ג׳ באב, תשפ״ד
07 באוגוסט, 2024
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לכבוד
פרופ׳ אריאל בנדור, משפטים, אוניברסיטת בר-אילן
פרופ׳ מיכל אלברשטין, משפטים, אוניברסיטת בר-אילן

לפרופ׳ אלברשטין שלום רב,

הנדון: בקשתכם למענק מחקר בנושא:
ריאליזם דוקטרינרי במשפט הציבורי בישראל

הצעת המחקר אשר הגשתם לקרן הלאומית למדע לא נכללה, לצערנו, בין ההצעות אשר זכו במענקי מחקר השנה.

מצ״ב עיקרי חוות הדעת.

לתשומת לבכם, החלטות הנהלת הקרן מתקבלות על סמך סיקור עמיתים ודיונים בוועדות מקצועיות. ראוי להדגיש כי הוועדה המקצועית אשר בחנה את הצעת המחקר התבססה על מכלול ההערות והציונים שהתקבלו מסוקרים חיצוניים ומחברי הוועדה שהם מומחים בתחום, ונתנה משקל, בדיוניה, רק לאותן ביקורות והערכות שהיו מקובלות עליה.

מאחר שכספי ההקצבה השנתית מחולקים עד תום, החלטות הנהלת הקרן הן סופיות ואינן ניתנות לשינוי.

אנו מאחלים לכם הצלחה בהמשך דרככם המדעית.

בכבוד רב,

תמר

ד״ר תמר יפה-מיטווך
מנכ״ל

העתק: רשות המחקר, אוניברסיטת בר-אילן

מוזמנים לבקר באתר קול המדע https://kolhamada.isf.org.il/ - מיזם של הקרן הלאומית למדע, המגיש מידע מדעי מחזית המדע, לציבור ולקהילה המדעית בישראל.

Reviewer No. 1

This project has strengths. The methods are proven and the approach is widely accepted in the field. The downside is that I am sceptical that much new knowledge can come from this research. I don't see this project as especially innovative and, as such, I am not convinced it should be funded.

Reviewer No. 2

Originality, importance, and quality of the proposal

The proposal suggests examining the work of the Supreme Court of Israel through the lens of "pragmatic realism." According to the proposal's abstract this term means that "judicial decisions are formed [A] in light of prevailing political ideologies, along with [B] the institutional interests of the Judiciary" (my emendations). Based on this, the proposal hypothesizes, (1) that commentators now assume that judges decide based on their politics (rather than legal rules); (2) that the Supreme Court itself has transformed pragmatic realism into legal doctrine. (My hypothesis (1) and (2) correspond to the proposal's H2 and H1, respectively.)

It seems, though it is not stated explicitly, that the two hypotheses correspond to the two different meanings of pragmatic realism (designated [A] and [B] above). Hypothesis (1) on observers' perceptions of the Supreme Court's work focuses on meaning [A] above, whereas hypothesis (2) about the court's doctrines focuses almost exclusively on the meaning [B].

Hypothesis 1: Outsiders' assessment of the work of the Supreme Court of Israel

Hypothesis 1, which examines the work of the Supreme Court through a political lens is hardly news. Criticism of the Court's political orientation and accusations that its "liberal" values are not in line with the majority of Israelis, have been made since at least the 1990s. Since then, political analysis of the Court has become mainstream. It's now commonplace to read in newspapers or news websites that a certain judicial nominee is a "liberal" and that another is a "conservative."

A major part of the proposal is focused on evaluating the judicial reform proposals through this lens. While valuable and important to go beyond the more rushed analyses of the proposals one reads in newspapers, I am not sure that a political analysis of the reform proposals will be too revolutionary. Many proponents of the reforms have adopted this "realist" (i.e., political) language explicitly and repeatedly.

The proposal states that "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 reforms debate as a culmination of this phenomenon" (p. 10). This is hard for me to assess. It may be true, and may provide a valuable and illuminating synthesis of existing discussions, but it not seem ground breaking.

Hypothesis 2: The incorporation of pragmatic realism into legal doctrine

If there is novelty in this proposal it is in the suggestion that pragmatic realism is not (anymore) just a matter of outsiders' observations, but that it "transformed from a mainly critical stance to a central doctrinal regime, and is used as a basis for judicial decisions and court reasoning" (p. 1). In other words, the Supreme Court *itself* has adopted in its own decisions the pragmatic realist perspective.

This is an interesting hypothesis and the proposal offers to discuss it in historical trends of the court's work. Here, however, it is not meaning [A] of pragmatic realism that dominates this hypothesis but meaning [B]. The proposal does not say that judges are overly political in their decisions but that the

Court often takes institutional considerations into account. In other words, the hypothesis is not that judges translated party politics into legal doctrine, but rather that "Justices prefer not to address the substantial [sic] law and its meaning … and continuously reflect upon their own role, the position of the court, and the impact of their decision" (p. 4). This idea is further explicated in terms of various restraint doctrines (such as like constitutional ripeness, relative voidance, or proportionality (pp. 5-7)) designed to avoid, delay, or limit decisions on politically contested issues.

There are several concerns here:

1. It is not clear how the two senses of pragmatic realism (identified as [A] and [B] above) are connected to each other, and the proposal does not explain their relationship. Without this connection, it may look like the proposal seeks to discuss two rather different (if loosely connected) phenomena under a single label. All the restraint doctrines are designed to avoid, delay or limit the scope of judicial decisions on politically contested matters. Such doctrines could be seen as courts' efforts to *avoid* their politicization. Courts are, of course, aware that some cases they are asked to decide on involve politically charged issues (abortion in the US, Brexit in the UK, secession in Canada, to give a few examples). In such a context, a court that wishes to avoid engaging in a question may employ various postponing/avoiding techniques. All these techniques (sense [B] of pragmatic realism) could be seen as means of *reducing* the perception of the court is a political player that decides cases based on politics rather than law (i.e., sense [A] of pragmatic realism). This suggests that the two senses of pragmatic realism are potentially going in opposite directions. Other relationships are possible but should be explained.

2. The doctrines that purport to show the adoption of pragmatic realism by the Supreme Court of Israel (or others like them) are familiar from many courts dealing with politically charged questions. Courts around the world employ doctrines such as constitutional avoidance (not deciding constitutional questions unless doing so is necessary for the disposition of a case), proportionality, reasonableness, rights balancing, justiciability, standing, the political question doctrine, levels of scrutiny,[1] deference to other branches of government (and more broadly, separation of powers), margin of appreciation, and so on.

Some of these are American in origin, others (like proportionality) are not. As such, it is difficult to see them as influenced by American legal realism. Apart from the question of origin, since such doctrines are so prevalent in so many different legal systems with different legal-political traditions, to say that all of them are examples of pragmatic realism potentially renders the claim trivial, because it suggests that *all* courts (at least when dealing with constitutional questions) adopt versions of pragmatic realism. In other words, the claim that the Israeli Supreme Court adopted the stance of pragmatic realism may be due to the fact that since the mid 1990s, the Court assumed the power of judicial review of legislation, which necessitated the adoption of various restraint doctrines to counterbalance the new power.

[1] In one paragraph (p. 4), the proposal asserts that levels of scrutiny are not examples of pragmatic realism, although I couldn't quite understand why. The proposal could be read as suggesting that this doctrine serves a role roughly comparable to that of the proportionality doctrine, which *is* seen as an example of pragmatic realism.

3. Since such doctrines are so common, there should have been some sensitivity to their relationship, rather than merely listing them. Suppose we accept the standard narrative that in its early years (say, in 1948-1978), the Supreme Court adopted a broader doctrine of justiciability than it did in later decades. (The proposal notes that justiciability is understood narrowly in Israeli law today (p. 7).) But the proposal considers justiciability constraints as examples of pragmatic realism, which means that the Supreme Court adopted pragmatic realism from its earliest days, although it changed its doctrines.

What seems to have changed is that in its early days, the Supreme Court avoided certain issues altogether, whereas in more recent times, the Court adopted more nuanced forms of avoidance/restraint. The proposal hints at something like this when it calls certain "binary" decisions (p. 5) formalist. This is a completely different definition of the realist-formalist contrast from the one used in other parts of the proposal. This characterization has the effect that more comprehensive avoidance doctrines (such as broad justiciability doctrines) are seen as formalist rather than extra-realist.

4. The empirical study of court decisions is supposed to cover the period of 1978 to 2024. The start date was chosen because it was the year Aharon Barak was appointed to the Supreme Court (pp. 11-12). This is potentially problematic, because it undermines the possibility of refuting the hypothesis that the Court adopted pragmatic realism relatively recently. If various restraint/avoidance doctrines had been used in the early decades (albeit perhaps different ones from those used today), this could refute the hypothesis that pragmatic realism is a novel development. This is related to the previous point that avoidance doctrines had been used all the time.

5. I am not entirely clear what "machine learning" is supposed to do in the textual analysis. It sounds techy and up-to-date, but the proposal does not explain anything that seems to require machine learning.

Apart from these two hypotheses, the proposal has another one (called H3): "The materialization of pragmatic legal realism in Israeli law and society raises foundational dilemmas and generates groundbreaking theoretical and normative implications" (p. 11). This is not a hypothesis, as it does not state anything that could be tested, confirmed, or refuted. Regardless, it is not clear what those groundbreaking implications will be.

<u>Adequacy of Methods</u>

The proposal adopts "a-bit-of-everything" approach. Different parts of it involve doctrinal analysis, text mining, surveys, semi-structured interviews, and "desk analysis" of various texts for the sake of producing a "comprehensive" evaluation of the Israeli public law. This may be a bit too much for a single proposal. Moreover, some of the proposal's compoennts seemed to me more valuable than others. Interviews with judges can be illuminating as they sometimes allow us to peer into the black box of judicial decision making. But interviews with academics or proponents or opponents of legal reforms strike me as less useful. These people express themselves in public forums (academic publishing, opinion

pieces in newspapers, newspaper interviews etc.). I am not sure about the added value of interviews here.

Suitability of investigators' scientific background to the project

Both PIs published extensively in relevant fields and their background and interest complement each other with respect to the proposal. Both have written theoretical works in relevant fields, Alberstein (PI2) has conducted empirical work.

Summary (strengths/weaknesses of the proposal)

Strengths: The proposal seeks a comprehensive evaluation of Israeli public law in light using different research methods. It seeks to situate the recent law reform proposals in light of longer-term trends.

Weaknesses: Some of the basic conceptual building blocks of the proposal are not as clearly explicated as one could wish for. Despite promises to offer "groundbreaking theoretical and normative implications" (p. 11), those were not demonstrated. On the contrary, at least one of the main hypotheses of the project (that the Supreme Court's work is perceived by many outside observers to be political) is nowadays widely accepted.

Reviewer No. 3

1) Originality & innovation

The idea of measuring the realism ("pragmatic realism") of the decision of a court belongs to the larger legal sociology /political science enterprise of bringing to the fore patterns of judicial decisions, explaining their intellectual and/or material causes, and building a fruitful theoretical flat upon it. The present project looks highly original and innovative, to my knowledge, in it's applying such an approach to Israeli Supreme Court's Decisions from 1978 to 2024.

2) Project importance and contribution to scientific knowledge

The project looks very important and will certainly contribute to scientific knowledge about Israeli Supreme Court's patterns of decisions.

3) Adequacy of methods

The methodology of inquiry looks fully and completely adequate to the task.

4) Suitability of investigators' scientific background to the project

The investigators' scientific background, as it can be gathered from their careers and publication, look perfectly adequate to ensure that the project will be properly and fruitfully carried out.

5) Summary (strengths / weaknesses of the proposal)

The proposal looks very strong. The idea of a four-years program of investigation is evidence of the seriousness of the overall conception of the plan. I do not see weaknesses.

Reviewer No. 4

The **originality and innovativeness** of the proposed research consists above all in its strict actuality: in the days of the escalation of the Israeli-Palestine conflict, any impartial scholar, but also one openly sympathetic to Israel, cannot help but wonder whether the conflict itself, and the justice reform on which the Israeli Supreme Court has intervened, are not two sides of the same coin – that is, two ways of the Israeli government itself, or at least of its premier Benjamin Netanyahu, to preserve itself in power. By reforming Israeli version of judicial review, in particular, the premier and his majority are openly pursuing the regression of the Israeli constitutional system – to use categories from the European-Continental debate – from the constitutional state, provided with constitutionality review of laws, to the Westminster model of legislative state, devoid of constitutionality review. The same premier and his majority took advantage of the crimes of Hamas and their Shiite allies to radicalize the conflict and make impossible a return to the ballot box that would surely have seen them defeated. This hypothesis, of course, is not very original: most observers, in the West, might share it. Yet the proposed research could support such hypothesis by empirical evidences, by eliminating the impression that it is suggested only by a political stance.

The strict actuality of the research, nevertheless, does not exclude its **importance and its contribution to scientific knowledge**; indeed, it represents a sort of case study of another issue of great importance: the processes of democratic recession underway in the West and, as in the case of Israel, on its borders. Despite the project's abstention from the use of abused term 'populism' to qualify the policy of the Israeli government, it is a commonplace in such studies to observe that populism, once in government, tends to weaken, if not actually occupy, guarantee institutions such as the judiciary, especially the supreme court, information system, and the like.

As for the **adequacy of the methods**, it depends on the adequacy of the metalanguage used by the researchers compared to the object-language used by post-Aaron Barak Supreme Court case law: an adequacy called into question by the fact that both are qualified here by the ambiguous term 'doctrinal realism'. Double ambiguity: why there is no distinction between metalanguage and object-language, and why 'doctrinal realism' might sound oxymoronic. Characteristic of legal realism, especially American, in fact, is precisely that of not being so much doctrinal, in the normative sense of the legal and judicial English 'doctrine', as descriptive, also due to the fact of using tools from social sciences in the empirical description (political science, economics, psychology , statistics...). In order to dispel this double ambiguity, it is recommended to use the expression 'pragmatic realism' for the metalanguage and 'doctrinal realism' for the object-language. With this measure, at least, the suspicion of a preventively sympathetic approach of researchers towards their object is eliminated.

As to **suitability of investigators' scientific background to the project**, the scientific profile of the researchers employed in the project appears perfectly adequate: exactly this type of scholars is needed, who combine expertise in public and constitutional dogmatics with knowledge of the essential tools of the social sciences.

Summary (strengths / weaknesses of the proposal)
In sum, on the side of strengths of the proposal, we have scientific competence of proponents, actuality of research and importance of the object; on the side of weakness, on the contrary, the remediable discrepancy between language-object and metalanguage, and maybe the understandable lack of focus on populism.

Reviewer No. 5

Overall, the project is of considerable interest. The research goals are clearly delineated, the methodology is sophisticated and fully adequate for the purposes of the outlined investigation. Likewise, the profile of the researchers appears entirely consistent with the nature and objectives of the inquiry. Given these premises, the project certainly appears very promising and capable of making an innovative and significant contribution.