**Doctrinal Realism and Hyper-Realism in Israeli Public Law**

The essence and function of law and adjudication have long been subjects of intense debate among legal scholars and policymakers worldwide, particularly within Western legal systems. Critical perspectives on law that challenge foundational assumptions across different legal frameworks have reshaped the legal landscape. The American Legal Realist Movement significantly contributed to this transformation by questioning core premises of legal theory and influencing both global and local perspectives. A central tenet of this movement, articulated by Oliver Wendell Holmes Jr., is that law cannot be fully understood solely through legislation and court decisions. Holmes famously asserted that law consists of “the prophecies of what the courts will do in fact, and nothing more pretentious” (Holmes, 1881). According to this descriptive viewpoint, Legal Realism holds that understanding the application of legal rules in practice necessitates analyzing how courts are likely to implement them.

Following this framework, Legal Realism posits that judicial decisions are shaped by prevailing political ideologies and the judiciary’s institutional interests (Fisher et al., 1993). This study centers on a variant of Legal Realism, here termed “institutional pragmatic realism” (Alberstein, 2002), in the context of Israeli public law. The study will empirically examine two principal hypotheses. First, institutional pragmatic realism has evolved within Israeli constitutional and administrative law from a descriptive and critical stance into a doctrinal framework. Israeli courts now rely on this framework as a foundation for substantive legal doctrines and judicial reasoning. The second is that the prevailing political, public, and, to some extent, the academic mindset in Israel reflects a hyper-realist perspective, which largely ignores the formal essence of law and assumes that judicial decisions are mainly shaped by judges’ political convictions and personal identities.

To examine these hypotheses, the study will employ empirical, ethnographic, comparative, and jurisprudential methodologies.

***Scientific Background***

***The Legal Realist Movement***

The Legal Realist Movement in American law has been prominent in criticizing the various claims of law for formality (Tamanaha, 2008). The aspiration of law to formality has been accompanied by a constant critique of “formalism,” a stance emerging with philosophical pragmatism at the end of the 19th century as an American critique of European social thought (White, 1949; Dickstein, 1998; Alberstein, 2002).

Among the tenets of the Legal Realist Movement, the political challenge and the institutional-personal claim are foundations for the evolution of institutional pragmatic legal realism.

*The political challenge*: Weber (1954) identifies juridical formality—the separation of legal rules from other societal norms—as the primary hallmark of modern Western legal systems. This includes a belief in the primacy of individual rights and the sharp division between private and public law, bolstered by the legal positivist view of law as an autonomous system of norms (Kelsen, 1967). In opposition to this approach, Legal Realism (Llewellyn, 1930; Fisher et al., 1993) and the Critical Legal Studies School argue that judicial decisions are driven by social, political, and ideological considerations (Kennedy, 1976, 1997, 2004; Unger, 1983). Judges and courts, they contend, operate within a political culture that influences their decisions when interpreting and applying the law.

*The institutional claim:* Legal Realism challenges the traditional divide between “law in books” and “law in action” (Pound, 1910; Garth & Sarat, 1998). This approach originated with Oliver Wendell Holmes Jr., who defined law as “the prophecies of what the courts will do in fact” (Holmes, 1881: 460). Karl Llewellyn expanded on this idea, asserting that “the most significant ... aspects of the relations of law and society lie in the field of behavior” (Llewellyn, 1930: 443). Consequently, the Realist approach emphasizes the institutional foundations underlying judicial decision-making.

These claims, alongside other Realist critiques, have had a profound impact on the evolution of American legal culture and the public’s perception of judges (Fisher et al., 1993). This perception suggests that legal decisions should be assessed not by their reasoning but by their outcomes, which represents a descriptive, not a normative, evaluation of judicial work. According to these views, personal and institutional considerations become the primary explanatory factors for understanding judicial motivations. The Israeli application of these principles has advanced them further, as this study will demonstrate in the context of public law.

***The Israeli Take on the Formalism-Realism Debate***

Israel’s legal system is a hybrid, heavily influenced by both common law and Anglo-American legal frameworks, while also incorporating significant elements of European codification (Rivlin, 2012). The debate over formalism in Israeli legal culture gained prominence following the publication of Menahem Mautner’s seminal work, The Decline of Formalism and the Rise of Values in Israeli Law (Mautner, 1993). This monograph argued that a major shift occurred in the jurisprudence of the Israeli Supreme Court during the 1980s, marked by an increased focus on values and judicial activism. The rise of an institutional realist approach to the judicial process has become a key aspect of this transformation (Mautner, 1993: 595).

Despite various substantive and methodological critiques of Mautner’s argument (Kedar, 2006; Bendor, 2003), his narrative has become dominant in legal academia. Institutional realist legal perceptions within the Israeli context underpin the academic writings of scholars on both sides of the political spectrum—those aligned with the right (Sapir, 2006; Segev, 2004) and those associated with the left (Peleg, 2013: 420–425), including Mautner himself. Given the Israeli Supreme Court’s role as a beacon of social values, it has been at the center of intense public debate since the mid-1990s (Meydani, 2011: 191). Some scholars have highlighted the Court’s constructive role, noting that, in the absence of a rigid constitution, the court has been vital in promoting human rights and protecting marginalized groups (Navot, 2014: 221-226). Conversely, critics argue that judicial activism has contributed to a democratic deficit by conferring excessive power on unelected judges (Dotan, 2002; Steiner, 2020: 292). Since the 1990s, the Supreme Court has been called upon to intervene in nearly every significant political and public issue within Israeli society (Navot, 2014: 206-211). In addition to developing expansive standards for standing (Segal, 1993) and justiciability (Dotan, 2022: 241-275) to facilitate court access, the Court has also introduced flexible normative measures that grant broad judicial discretion (Bendor, 2020).

Public debates over the role of the Israel Supreme Court and the ideological orientations of its judges have intensified over recent decades, fueled by changes in Israeli society and politics (Friedmann, 2016). These conflicts culminated in a national social and constitutional crisis following the legal reforms advanced by the government coalition beginning in January 2023. Critics described these reforms as a sweeping legal overhaul aimed at undermining democracy and transforming the entire legal system.

***Doctrinal Realist Israeli Public Law***

Israeli public law, both constitutional and administrative, has a strong, open-ended common law foundation. Upon the establishment of the State of Israel, a heated debate raged regarding the need for a constitution (Gavison, 2003). This controversy ended with a compromise that there would be a gradual accumulation of Basic Laws, which would be combined into a constitution at a later stage. This constitutive stage has not yet materialized, and therefore, Israeli public law has been developed by the judiciary following common law traditions.

In 1995, the Supreme Court established that Basic Laws enjoyed constitutional status, even prior to their incorporation into the Constitution (CivA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village*). This status is attributed to the enactment of Basic Laws by the Knesset under its authority as the constituent assembly, derived from the Declaration of Independence (Bendor & Shaham-Assia, 2021). In *United Mizrahi,* the Court held that the primacy of Basic Laws over ordinary legislation forbids the Knesset from enacting statutes conflicting with Basic Laws. If such a conflict arises, the Court declared that it is empowered to invalidate an ordinary law or provide an alternative constitutional remedy. This decision was based on two Basic Laws on human rights—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation—enacted in 1992. While the wording of these two Basic Laws indicates that they enjoy clear constitutional supremacy (CivA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village*), the Court’s ruling applies to all Basic Laws (Medina & Watzman, 2017). Notably, several of the Basic Laws, including the two addressing human rights, not only regulate and constrain Knesset legislation but also apply to the powers and decisions of the Executive and other governmental branches (Basic Law: The Government; Basic Law: The Army, Basic Law: The State Comptroller). In addition to the common law open-ended nature of Israeli public law, constitutional and administrative cases regularly deal with the separation of powers and institutional boundaries. Hence, they offer a fertile ground for examining the intersection between the self-reflection on the judicial role compared to other governmental branches on the one hand and the legal doctrine created by the court on the other hand. Despite the enactment and constitutional recognition of the Basic Laws, along with the passage of numerous ordinary laws addressing public law matters over the years (The Knesset Act, 1994; The Government Act, 2001), developments of pragmatic realism in public law jurisprudence stand out. Instead of relying on formalistic adjudication based on legislation, the court has developed an elaborate jurisprudence that translates critical theoretical claims into legal doctrine.

Addressing diverse issues, Israel Supreme Court decisions have constantly established substantive rules based on a judicial review policy—the policy and considerations of the court. Justices reflect upon their own role, the position of the court, and the impact of their decision. Their ruling reflects doctrinal legal realism: transplanting insights regarding “law in action” from an academic external descriptive, and even critical, perspective into “law in books”—declared norms formulated by the court in its case law (Cohen & Roznai, 2021: 161-166).

The following examples illustrate pragmatic realism in public law:

**Constitutional Ripeness**: According to the Israeli version of the doctrine of constitutional ripeness, which has developed in recent years, the Supreme Court may deny a petition that challenges the constitutionality of a legislative act in the case in which the act has not yet been implemented (Chachko, 2012; Poliak, 2014). There are two rationales for this doctrine. One is an institutional justiciability consideration of preserving the public trust resources of the court by avoiding unnecessary decisions on controversial issues. The second rationale is that only after a legal act is implemented can its constitutionality be properly determined by the court. The significance of this Israeli-style ripeness doctrine approach is twofold: First, the court explicitly considers its institutional interests when deciding whether to hear the petition. Second, the timing of the judicial review may determine the constitutionality of a given law (Bendor, 2016).

**Relative Voidance, Invalidation Notices, and Prospective Application of Precedents**: In contrast to a binary formalist approach of law, which declares the validity or voidance of governmental acts, the relative voidance doctrine, developed by the Israel Supreme Court, provides the court with a flexible framework for determining remedies for illegal governmental acts. The doctrine allows for judicial discretion in choosing the remedy for illegality of all sorts by considering the severity and degree of the flaw, third party’s interests, the rule of law, and other circumstances of the case (Barak-Erez, 1995). In the framework of the doctrine of relative voidance, the Supreme Court has developed the new remedy of an invalidation notice: the Court rejects the petition yet issues a warning that if a similar petition is submitted in the future without any amendment of the governmental authority’s policy, the petition shall be granted (Melcer, 2020). According to another doctrine related to the relative voidance doctrine, the court has the discretion to apply new precedents prospectively while not affecting the concrete case it decides upon (Bendor, 2020: 739-740). Although the consequences of the violation of legal rules and the remedies for their violation belong within the realm of substantive law, the relative avoidance doctrine and related doctrines enable the Court to consider inter-institutional deference considerations by allowing the other branches an opportunity to correct constitutional flaws without invalidating their decisions.

**Proportionality and Interpretation of Human Rights**: The proportionality doctrine in Israel originally provided the criteria for deciding the constitutionality of a restriction of a constitutional right by a statute or governmental action (Barak, 2012: 11-12). Nonetheless, it has become a broad indeterminate standard, which has, to a great extent, been left to the discretion of the judges (Sapir, 2006: 386). In the past, the Supreme Court viewed the second subtest of proportionality—the subtest of the least harmful measure—which is relatively determinable, as the most important subtest (CivA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village*: President Barak,para. 95). Over the years, the subtest of proportionality *stricto* *sensu*, which resembles the more general reasonableness standard, has become the dominant subtest and the focus of the constitutional review (Kremnitzer, 2016: 12-16; Bendor, 2020: 733). At the same time, the court tends to broadly interpret the constitutional rights established in the Basic Laws, and in particular the right to human dignity (Medina, 2016: 136-141), on the grounds that “[o]ur role as judges, at this stage of our national life, is to recognize in full the scope of human rights, while giving full strength to the power of the limitations clause to allow a violation of those rights, when necessary, without restricting their scope” (HCJ 7052/*03 Adalah Legal Centre for Arab Minority Rights in Israel and others v. Attorney General*: President Barak, para. 106).

**Babysitter Procedures**: Instead of deciding petitions substantially, during the past decade, constitutional and administrative matters have constantly been managed in what has been called a “babysitting” framework (Bendor & Segev, 2018: 393-397). Rather than examining the legality of the relevant governmental decision, the Supreme Court handles the case through a dialogue developed with the parties. The court acknowledges the flaws the petition exposes, provides directions to the parties, and may monitor the government’s progress in completing its repairs for many years. In cases where the governmental authority expects, following the justices’ comments, that if a decision is reached, the petition will be accepted, the judicial babysitting arises from repeated requests by the state for postponements during which it will purportedly rethink the matter. Some proceedings end in a determination by the Court; others are terminated by denying the petition because it has “run its course” (Bendor & Segev, 2018: 394) in light of the changes that took place while the proceeding was underway. Babysitter proceedings may be institutionally favorable for the Israeli Supreme Court in cases involving national security or political sensitivity. They may also produce a consensus among the political branches and the petitioners, allowing the justices to avoid taking a firm stand in a fully reasoned decision. For example, it was noted that the Israeli Supreme Court “sometimes views its role as a ‘babysitter’ whose job is to follow up on the respect for human rights and humanitarian law by the other branches” during times of combat (Scharia, 2014: 190). Another example involves sensitive petitions relating to the relationship between religion and state, such as the definition of a “Jew” entitled to immigrate to Israel under the Law of Return. Such petitions require a ruling—which the Court is not eager to make—on contentious issues between different religious streams of Judaism (HCJ 11013/05 *Dahan v. Minister of Interior*: President Hayut, para. 1-9). The evolution of babysitter proceedings into a common phenomenon reflects the expansion of pragmatic realist adjudication and the extent to which it is preferred over a judicial determination according to substantive law in some cases.

**Context-Based Judicial Review**: The Israeli Supreme Court ruled that the scope of judicial review in various areas is especially restrained (Dotan, 2022: 277-314). Examples from the last year include invalidation of laws (HCJ 7650/23 *The Association for Civil Rights in Israel v. The Minister of National Security*), regulatory issues involving special non-legal professional expertise (HCJ 8338/21 *The Lesser Group Limited v. Securities Authority*), national security and policy issues (HCJ 8349/23 *Almagor Organization v. State of Israel*), military placement considerations (HCJ 8939/22 *Klein v. Meitav Commander*), and decisions of the Attorney General regarding the opening of an investigation and prosecution (HCJ 3823/22 *Netanyahu v. Attorney General*). In a number of areas, such as judicial review of administrative decisions limiting human rights (HCJ 5419/23 *ALOT – National Association for Children and Adults with Autism v. Director General of the Ministry of Education*; Dotan, 2022: 202-204) and personal legislation which was not decided behind the veil of ignorance (HCJ 5119/23 *Movement for Purity of Morals v. The Knesset*), the Court indicated that the judicial review would be broad.

**Fitness of the Subject for Judicial Review**: An additional approach that expresses doctrinal realism in Israeli judicial review is a declared examination of considerations that pertain to the suitability of the subject for judicial handling, such as the expected effectiveness of judicial review. Thus, for example, former Supreme Court President Grunis held that the very doubt with respect to the effectiveness of a judicial decision and the fear that an ineffective decision would undermine the public status of the Court justify refraining from deciding on the merits in a petition against the constitutionality of the statute (HCJ 6427/02 *Movement for Quality of Government in Israel v. The Knesset*). Former Justice Rivlin would also take similar considerations into account in his decisions. For example, Justice Rivlin stated: “[t]he resources available to the court are limited. … Because the Judiciary has neither a purse, sword, nor a will of its own – its principal resource is a public trust. Descending into the public battlefield, when unnecessary, is liable to dissipate this precious resource.” (HCJ 466/07 ***Gal-On*** *v. Attorney General*: Deputy President Rivlin, para. 3). An additional stream of decisions in which the Supreme Court exercised its discretion to deny petitions because they are not appropriate for judicial review includes petitions in which it was ruled that it would be better for the subject to be handled by way of a statute (FHHCJ 10007/09 *Gluten v. National Labor Court*).

The existing literature offers various important empirical studies on the activity patterns and decisions of the Israeli Supreme Court in the areas of public law (Meydani, 2011: 6-18; Hofnung & Weinshall Margel, 2010) and the correlation between the religious beliefs of judges, their ethnicity, and their decisions (Weinshall-Margel, 2011; Weinshall-Margel, 2016; Gazal-Ayal & Sulitzeanu-Kenan, 2010). This study will build on these studies by examining a critical claim of pragmatic realism in action and the general context of public law and the reform debate.

***The Reform Debate as a Reflection of Legal Hyper-Realism***

The revolutionary legal reforms promoted by the coalition in 2023 all dealt with issues concerning the powers of the judiciary (including the authority of the Knesset to override constitutional decisions of the Supreme Court) and the appointment of judges and legal advisors in government ministries (Levush, 2023).

Thus, in the speech of Minister of Justice Yariv Levin on January 4, 2023, shortly after the formation of the new government, in which he presented the “first phase” of the reforms, he listed four reforms: changing the composition of the committee for the selection of judges; prohibition of the courts to examine the reasonableness of governmental decisions; legislation of an “override clause” that would allow the Knesset, with a majority of 61 Knesset members (MKs) out of 120, to annul decisions of the Supreme Court to invalidate laws as unconstitutional; and the appointment of the legal advisor of a government ministry by the ministry’s director general (the minister selects the director general based on personal trust) instead of the existing procedure of professional appointment in a tender procedure.

Out of these reforms, on July 24, 2023, the Knesset amended Basic Law: Adjudication, adding a clause stating:

Notwithstanding what is stated in this Basic Law, whoever has adjudication authority according to law, including the Supreme Court in its session as a high court of justice, shall not examine the reasonableness of decisions of the Government, of the Prime Minister or of another minister, and shall not issue orders in the aforementioned matter; In this section, “decision” – any decision, including appointments or decisions to refrain from exercising any authority.

The amendment, invalidated by the Supreme Court (……), did not cancel the obligation of the government, the prime minister, and the ministers to make reasonable decisions but denied the court authority to examine the reasonableness of those decisions.

On March 27, 2023, the Constitution, Law, and Justice Committee of the Knesset approved for the second and third reading bills to amend Basic Law: Adjudication and the Courts Act, 1984, which would change the composition of the Committee for the Selection of Judges. The Knesset sessions for the second and third readings were delayed by Prime Minister Benjamin Netanyahu but the votes were ultimately held at short notice. According to the existing Basic Law, the Committee includes nine members: three Supreme Court justices including, the President; two ministers including, the Minister of Justice (who serves as chairperson); two MKs (according to non-binding practice, one of them is from the coalition and the other from the opposition; and two representatives of the Bar Association. The selection of Supreme Court justices currently requires a majority of seven members, which means there is a right of veto for both the Supreme Court’s and the coalition’s representatives. According to the amendment, the Committee will include eleven members. The participation of the Bar representatives, whose vote is usually coordinated with the vote of the justices (Barzilai, 2022: 57), was eliminated. The amendment added two more ministers, two more coalition MKs, and an additional MK from the opposition were added to the Committee. It was determined that when selecting judges to courts below the Supreme Court, the judiciary would be represented in the Committee by presidents of other courts and not by Supreme Court justices, apart from the Supreme Court President. The consequence of the proposed amendment is that the majority of members will be representatives of the coalition and that the professional jurists who are members of the Committee will no longer be a majority but a distinct minority (three out of eleven). It is also suggested that the judges will be selected for all courts by a simple majority, essentially meaning that the coalition alone can choose all the judges.

In addition to these proposals, the Chairperson of the Constitution, Law, and Justice Committee, MK Simcha Rothman, in a series of discussions of the committee named “Zion shall be redeemed with the law—returning justice to the judicial system,” advanced proposals for constitutional changes in other areas, all of which relate to the composition of the Supreme Court and its authority. Thus, it was proposed that the authority to invalidate a law would be exclusive to the Supreme Court; that, as a rule, the Supreme Court would be able to invalidate a law only in the full composition of the Court (fifteen justices); that a decision by the Court to invalidate a law will require the majority of four-fifths of the justices; and that the Court will be authorized to invalidate a law only where the law clearly contradicts a provision in a Basic Law whose amendment requires a special majority, or if the law clearly contradicts a provision in a Basic Law that determines the conditions for its infringement.

The criticism raised by the initiators of the reforms was expressed primarily in terms of authority: a reduction of powers which, according to the initiators, the Supreme Court had unlawfully taken for itself (Rothman, 2019). However, these reasons reflect significant value-based changes that the reform’s initiators sought to advance through institutional amendments, paramount among them being the revision in the composition of the judges selection committee. As Minister of Justice Levin noted in one of his speeches (Baruch, 9/19/2023):

The battle we are engaging in here extends beyond a mere legal dispute and the process of selecting judges. It is a struggle over the fundamental question of whether the people of Israel will be allowed to determine what they have chosen – a Jewish state with true democratic values. We are contending against forces that seek to obscure our Jewish identity, prioritize infiltrators over our citizens, and, paradoxically, espouse democracy while acting in direct opposition to its principles.

Following the same line, the compromise directive proposed on March 16, 2023, by President Issac Herzog, which he called the “People’s Directive,” dealt primarily with issues related to the selection of judges and the powers of the judiciary: the composition of the committee for the selection of judges; the number of judges on the panel of the Supreme Court; the majority required for annulling a law as unconstitutional; denying judicial review of the Basic Laws and continuing judicial review of laws that violate rights that the Supreme Court has determined are derived from the constitutional right to human dignity; restrictions on judicial review according to the “reasonableness ground”; and various compromise arrangements regarding the election of legal advisors to the government and its ministries and regarding the legal representation of the government and ministers in court. In the title of the proposal, it is stated that the People’s Directive is intended to regulate the “constitutional relations between the authorities in Israel” by broad agreement. However, the Directive also deals with certain issues beyond the selection and powers of the legal authorities: the enactment of Basic Laws and the addition of several fundamental constitutional rights that are currently not explicitly stipulated in the Basic Laws. The directive thus balances institutional amendments, which reduce the powers of the legal authorities, with the inclusion of substantive liberal amendments. The content of the directive proposed by the President of Israel indicates the dominance of a pragmatic realist legal notion in Israel’s public and political discourse.

The existing literature offers various important empirical studies on the activity patterns and decisions of the Israeli Supreme Court in the areas of public law (Meydani, 2011: 6-18; Hofnung & Weinshall Margel, 2010) and the correlation between the religious beliefs of judges and their ethnicity and their decisions (Weinshall-Margel, 2011; Weinshall-Margel, 2016; Gazal-Ayal & Sulitzeanu-Kenan, 2010). The proposed research will offer, for the first time, a critical, comprehensive perspective on contemporary Israeli public law as a pragmatic realist arena and will examine the reform debate as a culmination of this phenomenon.

***Research Objectives and Significance***

*The project has three main objectives:*

First, from a doctrinal-descriptive approach, the study will provide an empirical and analytical account of the doctrinal realism in contemporary Israeli Supreme Court decisions in public law. We assume that institutional pragmatic realism is used as a basis for judicial decisions and court reasoning in Israeli constitutional and administrative law. It became a central doctrinal regime from a mainly academic descriptive and critical stance.

Second, the study will present Israel’s legal hyper-realism, mainly through contextualizing and reframing the debate on legal reforms. We claim that the political, public, and, to a certain extent, the academic perception prevalent in Israel expresses a perception that slightly recognizes the formal essence of law and assumes that judicial decisions are almost exclusively based on the political ideology and the personal identity of the judges. Both the initiators of the reforms, the opponents of the overhaul, and the settlement seekers share a focus on the election and role of judges and the courts rather than the substantive law and the authorities and legal powers of the elected branches—the Knesset and the government.

Third, from a theoretical perspective, this study aims to develop a novel analytical-normative perception of Israeli public law in light of institutional legal realism. The study will provide a data-driven framework for understanding contemporary jurisprudential and constitutional debates.

*Expected Significance:*

By gathering and analyzing Supreme Court decisions, together with diverse perspectives, including laypersons, politicians, and various jurists, the study will provide a genuine panoramic account of the interaction of law in books and action.

Additionally, if the hypotheses this study pursues are confirmed, it will identify striking similarities among diverse groups related to judicial reforms. More than that, embedded perceptions of Supreme Court case law will be revealed as sharing the same jurisprudential perception—pragmatic realism.

The findings of this study can be examined comparatively and may have implications for other legal cultures that experience challenges to democracy and face heated public debates as to the rule of law and the role of the judiciary.

***Detailed Description of the Proposed Research***

1. ***Working Hypotheses***

H1. Doctrinal Legal Realism is reflected in the Israeli Supreme Court’s constitutional and administrative law decisions.

H2. Legal hyper-realism is common among legal stakeholders and laypersons and strongly influences the perceptions of all sides in the judicial reform debate.

1. ***Research Design and Methods***

**Work Package (WP) 1 (following H1): *Unveiling and Measuring Doctrinal Realism in Israeli Public Law***

This phase entails doctrinal and analytical exploration (Task 1) as well as data mining of legal texts (Task 2) in order to identify and measure expressions of doctrinal realism in Israeli public law.

**Task 1**: *Mapping and framing the public law doctrines that express doctrinal realism.* This stage will entail doctrinal analytical analysis of central issues related to public law based on prevailing case law, including the following subjects: constitutional ripeness, babysitter procedures; reasonableness and proportionality and its sub-tests; remedies; judicial review of parliamentary (Knesset) decisions; judicial review of the Basic Laws; and context-based judicial review. Other issues related to doctrinal realism will be identified and categorized during the first year of the project, including those informed by the findings of Task 2. The doctrinal analysis will result in academic papers describing the doctrinal development in these areas.

**Task 2**: *Empirical analysis of the entire corpus of constitutional and administrative law Supreme Court decisions in the years 1948–2024*. This stage will include data mining using machine learning (ML) tools in search of Supreme Court expressions of self-reflection. Expressions such as: “this court will restrain itself,” “this court does not use…”; “the scope of judicial review in this area is limited” will be searched by using text mining, also referred to as knowledge discovery from textual databases (KDT). KDT comprises a set of methods and techniques employed to study and analyze extensive databases. Central to this approach is establishing relationships among extracted pieces of information, aiming to uncover patterns or connections within the examined texts. Information extraction involves searching for specific details in documents, considering the order and proximity of words to discern between statements with identical keywords but different meanings. The information extraction process commences with a natural language database, utilizing it to construct a structured database. This structured database facilitates the scanning of text to identify words or phrases corresponding to each field in the database. Consequently, KDT serves as a bridge between quantitative statistical analysis and qualitative examination. KDT is applied in studies across diverse fields, including law, particularly within the realm of public law (Hall & Wright, 2008).

Since some constitutional issues arise in criminal and civil cases of the Supreme Court, the ML operation of the data mining will be conducted on civil and criminal cases as well. This inquiry will enable us to unveil the scope, appearances, and characteristics of judicial self-reflection in Israeli public law and to identify further manifestations of pragmatic realism while supplementing the issues mentioned in Task 1.

**WP2 (following H2): *Empirical unveiling of legal hyper-realism perception among various legal and political stakeholders***

This phase aims to capture the perception of law in light of hyper-realism by conducting an empirical inquiry using a few methodologies: Hyper-Realism Survey (Task 3); in-depth qualitative interviews (Task 4); and desk analysis of the legal reform materials (Task 5).

**Task 3 – Hyper-Realism Survey**:A “hyper-realism survey” will be prepared to help clarify the perceptions of the tenets of hyper-realism in Israeli society and among jurists. The survey will be constructed, conducted, and circulated with the help of a survey research institute and will include short statements (~50) related to the tenets of legal realism followed by binary responses. This will enable us to test contemporary perceptions and validate and refine the outcomes of the theoretical inquiry. Tenets of realism will be examined by translating the theoretical questions into more measurable indicators, such as: Are judicial decisions considered based on rules? Are policies, principles, or proportionality acceptable in legal thinking? Are judges considered delegates of the legislature? Are judges considered to have significant discretion when interpreting the law? What are the common concepts used to define judicial reasoning? Is there an interest in the personality of the judge? Are personal or emotional expressions considered part of the judicial work? What is the fact-finding perception of law? Two survey versions for laypersons and jurists will be developed, and a comparison will be conducted among the various stakeholders related to the reforms and the debate on legal formalism. The findings of this survey will provide a quantitative map of prevalent core perspectives on Israeli law in general and will enable further studies in other legal fields.

**Task 4 – In-depth Qualitative Interviews**: We will conduct in-depth interviews with public law stakeholders, including judges (retired), lawyers, politicians, political activists, and legal academics. The qualitative study will include between 30 and 40semi-structured interviews with stakeholders related to public law and the legal reforms debate.Using interviews as a qualitative tool enables the extraction of a thick description that provides insights into the meaning that the interviewee attaches to objective reality (Kvale, 1994). The interviews will unveil jurisprudential perceptions and will seek to capture relevant tensions: 1) between the personalities and worldviews of the judges against legal compliance; and 2) between the institutional interest of the judiciary and law enforcement on other branches. The research team will interview retired justices and judges (~5); legal attorneys from the public and private sectors (~8); public law academics (~10); politicians related to the legal reforms debate (~6); activists from all sides of the legal reforms debate – promoters, opponents, settlement seekers (~8). The interviewees’ various positions, roles, and professional orientations will provide a multi-perspective triangulation of legal realism in Israeli law and society, creating a rich set of diverse narratives, considerations, and notions. The interviews will be conducted by the PIs, together with students in the Conflict Resolution Clinic and the Advancement of Equality Clinic, both headed by the PIs. The interviews will be co-constructed, supervised, and processed by the research coordinator, an expert in qualitative research. The transcriptions of the recorded interviews will be analyzed and coded using the *Atlast.ti* software. The findings will generate new insights into the legal reforms and public law in general.

**Task 5 – Desk Analysis of the Legal Reforms Materials**: This stage will entail analysis of the Knesset legislative bills and their explanations, alternative bill proposals, public speeches, and prominent media articles related to the reform debate. Research assistants will code the materials for pragmatic realist and formalist elements.

**WP3 (following H3): *Theoretical and Normative Implications***

The first, second, and third tasks will generate a comprehensive picture of Israeli public law in relation to institutional pragmatic realism. By investigating the influence of the Legal Realist Movement and assessing its impact on Israeli legal culture, the research will generate new theoretical and normative perspectives about law, politics, and the judiciary. The fourth and fifth tasks will further enrich this general analysis by referring to the reforms debate. Constant reflection and deliberation on the research development and findings will be conducted during the research stages together with students from the Conflict Resolution and Advancement of Equality Clinic. An academic colloquium debating the empirical, theoretical, and normative findings will take place during the last year of this project. Deliberation and dialogue among various stakeholders related to public law and the reforms will assist in further elaborating and integrating research findings, including discussing the comparative implications of it in general and for other democracies in crisis.

***Preliminary results***

The above-mentioned overview of issues in public law, which reflect doctrinal realism, was articulated by the first PI in various scholarly papers (Bendor 1997, 2011, 2013, 2020) and academic presentations and teaching. This study will further elaborate and examine these claims within the framework of pragmatic realism and by using empirical methodologies. An empirical coding study of legal opinions of the Supreme Court through reference to legal formalism was conducted by the second PI (Alberstein, 2012, 2019, 2021) and will be modified for the study of pragmatic realism and expanded through the use of advanced technologies, among them KDT, along this study.

***Research Conditions: Personnel, Infrastructure, and Accessibility***

**Personnel**

Ariel L. Bendor is a full professor (tenured 1998) at the Faculty of Law, Bar-Ilan University (BIU). Among his previous positions: Dean of School of Graduate Studies at BIU, Dean of Law and Dean of Students at the University of Haifa, and Chairperson of the Association for Public Law in Israel. He specializes in constitutional and administrative law and has published intensively on the links between substantive public law and adjudication in constitutional and administrative law matters in Israeli and comparative law. He was part of the Deans’ Forum headed by Professor Yedidia Stern to form solutions of compromise to the reform debate in 2023.

Michal Alberstein is a full professor (tenured 2005) and Dean of Law at BIU, specializing in jurisprudence, conflict resolution, legal formalism, and pragmatism. She was the PI of a European Research Council (ERC) consolidator grant to comparatively study the changing roles of judges in an age of vanishing trials. She has managed various research teams conducting empirical and theoretical studies.

The research team will include a project coordinator qualified in empirical methodologies, both qualitative and quantitative. Conflict Resolution and Advancement of Equality clinic students supervised by their clinic coordinators will assist in conducting and processing the interviews. A data scientist will be hired to process the machine learning phase, and research assistants will help conduct the desk work and the analytical and comparative inquiry.

***Accessibility and Ethics***

The proposed research will be conducted at the Faculty of Law at Bar-Ilan University, which has a diverse student and faculty population. Initiators of the legal reforms, strong opponents of the overhaul, and settlement seekers were all led by the Bar-Ilan law faculty. Student and faculty efforts to promote democratic dialogue on the controversial issues were encouraged throughout the 2023 crisis. As described above, a few of the research tasks will be conducted and processed with clinic law students and faculty. They will enrich legal education by contributing to an integrated theoretical and normative perspective on deep and divisive controversies in Israeli society.

During Task 3, interviews with some retired justices and senior politicians may prove challenging, yet the research team will persist in accumulating the data until saturation. Any other material is publicly accessible.

Ethical approval for the empirical work, including interviews of stakeholders, will be requested from Bar-Ilan IRB. The privacy of the interviewees will be protected by using a pseudonym or username with no tracking of information to the user. Identifying information will be stored in an encrypted folder according to personal data protection best practices.

***Expected Pitfalls and Mitigation:***

*Conceptual challenge #1:* Institutional pragmatic realism, including the reference to the specific tenets described within this proposed research, may not be controversial. In response, we will validate our claims through empirical inquiry and will fine-tune our theoretical claims alongside the development of this study.

*Methodological* challenge #3: Developing a machine-learning study of Supreme Court decisions may be challenging due to the complex theoretical questions involved. In response, a legal-tech expert will be part of the research team and adapt the ML to train the data.

*Empirical* challenge #4: Integrating the data while diagnosing connections and relationships may be complicated and given to inverse interpretation, considering the mixed methods approach taken in this study. In response, each small empirical achievement in collecting data, raising consciousness, and generating knowledge during the research will be significant in itself, and a novel broad picture of contemporary Israeli public law will emerge regardless of possible diverse perspectives on its meaning. Furthermore, an empirical methodologist expert will be part of the research team and will assist in integrating the findings, including the various datasets.

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