

UBO 4360077

# The Politico-Legal Dynamics of Judicial Review

A COMPARATIVE ANALYSIS

THEUNIS ROUX

University of New South Wales, Sydney

Dipartimento di Scienze Politiche Biblioteca
Inv. DSP 7124
Coll. COMPAR. 340.2.B.227



CAMBRIDGE  
UNIVERSITY PRESS

# Contents

<i>List of Figures</i>	<i>page</i> xii
<i>List of Tables</i>	xiii
<i>Acknowledgments</i>	xiv
<b>Introduction</b>	<b>1</b>
<b>1 Preliminaries</b>	<b>12</b>
1.1 Institutional Scope	13
1.2 Inattention to Ideational Questions	15
1.3 This Study's Approach	34
1.4 Methods and Case Selection	44
<b>2 A Typological Theory of JR-Regime Change</b>	<b>49</b>
2.1 Law's Autonomy: Legal-Cultural Ideal Not Empirically Testable Claim	52
2.2 JR-Regime Transformation during the <i>Lochner</i> Era	58
2.3 Generalizing the <i>Lochner</i> Story	62
2.3.1 The Core Concept: JR Regimes	64
2.3.2 The Evolution of JR Regimes	66
2.3.3 The Key Independent Variables: Changing Conceptions of Legal and Political Authority	68
2.4 Four Ideal-Typical JR Regimes	78
2.4.1 Democratic Legalism	78
2.4.2 Authoritarian Legalism	81
2.4.3 Authoritarian Instrumentalism	83
2.4.4 Democratic Instrumentalism	84
2.5 Consolidation, Transformation, and Incremental Change	85
2.6 Conclusion: Refining and Testing	89

3	<b>Australian Democratic Legalism: Constant Cultural Cause or Path-Dependent Trajectory?</b>	91
3.1	The Three Levels of <i>Engineers</i>	95
3.2	The Postwar Cases and the Failed Court-Packing Plan	108
3.3	The Dixonian Consolidation of Legalism	114
3.4	The Mason Court's Challenge	120
3.5	The Contemporary Australian JR Regime	134
3.6	Conclusion	140
4	<b>From Democratic Legalism to Instrumentalism: India's Constitutional-Cultural Transformation</b>	146
4.1	The Establishment Period: 1950–1967	149
4.2	From <i>Golaknath</i> to <i>Shukla</i> : 1967–1977	155
4.3	The Court's Rehabilitation: 1977–1989	165
4.4	The Modern Era: 1989–2015	176
4.5	Conclusion	187
5	<b>The Postcolonial Adaptation of Authoritarian Legalism in Zimbabwe</b>	193
5.1	Law and Politics in Zimbabwe before Independence	198
5.2	Building on the Colonial Legacy: 1980–1998	204
5.2.1	ZANU-PF's Illiberalism	206
5.2.2	Continuities between the Pre- and Postindependence Regimes	209
5.2.3	ZANU-PF's Response to Assertive Judicial Decisions	213
5.3	The Instrumentalist Interlude: 1999–2008	218
5.3.1	The Causes of the Transition	218
5.3.2	The Assault on the Judiciary	225
5.3.3	Assessing the Character of the Post-2000 Regime	230
5.4	Recovery and Return: 2009–2013	233
5.5	Reconsolidation: 2013 to Date	239
5.6	Conclusion	240
6	<b>Testing the Typological Theory: A Medium-N Comparative Study of JR-Regime Change</b>	242
6.1	Populating the Typology	245
6.1.1	Democratic Legalism	245
6.1.2	Democratic Instrumentalism	255
6.1.3	Authoritarian Legalism	257

6.1.4	Authoritarian Instrumentalism	261
6.1.5	Summary	269
6.2	Consolidation	269
6.3	Transformation	281
6.4	Within-Regime Incremental Change	290
6.5	Conclusion	293
<b>7</b>	<b>Findings and Implications</b>	<b>295</b>
7.1	Main Findings	296
7.1.1	Findings Specific to Democratic and Authoritarian Instrumentalism	303
7.1.2	Subtype Transformation under Democratic Legalism	306
7.1.3	Vertical and Horizontal versus Diagonal Transformation	308
7.2	Normative Implications	309
7.3	Practical Implications	318
7.3.1	Constitutional Design	318
7.3.2	Judicial Practice	323
7.3.3	Social Activism	325
7.4	Conclusion	328
	<i>Bibliography</i>	329
	<i>Index</i>	352