Judicial Review Regimes: Bringing together Law and Politics in Comparative Research

Book review

Theunis Roux. *The politico-legal dynamics of judicial review. A comparative analysis*. New York: Cambridge University Press, 2018.

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After four years of work, in his astonishing new book, Theunis Roux, professor at the University of New South Wales (Australia), posits his comparative theory on judicial review from a macro-socio-legal point of view of a slower-moving process. It is a provocative perspective of ideational factors through which to understand, from a heuristic point of view, the development of judicial review based on societal conceptions of law's autonomy, which Roux calls *Judicial Review Regimes*, given the fact that claims of legitimacy based on law or politics have not been extensively taken into account in the literature as independent variables, neither by lawyers nor by political scientists. Drawing on an approach based on historical institutionalism, the book offers a suggestive typology to link co-determinacy between law and politics in a cross-country comparison so as to provide the basis of a normative assessment of the moral legitimacy of judicial review.

According to the South African professor, inattention to ideational questions by researches produces blind spots in terms of conceptions of the law/politics relation. Most legal scholars focus on isolated studies about doctrines or judicial decisions, but there is a lack of systematic analysis of constitutional culture. Likewise, behavioral and rational choice approaches to judicial review in the field of political science tend to assume law as a subsystem of politics, even to the point of considering the judges as self-interested politicians. It reduces the judicial independence and the faith in law as a relevant variable, fails to make generalizations with those premises in larger comparisons and fails to integrate a normative dimension to evaluate

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models of judicial review. I would like to describe the argument and the theoretical framework in some detail, to then make a number of remarks and provide a discussion.

The book's argument, presented in the first chapter, is a generalizable insight through a typological theory about how the claims of legal and political authority interact in regular ways, and how its consolidation, transformations and increasing developments follow recurrent patterns (p. 35). The argument is oriented by two theories: in the first place, historical institutionalism, in which institutionalized values and ideas —as law's autonomy— play a role that remains unexplained by rational choice-based approaches; and, in the second place, comparative historical analysis, a perspective that values the process over time, through systematical and contextualized comparisons. The two independent variables, forms of legal and political authority claim, are tested qualitatively. First, extracting generalizable concepts from the American example; then by presenting detailed historical case studies from Australia, India and Zimbabwe; and, finally, by making a conducting schematic analysis in a medium-N comparative case study. The normative dimension is explained by assessing the *democratic legalism* and the *democratic instrumentalism* as morally attractive regimes.

The second chapter presents a typological theory of JR-regime change. Taking into account that the ideational foundations of law's autonomy are not an empirically testable claim, but a useful abstraction to understand societal conceptions of law in modern society, Roux shows how the dominant conception of law/politics relation change in American judicial politics. In fact, the *Lochner* era, described as the moral and political influence of Justice *Lochner* in the US Supreme Court's decision making to tackle economic crisis, was a change of conceptions in law/politics relations over a new understanding of the legitimate basis for judicial review: from a conception grounded in law's autonomy to the acknowledgment of law's susceptibility to political influence.

The ideational change is qualitatively tested by proposing four ideal types of judicial review regimes according to societal conceptions of the legitimate basis for law's authority and political authority. In terms of law's authority, Roux characterizes legalism as a legitimating ideology of impartiality and neutrality of law, and explains instrumentalism as a way of accommodating disagreement by using law as a tool. In terms of political authority, seeking political legitimacy is divided into democratic and nondemocratic bases, which the author describes as shifting from a "fully competitive, multiparty democracy" to another different package of legitimating devices. With those variables, the author builds the following matrix:

Table 2.1. (p. 79)

Typology of JR-regimes	Political authority based on a mandate derived from a fully competitive democratic system that respects liberal political rights	Political authority based on asserted need to subordinate the democratic system to some overarching and democratically nonnegotiable conception of the public interest
Law's authority based on public confidence in the autonomy of law from politics	Democratic Legalism	Authoritarian Legalism
Law's authority based on its perceived usefulness as an instrument for the pursuit of political goals	Democratic Instrumentalism	Authoritarian Instrumentalism

The ideal types have stability and can change over time. The stability of *democratic legalism* "depends on the judiciary's observance of the reasoning methods that have come to be associated with the ideal of law's autonomy from politics" (pp.78-79). The stability of *authoritarian legalism* "comes from the residual legitimating role that law plays in these circumstances, together with power holders' skill in prosecuting their alternative, less than fully democratic claim to authority" (p. 82). In *authoritarian instrumentalism* "stability is a function of a naked force and non-legal forms of legitimation, with law acting as a projection of political power rather than a constraint to it" (p. 83). Finally, *democratic instrumentalism* seems to be a stable regime in which law's authority is premised "to promote substantively just outcomes and on decision makers' candor about the politics of constitutional adjudication" (p. 84), but it is concerned with the consequences of judicial choices.

Drawing on those features, Roux posits that there are three main classes of changes: "(1) the consolidation of a JR regime, which describes the emergence of a relatively stable, dominant societal conception of the law/politics relation; (2) the transformation of a JR regime, which describes a situation where one dominant conception of the law/politics relation transitions to another; and (3) the incremental development of a JR regime, which refers to any observable change in societal understandings of the law/politics relation short of wholesale transformation" (pp. 85-86). Without external shocks the ideal types tend to be stabilized, but certain internal settings may facilitate the change.

Applying the theory, the following chapters focus on Australian *democratic legalism* (Chapter 3), Indian *democratic instrumentalism* (chapter 4) and Zimbabwe *authoritarian legalism* (Chapter 5). In Australia, according to the author, law and political claims of authority consolidate a JR-regime around a legalist conception of law's authority, but containing the proliferation of right-based decision making to other areas. In contrast with the Australian case, reinterpreting the Indian story, Roux shows how the Court switches from legalism to a conception of constitutional adjudication as deeply immerse in politics, as a result of the Court's doctrines and its interactions with the political environment. In the analysis of the Zimbabwean case, the adaptions to authoritarianism through selective deference to judicial independence and the continuity of violence, provides Roux with the opportunity to explain the return to authoritarian legalism after several uses of law as a legitimating device. In a way, those very detailed chapters show how successful the ideal types might be to understand large-scale processes in a comparative framework.

Ten additional cases are tested in Chapter 6: Germany, Colombia, Hungary, Indonesia, South Africa, Chile, Singapore, Egypt, the Occupied Palestinian Territories, and Myanmar. The purpose of this is to point out that the typology both fits commonwealth countries and allows cross-country comparisons. This chapter enriches the discussion proposing three sub-types of democratic legalism (rights exclusion, substantive legalism, deferential rights review) according to competing visions of constitutional adjudication. But there are no specific sub-types to discuss democratic instrumentalism and authoritarian legalism. In terms of change processes, Roux posits a suggestive argument of pathways to consolidation (new regime formation, adaptive continuity, counterreaction and reversion to dominant type), conditions for judicial review regime transformations and within-regime incremental change, as general propositions observed through the examples.

The last chapter discusses the main findings and implications. On the one hand, thinking about the ideational dimension of judicial review, it allows us to assess the moral worth of this institution in its empirical complexity. On other hand, providing guidance to assess

constitutional design, judicial decision making and democratic activism, drawing on societal conceptions of the law/politics relations, its limits and potentialities. These findings require a little more analysis by the scientific community, but there are some debatable aspects.

According to Cohn[1], the book has some vague aspects that I would like to point out and discuss. First, Roux's conception of democracy and authoritarianism seems simplistic. Second, there is no clear definition of the weight of the interaction between legal and political ideational claims of authority to drive the evolution of judicial review.

In fact, the distinction between democracy and authoritarianism is not quite clear, there are several ways to think about authoritarian rule, also, democracy is not completely fulfilled by electoral competition or even the existence of judicial review. But, in defense of Roux's argument, I do not think that the classification or the assumption of a continuum between the two concepts subtracts value from the typology. The level of abstraction raised by Roux's theoretical framework seems to be a 'necessary evil' in Becker's terms[2]. It is not really simplistic because Roux himself created sub-types of democratic legalism that help to understand distinctions between countries in a comparative fashion, although it fails to provide the same level of specificity about the other types.

Thus, the purpose of understanding a complex dynamic posited by Roux's theoretical framework is not aimed at finding causal arguments as those used by political scientists to understand causal links; despite having more coverage in theoretical terms, it is less pretentious than. Understanding the judicial role in a historical institutional perspective, drives us to discuss both the causal factor and the complexity of the law/politics relationship. It seems to me that Roux's way to describe judicial review regimes try to capture the whole complexity without positing his argument on the surface of constitutional politics or even the analysis of political junctures. Other authors such as Landau or Nunes regarding Colombia and Brasil[3] have been drawing attention to ideational factors in a less complex way, nevertheless Roux's work grounds on a wider coverage such as the societal conceptions of law's autonomy.

Finally, the book will be important in terms of continuing to think about judicial review on an interdisciplinary and comparative basis. Historians, lawyers, political scientists, as well as possibly legal anthropology, will benefited from this theoretical framework.

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1 See Margit Cohn, "Book review: the politico-legal dynamics of judicial review", *Social & Legal Studies*, 18 (5), 2019, 725-730.

2 See Howard S. Becker, "Theory: the necessary evil", in *Theory and Concepts in Qualitative Research: Perspectives from the Field*, David J. Flinders and Geoffrey E. Mills, Eds. (New York: Teachers College Press, 1993) 218-229.

3 See Rogrigo Marinho Nunes, "Ideal Justice in Latin America: Interests, Ideas, and the Political Origins of Judicial Activism in Brazil and Colombia" (Ph. D. Dissertation, The University of Texas, 2010); and David Landau, "Beyond Judicial Independence: The Construction of Judicial Power in Colombia" (Ph.D. Dissertation, Harvard University, 2015).