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Judicial Policy Making in the Age of Democratic Erosion: A Research Program

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Abstract

This paper offers a research program for the study of judicial review and its public policy effects in the context of democratic erosion. Courts manifest liberal democratic arrangements: courts are independent reviewers of government rule who base their power on public legitimacy, obliging the government to follow the rule of law. Hence, rules seeking to decrease the extent of democratic norms would usually aim at reducing judicial review independence. Facing such a challenge to independent judicial review and liberal democracy, research should be offering anchors for examining the extent of independent judicial review and its actual influence on political systems. The literature examining judicial review offers ideal types and conceptualizations regarding the judicialization of politics. However, for the most part, it does not provide clear, measurable indicators for the actual effects of the judicialization of politics. This research usually focuses on whether judges intervene in government decisions or defer to them. Here, I offer a research program that aims to go beyond the mere question of intervention and offer three indicators of judicial review's influence on politics: ideological policy dimensions, the effect on government fields of operation, and policy agendas pertaining to policy subsystems. Throughout the paper, I use findings from empirical studies of the Israeli High Court of Justice to illustrate my claims. This particular court offers an arena that moves between activism and deference and allows to examine variance in the different and varying effects of judicial review.



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1. INTRODUCTION: JUDICIAL POLICY MAKING AND DEMOCRATIC EROSION

Across the liberal democratic world there is a trend of democratic erosion in which voters and parties make choices within the democratic game while eroding the level of individual and social freedoms associated with democracy (Diamond et al., 2016; Merloe, 2016). This choice process resembles past processes, especially those that happened in Europe between the two world wars (King et al., 2008). However, contemporary democracies are not in a situation where people are under the might and threat of totalitarianism such as Nazi Germany in its height of power, Stalin's Soviet Union, or contemporary North-Korea (Merkel, 2014; Merkel and Kneip, 2018). The situation we do see is one of people purposefully giving in on their liberties to follow a nationalistic vision seeking to infringe on these liberties. Thus, we need to think about these processes within democracies' realms, turning from embedded liberal democracies to defective democracies (Merkel and Kneip, 2018), or even to competitive authoritarian regimes (Howard and Roessler, 2006).

Judicial review is associated with liberal democracies: its ability to maneuver independently affecting government policies is a benchmark often used by students of democracy and liberalism to denote an embedded liberal democracy (Ginsburg, 2008; Shapiro, 2008). Judicial review of government decisions, activities, and legislation can take the form of setting the premises of justiciability of government actions by accepting petitions and lawsuits against the government for review (Lindquist and Cross, 2009). Moreover, judicial review can set limits of government activities by showing deference to the government by reviewing and then rejecting such lawsuits (Lax, 2011). Furthermore, judicial review can set norms that affect government and governance, compelling government institutions to take specific policy paths and avoid others (Rodriguez, 2008). Finally, judicial review's extent defines its place within the different government branches (Lindquist and Cross, 2009).

Within democratic erosion, the courts as a whole and judicial review, in particular, is one of the first targets for leaders seeking to decrease the scope of judicial review (von Bogdandy et al., 2018). The reason is easy enough: as independent courts are potentially institutional veto players, the authoritarians-to-be wish to decrease the number of veto players, which could curb down their ability to manoeuvre. However, in some of these settings harming judicial review would happen in incremental steps seeking to preserve the government's legitimacy (Kelemen and Laurent, 2019). Thus, the research program I offer here seeks to examine the extent of the judicialization of politics thereby measuring the democratic erosion embedded within independent judicial review. The program does so in a manner that can be sensitive to particular moves made by the judiciary, decreasing or increasing the scope of judicial review as a whole and the judicialization of politics in particular.

Making one more distinction regarding this research program's scope: this is not the situation where we *cannot* pin moral responsibility on citizens who face grave credible threats as individuals facing collective organized power (Nili, 2018). We relate to a situation where the authoritarian-in-the-making drives her legitimacy from the people's choices and uses that legitimacy to infringe on people's liberties. Our main aim here is a particular institution threatened in most of these situations: the courts (Huq and Ginsburg, 2018). The easiness of

infringement of courts and judicial review powers are well known. Courts depend on the legitimacy and political acquiescence to that legitimacy to maintain their effect on politicians and politics (Caldeira, 1986). Thus, Hamilton's well-known claim that courts are the weakest of government branches with no sword nor a purse meant that courts lean on public legitimacy to function (Caldeira, 1986). Yet, if that legitimacy is given to the new power that seeks to undermine the courts, courts would find legitimacy-attainment trickier (Garoupa and Grembi, 2015). Furthermore, at the stage where the people did not give all their powers to the government and the country is not yet authoritarian, the courts have an educating role in promoting liberal and progressive agendas (von Bogdandy et al., 2018). Hence, another benefit for the research program I propose here is to offer keys for reasoned public debates regarding courts' power and judicial review independence. Below, I present the research program I wish to develop. I start by offering a view of independent judicial review as an externality to the political system. I then describe three measurable effects on politics: promoting or blocking particular political ideologies, affecting specific parts of government functions, and influencing policy agendas relating to policy subsystems.

2. JUDICIAL REVIEW AS AN EXTERNALITY

Judicial review of government activities has not been a mere reflection of value-free legalistic reasoning. There is much research showing how judges strategically reason about their political environment being purposeful players wishing to affect public policy (Epstein and Knight, 1997; Epstein et al., 2001a, b; Epstein and Knight, 2000; Epstein et al., 2011; Sommer, 2010; Vanberg, 1998; Whittington, 2003). Viewing courts and judicial review as purposeful players seeking to expand their influence on politics and policy, led some to claim that independent judicial review yields' judicial despotism: where judges use judicial review to promote policy agendas and ideological world views (Friedmann and Watzman, 2016; Hirschl, 2008, 2009; Posner, 2007; Waldron, 2006). Some refer to this trend as the judicialization of politics (Hirschl, 2008, 2009). Yet, when facing external political pressures aimed at decreasing judges' willingness to actively rule on those issues, judges would reduce their desire to intervene on political value-laden issues (Segal, 2010). Thus, when judges and courts do intervene in politicians and the bureaucracy's policy decisions, it would usually be a sign of a functioning democracy (Shapiro, 2016). Hence, viewing judges as political players who set core values affecting how the political system functions either happens in systems where liberal democracy is an embedded value. Furthermore, even if judges do intervene in issues that entail core values (Jacobsohn and Roznai, 2020), in essence, they make their decisions based on legal analysis founded in proper legal theory (Barak, 2002; Lax, 2011).

In the study of judicial politics, this debate has yielded (at least) three research programs examining judicial behavior: the realist approach assuming judges make decisions following legal theory, the attitudinal approach according to which judicial review follows judges' policy preferences, and the strategic-institutional approach perceiving judges as sophisticated players maneuvering within and between political institutions to promote their agendas (Epstein and Knight, 1997). These approaches are substantial to the study of law and politics, and the indicators I offer here could be a part of either of those research agendas. However, I take a minimalist approach to judicial behavior and use it as the stepping stone for my proposed analyses. This approach relates to judicial review as an externality on policy and politics.

That is, it may well be that politicians manoeuvre vis-vis' each other setting an ideological position to attain their goals while affecting the party system in which they operate, either polarizing or centralizing it. An elected partisan political player does so for political aims gaining power and promoting public policies affected by being policy and position seeking (Austen-Smith and Banks, 1988; Greene and Haber, 2016; Heller, 2001; Rosenthal, 2014). Yet, constitutional veto players might behave as-if they are partisan veto players making decisions on core systemic issues (Huber, 1998; Meydani, 2009; Rosenthal, 2012). These players could be policy-seeking using their institutional powers to affect the policymaking process. However, they lack the final veto powers politicians potentially have on setting the system's basic rules. Thus, politicians can intervene and overturn the decisions made by constitutional veto players, amending players' authorities and jurisdictions (Segal, 2010). Hence, for scholars interested in judicial review's political effect, *why* judges make decisions is of less interest than the *outcomes* of judicial review. Politicians have more than enough powers to handle the judiciary (and the bureaucracy) if they wish to do so. Their main concern is with the policy fallout derived by judicial review. Focusing on a judicial review's political effect, I relate here to policy outcomes

as *externalities*: the unintended systematic consequences of players' moves and choices. My purpose is less to understand why a given judge (for example) accepts all petitions submitted to the Israeli High Court of Justice against the state seeking to expand the West Bank settlements but to understand the influence of that judge on the settlements' expansion regime.

In public economics, the term externalities describes a social cost incurred by individuals and firms (player A) due to other individuals or firms (player B) in the market. While B is handling her affairs, taking care of her activities, seeking to maximize profits and minimize costs, she might be taking actions that player A finds costly. For example, one might think of an ink factory upstream that sends its waste downstream as it is less expensive for it to handle this waste otherwise. However, player A has a business that uses downstream water to wash clothes for the inhabitants of a town nearby (some might be working in the ink factory). When using that polluted stream, some of the clothes would be stained by the ink waste. The polluter who meant no direct harm incurs damages upon player A. These damages are not intended and stem from B's logic of activity. However, that logic incurs damages on A, thereby affecting social and individual welfare (Coase, 1960). I do not mean here that judicial review implies damages to other political institutions. There are times when judicial review offers positive externalities and allows political players to attain their will (Segal, 2010). However, even if lawyers' and judges' activities regarding political and social institutions are not aiming at intentionally harming (or benefiting) them, such results could happen and need to be taken into account. Even when taking my proposed minimalist approach to judicial review, ascertaining extra-legal implications for judicial review is critical for understanding judicial review's context and the counter-moves aimed at curbing down the judiciary's powers during democratic erosion. I now turn to sketch such three potential externalities in terms of areas of effects judicial review might have on political, administrative environments:

- The political system's ideological orientation, where a judicial review might infringe or promote particular ideological orientations.
- Government priority areas where a judicial review might encourage activities in one area and discourage activities on other areas.
- Policy agendas relating to policy subsystems where judicial review might become a policy venue for policy entrepreneurs seeking to affect a particular policy subsystem.

3. PUBLIC POLICY, POLITICAL IDEOLOGIES AND JUDICIAL POLITICS

Many decisions include implications where when considered, imply different potential results on those decisions' consequences (Mintz, 1995). If one purchases a car then the utility from purchase can have one value when considered from the price one paid for the car, considering the purchase from another aspect such as its market value, its colour, mechanical status could bring about a different perspective of the car purchase utility. Policy making processes have that same quality: a policy when designed has a variety of policy dimensions which embed consequences stemming from adopting one policy and not the other. For an example, dealing with gun control issues in the US has constitutional, normative and public safety implications. Examining the issue of gun control from these different aspects while considering the different policy options relating to that issue, could bring about different potential choices and consequent decisions (Rosenthal, 2018).

For an example, When the Israeli High Court of Justice (IHCJ) handled on 2012 petitions regarding the military conscription of ultraorthodox religious Jews, it related to the moral, economic and bureaucratic implications of the way the state of Israel was handling that policy (Maj. (ret.) Yehuda Resler (adv.) V. Knesset., 2012). When the court finally adopted the decision to intervene in the government's policy, it did so by emphasizing the normative implications associated with the military offering unique drafting procedures for this population while harming the right for equality to the rest of the Jewish population. The economic and administrative issues were a part of the conversation between the judges (as shown by the reasons offered by both minority and majority judges). However, when a particular dimension was adopted as a principle for decision-making, then the IHCJ decided to revoke the government's policy on that matter (Rosenthal et al., 2020).

Political ideologies reflect topics that relate to basic beliefs regarding state and society, which serve as the basis of political parties' manifestos (McDonald and Budge, 2014). In turn, party manifestos affect the policy process as they are reflected in legislative and government agendas (Walgrave et al., 2006). Analyses of ideological dimensions in the study of politics include foreign policy, democracy and civil rights, governance, economic planning, welfare, national identity, and weak social groups (Budge and McDonald, 2012). Each dimension potentially embeds various issues where taking a position regarding such issues would coincide with an overall policy stance that can be defined as political center, left or right (Bobbio, 1996; Budge and McDonald, 2012).

Hence, when examining policies relating to the economy with a policy supporting planned economy, a support in such a statement would have a left-wing orientation. Examining policies relating to foreign policy where there could be a policy strengthening the military and the violent use of force, supporting that choice would have a right-wing orientation (Bobbio, 1996; Budge and McDonald, 2012). Taking a position on this topic or the other, does not mean that a policy maker is a representative of either a left, right or center ideology. However, when aggregating a person, party or an institution's statements along time, one can subtract left from right statements and evaluate their fraction from the corpus of statements made by the player in question (Budge and McDonald, 2012; McDonald and Budge, 2014). Indeed, this line of

analysis has been utilized by the Comparative Party Manifestos' research project (abbreviated as MRG, CMP or MARPOR)¹. Party manifestos, political speeches and media statements have all been analysed by this coding method, uncovering political ideology or its lack in a wide variety of political settings (Green-Pedersen and Mortensen, 2010; Greene and Haber, 2016; Vliegenthart et al., 2011; Walgrave et al., 2006, 2008).

Let us review the effect of judicial review as an externality on the manner in which a political system prefers public policies with particular ideological orientations. Let us assume that when judges review cases with political ideology ramifications, yet they are not fully aware of these implications. They might be seeking the legal issue relating to the case which in and off itself has some sort of meaning internal to a Kelsenian world of law. One case might be a petition set against economic policies initiated by the state seeking to expand the state's powers and get a hold of the markets. Another petition might be about decreasing the army's authorities and limiting its jurisdiction. Legally both cases could relate to administrative law and handle legal topics such as reasonableness and proportionality. However, when judges make their call on these cases it has political implications. These are judicial externalities that relate to public policy: it may well be that the government is not reasonable in its decision making regarding foreign immigrants. When the court decides for petitioners and against the government the court might follow some version of its reasonableness doctrine. However, repeated strikes against a particular type of policy even when legally justified would have political externalities: assume that the court decides in a series of moves that go against a policy identified with the ideological right. For right-wing parties whose policy is blocked there is no point in pondering on judges' ideologies: they interpret the judicial review from the political background and associate the judges with a particular world view which coincides with a political ideology. In this case, the politicians might claim that the judges are leftists, for them the proof for that statement would be the policy the court revokes.

Various attempts have been made to examine judges' ideological positions and the manner in which it reflects on their review (Epstein et al. 2007; Martin et al. 2004; Weinshall-Margel 2011; Weinshall et al. 2018). Others showed how these dimensions affect judicial review (Braman, 2006, 2009) Furthermore, there have been several attempts to examine judges' ideological positions in multidimensional ideological settings (Grofman and Brazill, 2002; Lauderdale and Clark, 2012). The approach I offer to pursue here is a continuation of previous attempts I did in an earlier paper (Rosenthal and Talmor, 2020). What we did on that particular research was to code case topics using the above mentioned Right-Left political ideologies scale (Budge and McDonald, 2012). We then aggregated the different ideological directions of judges' decisions in terms of right, left and center. What we found is that in the Israeli case judges were quite consistent in their choices within specific policy dimensions but were not coherent across dimensions. Thus, most of them were not easily scaled on a coherent left-right scale. Rather, they were scaled on particular issues such as human rights, economic policy and nationalism

¹ Project details can be observed here: <https://manifesto-project.wzb.eu/>.

(Rosenthal and Talmor, 2020). This coincided with other analyses of the Israeli case which focused on single dimensions (Sommer, 2010; Weinshall-Margel, 2011; Weinshall et al., 2018), but was in contrast to the US case in which dimensions were both consistent on particular ideological issue areas, coherent on the liberal-conservative scale and changed dynamically (Grofman and Brazill, 2002; Lauderdale and Clark, 2012).

4. GOVERNMENT PRIORITIES' JURISDICTIONS AND JUDICIAL REVIEW

Another type of policy externality stemming from judicial review relates to judicial review's influence on the agents (ministries and agencies) working to attain the government's various policy functions: coordination, security, infrastructure, welfare, culture and leisure (Rose, 1976; Rosenthal and Wolfson, 2013). Rose identifies these functions as a government priority where governments decide to expand of a particular function, supplying a set of public goods associated with these functions. For that purpose, government would form ministries and agencies each of which aiming at supplying these public goods. Rose's view of these functions is developmental and aimed to describe the way public administrations emerge and develop (Rose, 1976). However, Rose's typology is useful to observe variance in government behaviours and its administrative organizational responsibilities, as it moves to supply goods and policy benefits to citizens within and between different government ministries, agencies and levels of governance (Rosenthal and Wolfson, 2013).

In this respect, courts interact with government priorities: a government sets its priority on one of its functions seeking to change the manner it handles these functions. Consequently, citizens react to these changes and one of their reactions is to petition the court against the government's policy targeting a particular government ministry or agency. That petition could relate to a set of behaviours concerning the manner the government handles its internal affairs, the way it runs the security services or cultural identity. When sufficient levels of petitions are directed at a particular government function that could be translated to a statement made by the court regarding the manner the government handles its affairs with regards to this function. With deference regarding a government function the government would move on undeterred by the court and the manner in which it would potentially intervene in that government activity. With higher activism on that function and the agents performing it, the government would have to handle its activities differently taking the court's decisions on that matter as guidelines (Lindquist and Cross, 2009; Dotan, 2000; Meydani, 2012). Hence, in a similar vein to examining judges' ideological positions based on their decisions with cases laden by ideological connotations, examining the manner in which courts make decisions on a policy function in a particular manner could also tell us quite a lot on the effect of judicial review on public policy. For an example, in another project when examining IHCJ's decisions in this respect we found that the IHCJ tends to intervene quite actively with cultural identity decisions and much less in security services' decisions (Rosenthal et al., 2020). That is, the IHCJ's support in petitions relating to security matters submitted against the activities of Israel's government between 1995-2017 was 5.9 pct. acceptance rate, in comparison to 25.45 pct. on petitions submitted on religious affairs (Rosenthal et al., 2020). Hence, there is not an either activist or deferential view in Israel's High Court of Justice as a whole, but varying activism on particular policy functions (Rosenthal et al., 2016).

5. POLICY AGENDAS AND SUBSYSTEMS IN JUDICIAL REVIEW

Another component in the policy process beyond political ideology and government functions is the manner in which the policy agenda is formed and seeking political attention from key players in the political system (Kingdon, 1995; Baumgartner and Jones, 2010). Policy agendas usually relate to policy subsystems: the particular policy areas policy entrepreneurs seek to affect (Jones and Baumgartner, 2005). Policy subsystems connect political ideologies, public goods and government functions. All these differ yet eventually relate to the same outcome: the government paying attention to a policy problem and can address it economically, organizationally and symbolically. Policy subsystems include large and varied fields of activity: from macro-economics, to welfare policies, running the military, handling foreign relations, government operations, urban planning policies and immigration just to name a few (Baumgartner et al., 2008). All these subsystems include a set of players, policy functions and a variety of policy venues through which political entrepreneurs can push through their proposed policy changes (Jones and Baumgartner, 2005). Policy attention towards a policy problem could yield two types of government activities: policy attention and policy substance (Dowding and Martin, 2017). The first relates to policy subsystems addressing and discussing a particular policy problem. The later relates to policy subsystems actually allocating resources to handle the policy problem (Dowding and Martin, 2017).

One potential policy venue for affecting policy subsystems is courts that review petitions and lawsuits against government decisions and activities. Courts serve two agenda purposes for policy entrepreneurs. Courts can serve as a setting for policy entrepreneurs seeking policy attention, as their purpose is to affect the set of topics deliberated on the public agenda. Courts are covered by the press and receive responses to their decisions by leading politicians who give speeches in parliamentary plenaries and committees. Each of these arenas serves as a policy venue. Thus, for entrepreneurs even setting their policy positions in the form of petitions and lawsuits submitted to the courts would be enough to draw policy attention. Even if courts reject these petitions and do not wish to review them, such petitions already receive press coverage and political attention (Dotan and Hofnung, 2001). Furthermore, if courts actually offer policy substance by accepting the petition or lawsuit then petitioners' aims are satisfied and yield the desired policy outcome.

Here, examining judicial review across various policy subsystems could allow to examine whether there is a consistent effect of judicial review within subsystems and across time thereby affecting the ability of the state to function and promote policies across these subsystems. Furthermore, focusing on the agenda effect of merely setting topics on the agenda of the parliament, the cabinet and the mass media would also allow us to better understand the manner in which agendas diffuse and the actual effect of courts on such a diffusion. An initial analysis of subsystems-related policy agendas set on the Israeli High Court of Justice's

agenda between 1995-2015 using the Comparative Agendas Project² as utilized to the Israeli case (Kosti et al., 2019), shows that 20.2% of the court's attention was devoted to immigration issues, 12.96% pct. of the court's attention was devoted to government's coordination, 12.27% was devoted to law and order petitions, 8.54% was dedicated to security issues, 7.4% to land policies, 6.28% to human rights with the rest of the policy subsystems the CAP project identifies received less than 5% of the court's attention Hence, policy attention varies between subsystems implying different court attention and potential effects over these subsystems. (For full details on the Comparative Agendas Project please see: <https://www.comparativeagendas.net/pages/master-codebook>. For the Israeli CAP project please see: <https://www.idc.ac.il/he/research/cap/pages/home.aspx>. The data stems from a first cut of a data coded and collected thanks to the Israel Science Foundation and the PDRD).

6. CONCLUSION AND ANCHORS FOR FUTURE RESEARCH

The research program I offer here examines the effects of judicial review on politics and policy across various aspects: ideological policy dimensions, government functions and policy subsystems. I believe that such an analysis would allow us to better understand the effect of judicial review on politics and policy and to better estimate the activities of government's attempts to decrease judicial powers and put them in context, seeking the tipping points of democratic erosion given court activities and their effects on politics and policy. Even without relating to the context of democratic erosion, examining judicial behaviour in this manner gives us a multi aspect understanding of judicial review in democratic contexts.

The understanding of judicial review I offer here, examines judicial review from its demand side: not what the incentives driving judges to take a decision or avoid it, but the aftermath of such decisions in terms of the political system. The effects I offered here as points of analysis are political ideologies which the policies associated with them are brought before the court, decisions governments make relating to the functions which they seek to take upon and the policy agendas pertaining to the subsystems that amalgamate the various 'moving parts' of government. When judges relate to cases associated with ideologies, functions and policy agendas as justiciable refuting some and accepting others, they affect politics and democracy. The extent of that effect is measurable and can serve as the basis for a reasoned debate about independent judicial review and as an indicator to the embeddedness of democratic liberalism.

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