

Judge All, Lose All: The Justiciability Doctrine in the Supreme Court of Israel

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This paper comprises a historical examination of the justiciability doctrine in Israel; a comparative study of the doctrine in other common law countries; a normative discussion of the need to return to the practice of rejecting claims on grounds of non-justiciability; a review of initiatives that seek to restore the extensive use of the doctrine; and the proposal of a legal amendment that obligates the court to hold a separate hearing on justiciability before hearing a case on merit.

The **first chapter** looks at the development of the justiciability doctrine in Israeli law from the state's establishment till the nineteen eighties, with examples of the way it was used by judges. It then examines the steady erosion of the doctrine and follows its rapid deterioration from a threshold test that practically restricted the Court's jurisdiction to a standard subject to arguments of merit with no practical curtailment of judicial intervention. This change is demonstrated with examples from an array of domains - defense and foreign policy, economic priorities, inner-parliamentary matters and other matters never before considered judiciable. Lastly, the chapter discusses small islands of justiciability that still exist in the system today.

The **second chapter** is a normative discussion of the negative impact of abolishing the doctrine on the principles of separation of powers, on democracy, on legitimacy, and on judicial workload, as well as the implications for the rule of law.

The **third chapter** compares the essence and development of the justiciability doctrine in Israel to the arrangements in other common law countries: the US, the UK and Canada. In all three, the doctrine, though somewhat weaker than in the past, is of great importance and still in wide use.

The **fourth chapter** examines suggested alternatives for restoring the justiciability doctrine to the Court. The first proposes legislative intervention defining certain subjects as non-justiciable and effectively outside the Court's authority. The second prefers to leave the doctrine at the judge's discretion and maintain its flexibility, proposing that judges themselves restore the extensive use of the doctrine in practice. The third, recommended by this paper, proposes to combine both approaches by legislating a procedural duty to hold a preliminary hearing on justiciability in cases in which it was challenged.

Summary:

The doctrine of justiciability was integrated into Israeli law in the early years and served as a threshold standard aimed at restricting the Court to legal matters. Justiciability prevented judicial intervention in matters of values that ought to be left to the public to resolve via their representatives, for democratic reasons; because the Courts lack the necessary knowledge and expertise; and to prevent the potential harm to the Court's legitimacy, efficiency and workload. However, since the nineteen eighties, the Supreme Court has eroded the doctrine of justiciability,

paving the way for the Court's growing involvement in various aspects of public life: security, Knesset operations, appointments, budget, public awards, foreign affairs and more. This change was encapsulated by the decree that "all is justiciable".

This erosion of the justiciability doctrine expresses a fundamental change in the Court's perception of its role in the tapestry of governance: from a body entrusted with conflict resolution to one that has an active role in shaping Israeli society and its values. Under this conception, the Court ruled that no subject is outside its purview, even should its review settle public, values-based controversies. Disintegrating the justiciability doctrine has far reaching repercussions for the separation of powers, the nature of the Court and public trust in the judiciary.

Currently, judges on all courts can legally expand the use of the justiciability doctrine to cases that should not be settled by the judiciary. This was so in the past and is the case today in common law countries. This necessary doctrine can and must be restored to the Court.

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