The Standing Doctrine in Israeli Public Law

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This paper analyzes the doctrine of standing, i.e. the practice of limiting the right to challenge government action or inaction in court, in the Israeli judicial system, tracing the dramatic shift from the classical practice to a virtual abolishment of the doctrine. As this shift seriously undermines the balance of power between branches of government, recommendations are outlined to restore the doctrine by legal measures.

The **first chapter** reviews the standing doctrine's background and its history in Israel.

The **second chapter** is a normative discussion, examining the claims (essential, utilitarian and procedural) against expanding the doctrine to allow more petitioners, as well as arguments that support doing so.

The **third chapter** is a comparative analysis of the standing doctrine in other Western states, highlighting those countries with a common-law system.

The **fourth chapter** recommends legal amendments to restore the standing doctrine and return the Court to its proper weight in the delicate balance between the branches of government.

Summary:

Since the 1980's, the standing doctrine has been eroded in Israel, so that currently, petitions to Bagatz (the High Court of Justice) are not limited to those parties who were personally, particularly, concretely or directly harmed or aggrieved. This expansion of the doctrine has allowed the Court to shift the balance between the branches of government. By granting standing to public petitioners (self-appointed representatives of the public), the judiciary removed the constraint of institutional passivity which had previously limited it to the cases brought before it in legal proceedings. Since the doctrine of standing in the Israeli legal system was created by case-law, and is to this day not anchored in legislation, it was changed by the Court on its own initiative, without the Knesset's input and despite the dramatic implications of this change on the balance of government.

The virtual abolishment of the standing doctrine reflects the Court's new conception of its role, disseminated by *Bagatz* Justices since the 1980's: it views itself as no longer merely a governing body focused on conflict resolution but one charged with preserving the rule of law; a system equal, if not superior, to the Knesset.

The change in case-law can be demonstrated by the review of prominent judicial decisions regarding constitutional and administrative law that were handed down in recent years, after the standing doctrine was effectively abolished. Such review reveals that close to 60% of these cases would not have passed the Court's threshold under the standing doctrine practiced in the past. Moreover, in nearly two thirds of such cases, the petitions were ultimately rejected, representing an enormous waste of judicial resources. Under the classic standing doctrine, these cases would have been rejected out of hand.

A brief analysis of other Western states in terms of standing shows that (1) non-recognition of public petitioners and (2) predicating standing on evidence of harm are both practices that are recognized and accepted in leading Western democracies. It is also accepted practice to regulate the standing doctrine in primary legislation; this is even considered constitutional in the case of the US. The judiciaries in the US, Australia and Germany rejected the idea of public plaintiffs and maintain a policy of narrow standing. Canada and the UK, however, have accepted the institution of public petitions and significantly softened their standing doctrine.

Recommendations:

Since it is highly unlikely the Court will choose to restrain itself, legal amendments are necessary to restore the principle of standing and abolish the institution of public petitioners.

The standing doctrine should be regulated by the legislature (similarly to the US, the UK, Australia and Germany), specifically by:

1) An amendment to Basic Law: The Judiciary, to the effect that the Court will not hear or rule on petitions from any party who was not harmed personally, concretely and directly.
2) An amendment to HCJ procedure regulations (תקנות סדר הדין בבית המשפט הגבוה לצדק), outlining the procedure for holding a separate and preliminary hearing on standing before any other proceeding regarding merit. All exceptions to this rule should be defined in legislation.

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