resources to convey their message effectively, the same opportunities are not available to the less affluent (Re, 2017). Thus, the practical ability to participate and influence public discourse differs between the rich and the poor and the Court cannot remedy this discrepancy.

Several cases illustrate the Court's inability to use public law as a means to "level the playing field" in the domain of free speech. One notable case examined whether the state bears a duty to allow a march and provide it with the necessary security.[45] The Court recognized that freedom of speech imposes a principled duty on the state to bear some of the security costs, but maintained that the organizers can be expected to shoulder some of the cost as well. In a different case, the Court even held that demonstrators must sometimes bear the cost of firefighting and emergency services.[46]

In the absence of a duty on the part of the state to actively fund free speech, most petitions concerning freedom of expression focus on the governmental action's effect on equality. One such case was considered a petition by a Holocaust survivor. The petitioner asked that a memorial center (funded by the government) include his relatives who perished in the Holocaust in a special commemoration program. The center agreed, but conditioned its approval upon payment. The petitioner argued that the financial charge discriminated against relatives of Holocaust victims who could not afford it.[47] Rejecting his petition, the Court maintained that the center must fund the commemoration of all victims, but only to a certain degree. The center could thus charge for special initiatives, including the type requested by the petitioner.

In another case, the residents of a small community demanded that the state install antennas to enable them to receive television and radio broadcasting.[48] The Court accepted the basic notion that the reception of such broadcasting is part of the public's "right to information," which is an important element of the right to freedom of expression. It also held that the implementation of the right "should be given priority in the public authority's allocation of its budget." Nevertheless, the petition was rejected. Although the Court viewed the refusal to install the antennas as undermining the residents' rights, it held that it "cannot mandate a particular allocation of resources," explaining that it lacks "both the authority and the ability" to do so.[49] The residents were therefore required to use their own resources to facilitate the reception.

The effect of income on the actual scope of expression is manifest not only when public funding is involved, but also when expression is exercised by private entities. A prime example concerns privately owned communication platforms. When an affluent individual establishes a newspaper and offers it to readers without charge, her ability to influence public discourse far exceeds that of the poor, who lack the means to do the same. This led a former Chief Justice to suggest that certain restrictions be placed on the private press, to guarantee that it reflects not only the positions of its owners, but also dissenting views of those who cannot establish their own independent platforms. As he stated, "[i]n theory, everyone can acquire such a platform. In practice, only a few do so. Ownership of such platforms is highly concentrated. A 'constitutional market failure' exists in this area. Whoever controls the platform controls an asset that is vital to democracy" (Barak, 2002, p. 294). Thus, according to this view, the platform acquired by the wealthy must also serve a social purpose, by guaranteeing that it remains open to the public at large. Doing so fosters the free expression of the poor, despite their inability to create their own communication channels.

This position, of seeking to impose restrictions on the private press, has not been adopted. Indeed, it raises significant concerns, including the limitation of the owner's own freedom of expression, as well as practical concerns of monitoring and enforcement. But the rejection of that position comes at a price. Maintaining the status quo perpetuates the imbalance between rich and poor, and sustains the discrepancy between their respective abilities to affect public discourse.

As in the previous examples concerning military activity and discrimination, the Court reverts to private law to offer the protection it could not (or did not want to) provide through public law. In the case of free speech, this is done not by expanding the scope of liability, but rather by narrowing it. In a leading case, the defendant published a book including defamatory allegations against a cabinet minister and the political party to which he belonged.[50] The trial court found the defendant liable and imposed significant damages to reflect the severe harm caused to the victim. Upon appeal, the Supreme Court did not dispute the defendant's liability or the extent of the victim's harm, but nevertheless diminished the damage amount by almost 50%. The reasoning for the Court's decision was premised on the defendant's economic position—as a private individual with modest resources. It was held that when the wrongdoer in a defamation case is of limited means, damages for defamation should be adjusted to her ability to pay.

While the ruling protects the wrongdoer's freedom of expression in its negative form (namely, her ability to express herself without fear of incurring prohibitive cost), providing it requires a departure from fundamental principles of liability. A basic tenet of tort law is that a liable injurer must make the victim "whole," that is, restore the victim to her pre-injury position. Liability that is tailored to the injurer's financial status (rather than the victim's harm) deviates from this principle. However, this deviation should be viewed in light of the dilemmas occupying the Court in the public law arena. The failure on the part of the state to facilitate the equal exercise of the right to free speech leaves the poor at a systematic disadvantage. If, in addition, the Court were to apply the conventional principles of tort law in the private law arena, this bias would have deepened further, as the "chilling effect" of defamation suits is disproportionately stronger with respect to the poor. As the Court explained, "[o]ne cannot juxtapose the liability imposed on a financially stable entity, which can bear it, price it, and insure against it, with the liability imposed on an individual of meager means, who must pay it off using his sparse resources, leading him to financial ruin or even to a state of bankruptcy."[51]

The departure from tort law principles can therefore be explained by the unique obstacles that the poor face when seeking to exercise their freedom of expression. Public law does not guarantee equality in the scope of free speech, and the difficulty emerging from this reality cannot be remedied within the confines of constitutional protection. The Court turns to tort law to fulfill a task that constitutional law cannot fully perform. By deviating from conventional rules of liability, it mitigates the inequality between the rich and the poor.

4. A BROADER VIEW OF COMPLEMENTARITY

The case studies considered above indicate a pattern of complementarity, in which judgments in a particular field are guided not by the principles governing the field itself, but rather by the (unfulfilled) objectives of a different field. In this section, we briefly discuss the broader phenomenon of complementarity and its underlying motivations, as well as its relation to the design of the judicial system.

The phenomenon of complementarity is not unique to the interface of public law and tort law and can indeed be traced to additional areas of the legal system. Thus, for instance, Sharkey (2005) has found that, in the realm of tort law itself, when legislation introduces damage caps for noneconomic harm, courts respond by awarding higher damages for the *economic* components of harm. A natural interpretation of that finding is that courts perceive caps as an unwarranted restriction on victims' recovery, and thus compensate victims by increasing their award. Similar examples can also be found in criminal law. Olson and Ramker (2001) have shown, for instance, that when courts charge offenders a fee intended to cover the cost of probation, the fee is (wholly or partially) deducted from the fine in case a fine is imposed. Likewise, Ruback et al. (2004) have demonstrated that when offenders bear a fine, they are charged with lower liability in restitution toward victims. In all of these examples, an external mandate restricts the court's discretion in one dimension, and the court responds by adjusting its policy in a second dimension. That process often requires deviation from well-established principles that otherwise govern judgments in the second dimension.

While complementarity-based considerations are often not explicit, in some cases courts acknowledge them more openly. Such is a case recently heard by the Israel Supreme Court. In *Krois v. Israel Police*, Petitioner challenged the police use of "skunk water"—a foul-smelling liquid used to disperse unlawful demonstrations. Petitioner argued that the measure violates the constitutional rights of protesters while inflicting severe physical distress to adjacent homeowners and innocent bystanders. The Petition sought an injunction, prohibiting the measure's use in densely populated areas. While the Court recognized that the evidence relays a "disturbing portrayal of the use of 'skunk water' as a means of dispersing demonstrations", it ultimately refused to impose an injunction prohibiting its use. Nevertheless, in an oral hearing, the Supreme Court President, Justice Hayut, urged Petitioner to channel his grievance to a private law suit: "you should put it to the test", she stated. "After one, two or three tort suits, even if there is no instruction to the contrary, the policy will most likely vanish."[52]

With that said, such explicit annunciations of complementarity are quite rare. Complementarity is not an official part of legal doctrine, and as many of the examples illustrate, it often entails an outright departure from accepted principles. Hence, even if a complementarity-driven policy is deliberate, it might not be openly declared. Moreover, the motivations of judges may not be uniform: some may apply it intentionally; others may do so subconsciously; and yet others may not do so at all. The significance of the phenomenon stems primarily from its existence, rather than its underlying motivations. Acknowledging the presence of complementarity-based considerations allows for a more nuanced understanding of decisions and institutions, and for a more informed critical examination of legal policy.

We argue that the phenomenon of complementarity is primarily a staple of general courts rather than specialized ones. This hypothesis is rooted in an extensive literature suggesting that specialized courts are characterized by a degree of seclusion from other parts of the judicial system. Indeed, it is the seclusion of specialized courts that underlies the conventional belief that specialization is to some extent inimical to "coherence": it is their isolation from other parts of the system that makes uniformity more difficult to achieve. As specialized courts are not as exposed to the full array of legal problems, such courts are less likely to hear arguments from diverse social and legal perspectives and are ultimately less likely to develop a holistic worldview. It is thus conventionally argued that the restricted focus of specialized courts leads to "insularity" (Parker, 2009, p. 273) and "ghettoization" (Wishnie, 2017, p. 8); that specialized courts suffer from "myopia" (Wasserman & Slack, 2021, p. 12) and a "tunnel vision" (Dreyfuss, 2004, p. 779, 780; Jindal, 2016, p. 1074; Oswald, 2017, pp. 260–262); that specialized courts are "immunized to new ideas" (Rifkind, 1951, p. 426); that they are "blinded to externalities" that their narrow focus inflicts on the general public (Dreyfuss, 1995, p. 17); and that they generally suffer from "bias" (Bruff, 1991, pp. 331–332).

Our hypothesis is grounded on the same premise of seclusion. Complementarity, like coherence, refers to *interactions* among legal fields. While coherence-based approaches seek to achieve consistency among fields, complementarity-based approaches seek a division of labor among them, so that shortcomings in one area are attenuated through adjustments made in another area. Neither coherence nor complementarity can be advanced if a single field is viewed in isolation. The general court, by virtue of its broader vantage point, can advance coherence more effectively than its specialized peer. The same vantage point also allows it to be more effective in advancing complementarity.[53]

5. THE COMPLEMENTARITY THESIS: A NORMATIVE PERSPECTIVE

The discussion so far has illustrated the complementarity relation characterizing judicial policy in different fields of the law. We conjectured that general courts, unlike specialized courts, can approach legal challenges in a holistic manner. A general court can counterbalance its restrictive approach in one area by adopting an expansive approach in another area. Complementarity (and not only coherence) is a phenomenon characterizing general courts. What, if any, are the normative implications of this observation?

It would seem that using tort law to complement public law could give rise to two main objections. First, resorting to tort law leads to a random and unequal allocation of the burden associated with the social policy that courts promote. Decisions in public law are directed at the state, and therefore lead to a broad distribution of cost, predicated on the progressive features of the tax system. Decisions in tort law, on the other hand, are often directed at individual tortfeasors, who are thereby required to carry the weight of advancing a desired social goal.

Thus, for example, one may criticize the decision concerning compensation for minors based on its erratic distribution of cost. While equality is a social goal worthy of advancing, it does not immediately follow that the cost of attaining it should fall on the shoulders of arbitrary tort injurers, rather than the public at large. One can similarly object to the Court's policy concerning freedom of expression. Protecting the free speech of the poor is an important social objective. But scaling down the damages that poor injurers must pay in defamation cases comes at the expense of victims who are no longer made whole. It is questionable whether the victims of defamation should be the ones to bear the cost of such reform.

A second objection is that the ability to resort to tort law could diminish courts' inclination to exercise their full authority when acting as constitutional courts. As tort law shares in the burden of protecting the rights of petitioners, the need to intervene further—by applying the instruments of public law—becomes less urgent. Whether complementarity-based policy is pursued consciously or subconsciously, it may ultimately "dilute" the scope of judicial review. For example, if the Court could not resort to tort law in matters relating to military activity, it would arguably find it more difficult to deny petitions challenging the discretion of military officials. The transition from public law to private law comes at a cost, as private law does not allow broad consideration of issues such as military policy, equality, and free expression in a direct and comprehensive manner. Rather, it considers them only indirectly, through the lens of the particular contingencies of the alleged tortious act. The impact of a decision to hold a tank commander liable in a particular tort case is, by its nature, more limited in scope than a decision to regulate military policy in public law. The very advantages that make tort law an attractive substitute—the less intrusive nature of monetary remedies compared to injunctions, and the fact that defendants are often private entities rather than the state—also render it less effective in advancing the protection of citizens against military violence.

While the first objection raises a substantial concern, its magnitude may depend on the extent to which tort law is used to substitute public law. Somewhat ironically, as courts' reliance on tort law intensifies, the concern about an unjust distribution of cost may diminish. Tort law policy then affects more spheres of activity, making the group bearing the brunt of the cost larger and more diverse. In addition, when liability insurance is prevalent, costs are spread even further, as potential injurers then bear the costs collectively through higher insurance premiums.

The second objection should be evaluated against the limitations that courts face in the public law arena. When operating in their constitutional and administrative capacities, courts are bound by the separation of powers principle, and cannot intercede in matters lying within the core prerogatives of the other branches. Accordingly, it is possible that turning to tort liability allows courts to advance policies that they could not otherwise advance. While the second objection underscores the peril of judicial reluctance to employ public law, in reality, it may be that the use of private law enables courts to expand the reach of legal protection. In that respect, adjudication (much like politics) is the "art of the possible, the attainable—the art of the next best."

In a more general sense, one's view with respect to the second objection hinges on one's substantive position relating to the desirable division of labor between public and private law. Particularly, it hinges on one's perception as to whether courts should be activist or restrained in either field. The following table indicates the interplay between this perception and the desirable structure of the court (Table 1).

Those believing that private law is an effective vehicle for advancing broad social policy would most likely view general courts as superior, as specialized courts would restrict the use of innovative doctrines of tort law to advance broad social goals.[54] Conversely, those believing that courts can and should take a bolder approach in the public law sphere would be more inclined to support the establishment of specialized courts—reasoning that the inability to compensate victims in tort law would ultimately result in a more expansive approach in public law.

TABLE 1 Approaches to general and specialized courts

	Advocates of activism in public law	Opponents of activism in public law
Advocates of activism in private law	Ambivalent	General Courts
Opponents of activism in private law	Specialized Courts	Ambivalent

Hence, those believing in a deferential policy in public law and an activist one in private law would view general courts most favorably. By contrast, those believing in an activist adjudication in public law and a restrained one in private law would view specialized courts most favorably. Others would have an ambivalent view. Those supporting activist courts in both areas, and those supporting restrained courts in both areas, would be ambivalent in their approach to court structure.

The aim of the above discussion is therefore not to elucidate the optimal degree of deference provided in public law or the role that private law should assume in advancing broad social policy. Rather, its main purpose is to illuminate an overlooked relation between the institutional structure of courts and the content of judicial decisions. When taking account of this relation, the choice between general and specialized courts may bear even greater significance than conventionally assumed.

6. CONCLUSION

Legal scholarship has traditionally focused on the substance of law, paying scant attention to the architecture of the legal system. Studies in the design of the legal system, however, have highlighted the important relations between structural elements of the legal system and the content of substantive law. Particularly, these studies demonstrated the relationship between court structure and the emergence of legal coherence. While specialized courts tend to view cases in isolation, general courts are more likely to promote consistency.

Analyzing three case studies, this article suggests that court structure induces a second effect, standing in tension with the standard coherence argument. General courts may deliberately apply different approaches in different fields. Their expansive approach in one field serves to counteract their restrictive approach in another. In so doing, they create a system that is coherent in a different way, namely, one in which different fields function as complements.

The present study focuses on the institutional design of courts, but our analysis has possibly broader implications. One particular area of interest is the institutional design of regulatory agencies. The consolidation, or deconsolidation, of regulatory agencies, has been a subject of much scholarly attention. Extensive literature has investigated the effects of merging separated agencies, each with limited regulatory scope, into a single agency with extended authority (e.g., Camacho & Glicksman, 2014; Coffee Jr., 1994; Freeman & Rossi, 2011; O'Connell, 2006; Yadav, 2021). This literature, analyzing major instances of regulatory consolidation in the United States, has suggested that consolidation leads to several outcomes. For example, it has been argued that regulatory consolidation facilitates more coherent policymaking and prevents possible overlaps between agencies in charge of closely related areas (Camacho & Glicksman, 2014; O'Connell, 2006; Pellerin et al., 2009). Consolidation also saves resources (particularly coordination costs), increases transparency, promotes information sharing, and may reduce the risk of regulatory capture (Brown, 2020). Against these benefits, it has been contended that maintaining "specialized" agencies may enhance expertise (Yadav, 2021) and innovation (Pellerin et al., 2009), and may enhance regulators' accountability (Freeman & Rossi, 2011).

The present study suggests that regulatory consolidation may give rise to an additional important, yet currently overlooked, phenomenon. A consolidated agency, because of its extended authority, can engage in similar "cross-subsidization" behavior—akin to the one underlying the behavior of general courts. Facing pressures to adopt a regulatory policy favoring an interest group, a consolidated agency may disguise its concessions to the group by promoting concomitant changes in other areas under its purview. As scholars have already suggested, consolidated agencies increase lobbyists' appetite to exert efforts aimed at influencing the regulatory process, as the potential gain from lobbying an agency with extended authority is higher (O'Connell, 2006). Whereas this argument focuses on the demand side for lobbying, our analysis suggests that consolidation also affects the supply side. Consolidated agencies, like general courts, can adopt policies that "balance" their effects across the various domains under their authority. They can more easily accommodate demands for policy changes while evading public scrutiny. While we illustrated the complementarity effect in the context of courts, there is no reason to believe that it is limited to courts; one may expect to identify the same phenomenon in other institutions.

Acknowledgments

For excellent comments and suggestions we thank Amichai Cohen, Liat Dasht, Israel Gilead, Nadiv Mordechay, Ram Rivlin, Adam Shinar, Ram Winograd, the editors of Regulation & Governance and four anonymous referees. For superb research assistance we thank Neta Dagan, Danial Raas Rothschild, Shira Solow and Rachel Taragin. For financial support we thank the Aharon Barak Center for Interdisciplinary Legal Research.

Endnotes

[1] For an early analysis of specialized courts, see Frankfurter (1926).

[2] Most famously, Judge Learned Hand argued against specialized courts. As his biographer wrote: "When Congress periodically considered establishing specialized courts to decide patent cases, [Judge Hand] steadfastly opposed those proposals: he believed that it was healthy for the judges and for the law that generalists decide disputes even in specialized areas; he feared that specialized tribunals would produce unduly narrow judges." (Gunther, 2010, p. 261). To resolve questions requiring professional expertise, Hand proposed the formation of advisory tribunals (Hand, 1901).

[3] For a similar result in the context of juvenile courts, see Leibovitch (2017). Note, however, that the findings are not always consistent. In some cases, specialized courts do not differ in their decisions from general courts. For instance, in a recent research it was found that administrative and civil courts do not differ in the awards for non-economic damages in medical malpractice appeals. See Amalia-Garcia (2019).

[4] For a parallel structural claim in the US context, see Orren (2012). Orren argues that changes in the US constitutional law are reactions to constraints in the field of criminal law. We examine here the interaction between private law (in particular, tort law) and public law.

[5] See, for example, *Tax assessor, Tel Aviv v. Yitzhak Sivan* (2005); *Eilabun Local Authority v. Mekorot Water Company* (2000); *State of Israel v. Badawi* (2000); *Cubshi v. Schwartz* (2010).

[6] *Daaka v. Carmel Hospital* (1999); *Tnuva v. Estate of Rabi* (2011).

[7] *Kibbutz Malkiya v. State of Israel* (2004); *Yeshuah v. State of Israel* (2014); *Grass Meat Products Export Ltd. v. State of Israel* (2015).

[8] Such concerns arguably underlie the well-known *Bivens* jurisprudence in the context of American law. In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the United States Supreme Court held that if an official of the federal government violates an individual's Fourth Amendment rights, the Constitution grants the individual an implied cause of action in damages against the official. But while the Court clearly saw merit in the claims of violation victims, and clearly saw value in maintaining accountability for constitutional violations—upholding the standard against federal officials proved quite a different matter. With growing concern that the standard amounted to judicial overreach, the Court exhibited increasing reluctance to impose actual liability. Such reluctance was not echoed in virtually identical cases in which claims against officials (at the state and local levels) originated in statute (rather than a judicial ruling). For recent analyses and reviews of the case law, see Lindval (2020) (arguing that the Supreme Court has effectively "gutted" *Bivens*); Pfander et al. (2020) (arguing that personal liability of federal officials is a "myth"). For an earlier analysis see Tribe (2006) (stating that "the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery").

[9] This distinction has been made explicit in the jurisprudence of the HCJ. See, e.g., *Yesh Din v. IDF Chief of Staff* (2018: 30).

[10] For a survey of the law in the US, England, and Australia with respect to the scope of the liability of the state and the broad scope of liability in the Israeli context, see Bachar (2019) ("Claims are brought for incidents ranging from the use of riot control techniques during protest, to military counterinsurgency actions, checkpoint shootings, drone attacks, and full-fledged military operations. […] As such, the Israeli case presents a rare exception to typical bars on bringing claims against the injuring state in the context of armed conflicts, including in the U.S."). Compare this to the broad scope of immunity granted to the state in the US context. See, e.g., *Koohi v. United States* F.2d 1328 (9th Cir. 1992) ("It simply does not matter for purposes of the 'time of war' exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts. […] To put it in the terms of the statute, the only question that need be answered is whether the challenged action constituted combatant activity during time of war").

[11] *Qanun v. Military Commander in the West Bank* (2002).

[12] *Yesh Din v. Chief of Staff, Israel Defense Forces* (2018).

[13] *Physicians for Human Rights v. Doron Almog* (2003).

[14] *Physicians for Human Rights v. Minister of Defense* (2011).

[15] *HaMoked v. Minister of Defense* (2014); Harpaz and Cohen (2018).

[16] *Qawasmi v. Ministry of Defense* (2011)

[17] *Almasri v. The Military Advocate General* (2017)

[18] Tort (State Liability) Act (1952). Section 5 ("Wartime Action") provides that "the state is not liable in torts for an act performed through a wartime action of the Israel Defense Forces."

[19] *Bani Ouda v. State of Israel* (2002).

[20] See amendments to sections 1 and 5 of the Tort (State Liability) Act (1952), from years 2002, 2005 and 2008.

[21] The court denied liability, reasoning that "the respondent was faced with an immediate threat to his life, although only a subjective threat, and he shot the appellant […] in order to neutralize the risk" (*Alon v. Hadad* 2009). The Court's ruling is similar to the rule applied in other common-law jurisdictions. See, for example, Dobbs, Hayden, and Bublick (2016), §7.1 ("The defendant can invoke the claim of self-defense if he […] subjectively [but reasonably] believes that the defense was needed because of harm about to occur").

[22] *Ministry of Defense v. Abu Samra* (2010: p. 16).

[23] *Id*.

[24] Tort (State Liability) Act (1952), §5A(4). The legislation also shortened the period of limitation from 7 to 3 years (§5A (3)), and required the plaintiff to provide swift notice of his harm before filing the formal tort claim (§5A(2)). These provisions intended to guarantee that the state can verify the facts while events are still "fresh."

[25] *Dahar v. Yoav* (2005).

[26] *Adalah v. Minister of Religious Affairs* (1998). For judicial review in cases regarding budget issues, see Rubinstein and Medina (2005, pp. 212–214) and Rose-Ackerman (1993). For a comparative perspective, see Axelrod (1990).

[27] *Adalah v. Minister of Religious Affairs* (1998).

[28] Id., p. 188.

[29] *Agbariah v. Minister of Education* (1990).

[30] *Agbariah v. Minister of Education* (1991).

[31] Two notable exceptions are *High Follow-Up Committee of Israeli Arabs v. The Prime Minister* (2006) and *Nasr v. The Government of Israel* (2012). In the former case, the Court intervened in a policy it deemed discriminatory in its allocation of government funding. In the latter, the policy was deemed discriminatory in its application of tax benefits.

[32] *Migdal Insurance Co. v. Abu-Hana* (2005).

[33] The practice in other legal systems is indeed different. For instance, in the United States the calculation of expected lost earnings often takes the victim's race into account (by relying on statistical tables). See Yuracko & Avraham, 2018. An exception is California, which amended its Civil Code in 2019, providing that "[e]stimations […] for lost earnings […] resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender" (Cal. Civ. Code § 3361).

[34] *Roe v. Dayan-Orbach* (2012).

[35] *Kol Ha'am Co. v. Minister of the Interior* (1953).

[36] *State of Israel v. Ben Moshe* (1968).

[37] *Hassan v. National Insurance Institute of Israel* (2012).

[38] *Citrin v. Minister of Justice* (1993); *Ministry of Transport v. Israeli News Corporation* (2006).

[39] *Kol Acher BeGalil v. Misgav Local Council* (2005).

[40] *Majority Camp v. Israel police* (2006).

[41] Id., p. 14.

[42] *Mifgashim v. Minister of Education, Culture, and Sport* (2007).

[43] *Abu-Ghosh v. Minister of Education* (1971); *Yeshivat Tomchei Temimim Merkazit v. State of Israel* (1984). For a discussion, see Shinar (2019).

[44] *Avneri v. Knesset* (2015), *Conservative Movement v. Minister of Religious Affairs* (1999).

[45] *Am-KeLavie Non-Profit v. Aharon Franco* (2008).

[46] *Majority Camp v. Israel police* (2006); Medina (2016, pp. 567–568).

[47] *Huppert v. Yad VaShem* (1994).

[48] *Brand v. Minister of Communications* (1993).

[49] Id., p. 7.

[50] *Nudelman v. Scharansky* (2008).

[51] Id., p. 64.

[52] *Krois v. Israel Police*, Israel Supreme Court Hearing Transcript (6.17.2019, p. 5).

[53] Of course, the court's designation as "specialized" or "general" is not always simple. Courts may exhibit mixed attributes, making their designation a matter of degree. For example, a system may be specialized at the trial court level, but general at the appellate level. Alternatively, a judge may preside in a general court, but only be assigned cases of a particular type, reflecting her individual area of expertise (see, e.g., Stempel (1995)). Such variations may affect the extent to which the court is secluded from the general system. In line with the conventional view, we assume that the more enmeshed a court is within the larger system, the more likely it is to develop a worldview that takes into account the entire legal field.

[54] Such a view might even support a reform in pleading rules, allowing plaintiffs to assert both their public law claims and their private law claims within the same legal action. Arguably, doing so would allow courts to apply complementarity considerations more directly and consistently, while ensuring that wronged plaintiffs are granted the appropriate form of redress. We thank an anonymous referee for suggesting this point.

Data availability statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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Appendix S1 Supporting Informatiom