FORMALISMS OF LAW
BUILDING MEASURES TO EVALUATE THE FLUCTUATING PATHS OF LEGAL RHETORIC IN SUPREME COURT DECISIONS

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ABSTRACT

This paper deconstructs the debate on Legal Formalism by detailing the claims and counter-claims about formalism in the law, and empirically examines formalistic and anti-formalistic tendencies in Israeli Supreme Court legal decisions over time.

A code of 31 binary variables was used in a content analysis of 2,086 Supreme Court opinions. Despite claims that there had been a movement away from formalism in Israeli law, we found that on most measures, the rhetoric of legal decisions remained formalistic. However, we also found that the various measures of formalism followed diverse patterns. The most significant decline in formalism appeared in the use of the language of policy and principles, as well as in reference to judicial discretion and choice. We suggest that these changes can be interpreted as the emergence of a new "Stage II Formalism," that reconstructs formalism to incorporate policy and discretion into the formal legal realm.

I. INTRODUCTION*

It is widely accepted that the aspiration for formality is an integral element of judicial decision writing. Despite the ongoing debates in legal literature that have referred to the limits of formalism, and have challenged assumptions about the possibility of deciding legal cases by an objective, straightforward application of rules, there still remains a commitment to the basic view of law as a complete, autonomous, conceptually ordered and socially acceptable system (Haltom 1998; Pildes 1999). There have been numerous definitions of legal formalism suggested in the literature, that often incorporate different attitudes to formalism. Some refer to the inherent quality of law as based on formality in all its institutional manifestations (Summers 1997). Others discuss legal formalism in a pejorative way, and condemn mechanical jurisprudence and the strict application of rules as rigid and unsophisticated (Dworkin 1977; 1986). Some refer to the relationship between rules and other factors that come into consideration in legal decision-making, such as principles, standards and policies (Schauer 1988). There are also arguments about the influence of legal cultures on

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formal and substantive decision making in law (Summers 1987). Discussions about the nature of formalism have often concluded with normative arguments to follow rules (Alexander 1999), to consider policies and principles (Dworkin 1985), and some calls to empirically test whether there are benefits to the use of more flexible considerations or to rely on rigid rules (Sunstein 1999).

Many of the arguments about formalism stem from Max Weber's portrayal of modern law as a gapless system of rules (Rheinstein 1954). According to Weber, the most advanced category of legal thought in western society is "formal rationality" and legal rules can be applied to any concrete fact situation and be used to evaluate any social conduct.

Jurisprudential scholarship challenged the possibility of a gapless system, and pointed to gaps and ambiguities that exist in legal rules that are particularly evident in hard cases (Hart 1994; Alexander 1999). The Legal Realist movement, which was part of the general intellectual revolt against formalism in the United States (White 1947), was even more radical. Its proponents claimed that rule formalism was basically impossible because the indeterminacy of legal rules was pervasive, and thus judges constantly make arbitrary decisions (Fisher et al 1993; Tamanaha 2007; 2009). Instead they described a legal universe composed of policies and instrumental reasoning in which legal discretion was the rule and not the exception. In addition, the Realists also pointed to the biased nature of fact-finding in legal decision-making, claiming that norm-application is embedded in the descriptions of facts, and raised doubts about the claim that legal concepts had internal meaning (Frank 1930). They further described the significant discrepancy that exists between law in the books and law in action (Pound 1908). These critical claims essentially expanded the notion of legal formalism to include fact-norm separation, rare moments of judicial discretion,

conceptual rigidity, and simplistic assumptions about the applicability of legal decisions. (Alberstein 2012).

Following the realist critique, various reconstructions of the notion of formalism have been developed. Some scholars have described the formality of the legal universe as entailing principles, policies and moral considerations (Dworkin 1977). Others have redefined the notion of judicial discretion, so that it is now limited and refers to structured reasoning rather than open-ended choice-making. These new "forms of formalism" reflect the multiplicity of views regarding the formalism of law (Pildes 1999), that often are realized within the texts of legal decisions. This paper seeks to provide a new slant on the debate about formalism by presenting a quantitative textual analysis of opinions in randomly selected routine legal cases of the Israeli Supreme Court from 1948 to 2013. Thus, contrary to traditional analyses of legal formalism which have largely relied on jurisprudential reasoning and have promoted a specific stance regarding formalism, the research in this paper adopts an interdisciplinary empirical approach. Incorporating the expanded notions of legal formalism that emerged following the debate with Legal Realism, we developed a complex measure which includes the various characteristics of formalism that have been suggested in the literature. This measure is used to depict the realization of formalism within the rhetoric of Israeli Supreme Court opinions over time.

The Israeli legal system provides a unique case study as it combines a British common law regime with some civil law influences (Barak 2002; Mautner 2012). Moreover, in the past decade Israeli legal practice and academic writing have been heavily influenced by American jurisprudence, including the incorporation of notions of judicial review. Within this rich legal culture, we expected to find various manifestations of different types of legal formalism. While our analysis is based on

Israeli judicial decisions, and thus the particular trajectories of formalism that we found may reflect specific socio-legal events that occurred in Israel, the empirical measurements we constructed to explore the realization of formalism in judges' decision-making can certainly be applied to decisions in other jurisdictions and legal systems. In fact, we anticipate that the Israeli case findings and insights will be of benefit to socio-legal scholars everywhere.

A. *The Israeli Debate about the Decline of Formalism*

The debate about formalism in Israeli legal culture emerged and developed following a monograph written by Menachem Mautner in which he described the "decline of formalism and the rise of values in Israeli law" (Mautner 1993). This essay captured a broad shift in legal writing by the Israeli Supreme Court during the 1980s, which included a greater emphasis on values, on substance and on judicial activism. The changes in legal rhetoric, Mautner claimed, were reflected in other social and cultural arenas, and were part of a general move from collectivism to individualism.

Despite some criticism of Mautner's thesis (e.g., Harris 1997; Bendor 2003; Segev 2005; Kedar 2006; Friedman 2007), there is a broad consensus among legal academics that the writings of Aharon Barak, the former Chief Justice of the Israeli Supreme Court who is considered by some to be a particularly "activist" and "anti-formalist" judge, had a significant impact on the writing of Israeli judges on the Supreme Court and on other levels of court decision making (Amit 1998; Posner 2007a). Thus, the early period of the State is commonly regarded as formalistic, guided by a strong libertarian spirit of human rights protection. Both personality and socio-legal factors are associated with a decline in formalism and a move to values in Israeli legal decision writing in the eighties. The promotion of Justice Barak, who

was influenced by American legal culture, to the Supreme Court in 1978, as well as the Americanization of Israeli society, with legal actors looking to the US rather than Germany and England as models for decision-writing, and the exposure of Israeli academics to "law and" movements that provide legitimation for legal realism, are cited by Mautner (1993) as explanations for the decline in formalism.

There are a number of reasons to assume that since the mid-nineties there has been some return to formalism. Those who promote this view argue that Mautner's claim about Justice Barak's influence and the subsequent media debate about his judicial activism created a backlash which in turn led to a more conservative, formalistic mode of decision writing (Alberstein 2012).

Our research examines these taken for granted assumptions about the existence and timing of trends in formalism, and seeks to define more precisely the type of formalism that is said to have changed over time. In this project, formalism is analyzed as a social construct comprised of diverse jurisprudential cultures and claims, which are discussed below. We rely on conceptions of formalism that include assumptions about fact-finding, the relationship between legal decision making and reality, the level of discretion and creativity in decision making and the style of judicial writing. Thus, we attempt to tease out the various dimensions of legal formalism by an empirical analysis of a large number of judicial decisions in public law, and civil and criminal appeals. These elements are examined against the expected trends in the timing and periods of legal formalism discussed above: 1948-1979, 1980-1995, 1996-2007, and 2008-2013.

B. The Claims and Counter-Claims of Formalisms of Law

The various claims and counter-claims about formalism that have been developed and discussed in legal literature and academic debates can be categorized into ten constructs of formalism (Alberstein 2012). Each construct was operationalized as a set of binary variables and all ten constructs are represented by 31 variables overall. In this section we elaborate on the ten constructs of formalisms, and we then describe the 31 variables in the methods section.

1. The Introduction and Framing of the Legal Decision

Within a formalistic legal culture, the question of formal authority for the decision and the legal framing of the dispute receive paramount attention. Thus, right at the beginning of the opinion judges present themselves as deciding according to the law and often preface their decision by referring to the formal basis of their judgment. Questions of standing are meticulously argued and procedural concerns are emphasized. Moreover, from the outset the issue to be decided is framed as a legal question. By contrast, modern critique has challenged the notion that legal conflicts should be framed as legal questions. In fact, even some "hard cases" are famous for their non-formal openings (Alberstein 2012).[1] In addition, modern critique has marginalized questions of jurisdiction and of standing in certain legal contexts in favor of reference to the merits of the legal claim. Thus if the opinion opens with the legal question, if the issue at stake is defined from the outset as a matter of applying legal norms to existing facts, and if questions of jurisdiction are raised at the beginning of the opinion, the opening would be regarded as formalistic. Based on the public and academic debate about the decline of formalism in Israel during the 80s

[1] See Alberstein's (2012) description of Justice Dorner's decision in which she opens with a quote in French from the legal philosopher Michel Foucault.

and up to the mid-90s, we expect that legal decisions over time will open with fewer references to the facts even when these are relevant, and will be less likely to invoke issues of jurisdiction.

2. Reliance on Extra-legal Arguments

Classic descriptions of the modern Western legal system have assumed that there is a separation of the legal realm from other social institutions, such that decisions in the legal sphere are made and rules understood according to abstract principles that are applied to the determination of specific cases (Rhinestein 1954). Thus law is considered a closed system, in which there is no reference to external considerations, such as political, sociological or economic issues. Indeed, formalism envisions the operation of the legal system as a separate technical rational machine. In contrast, the Legal Realism and Critical Legal Studies schools of law have pointed to political and ideological considerations that determine legal decisions, and have noted the insertion of personal, political and ideological elements into judicial decision writing. The focus on factors outside the legal field and the use of external arguments are considered inherently anti-formalistic, and many of the claims against the "politicization of the judiciary" have been based on the move away from formalism that relies on these extralegal rationales (Posner 1987)[2]. Indeed, experimental evidence indicates that the legitimacy accorded the Supreme Court will be damaged to a certain extent when extra-legal rationales are used (Farganis 2012). This paper examines the tendency to rely on extra-legal factors in routine cases, in order to determine whether there is a move away from formalism over time.

[2] In the United States, such claims were raised against famous precedential cases such as Lochner (1905), Brown v. Board of Education (1954) and Bush v. Gore (2000).

3. Reliance on Policy Arguments and Legal Principles

Another corollary of the view of law as a closed, unified rational system is that judges must apply legal norms without reference to any policy arguments or legal or moral principles. Any appeal to policy considerations or to unwritten principles of the law is considered a deviation from formalism. Rejecting this claim, a large body of writing maintains that legal decisions are based on social goals, policy considerations and legal principles, which do not necessarily correspond to the definition of a rule, yet are not political or external to the legal field (Solum 2006). The Legal Process School of Law developed a reconstructed version of law that relies on policies and principles in what is known as "purposive interpretation" (Hart & Sacks 1958). Ronald Dworkin (1978; 1986) further developed the argument that discretion in hard cases is narrow because judges are bound by the principles and policies that are inherent components of legal norms. Our empirical analysis will enable us to determine whether there was a move away from the formalism based on rules to policy-based decision-making. In view of the fact that Aharon Barak explicitly acknowledged the influence of the Legal Process School of Law on his writing, and wrote about "purposive interpretation" as the overall frame for his legal analysis (Barak 1992; 2005), we expect a significant decline in rule-based decision making since the 1980s and possibly some reemergence of rule-based formalism after Justice Barak's retirement.

4. Impartiality and Impersonality

Another characteristic of formalism is the use of impersonal language to create the impression that judges speak the law as direct delegates of the legislator, and that there is "a government of laws, not men." (Tamanaha 2004: 122; Kaehler 2013). In contrast to this view, some scholars have pointed to judges' need to express themselves in personal and emotional terms (Maroney & Gross 2014) and the

expression of emotions (Anleu & Mack 2005), as well as judicial biases and hunches (Fisher et al. 1993) in legal decisions. Those who object to expressions of emotion and personal style claim that these challenge judges' assumed detachment and impersonal reasoning[3]. Thus, formalism in judicial opinions would be associated with the lack of personal expressions by judges. In line with claims about the decline and later rise in formalism, we expect that judicial legal rhetoric will include more personal expressions in the eighties, which will decline in the 21st century.

5. Judicial Discretion and Choice

According to a formalist perception, the application of legal rules is done in a mechanical manner, without exercising discretion or choice. Formal legal writing ignores doubts and covers gaps with sub-rules and procedures. In a formal legal system, judges present the law as determining the decision, as if there is one true resolution to the legal problem, and rarely allow for expressions of doubt or self-reflection in the decision (Posner 1999). In contrast to this view, critics claim that discretion is an inevitable phenomenon in any decision-making,[4] and judges' work involves a substantial degree of intuition (Lehman 1984),[5] with many junctures where choice is exercised. This has been expounded extensively by the Legal Realism movement, which pointed to the indeterminacies of rules, as well as to gaps and ambiguities that pervade legal decision-making (Fisher et al. 1993). Thus, the

[3] However, Popkin (2007) has suggested that today in the U.S, judges who use a personal/exploratory style "are more rather than less likely to accommodate the twin political goals of projecting judicial authority and performing the difficult task of deciding cases" (Popkin 2007:5)

[4] Aristotle, Nicomachean Ethics, Book V. 10:1137b: "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator has failed us, and has erred by over simplicity, to correct the omission—to say that the legislator himself would have said had he been present, and would have put into his law if he had known."

[5] In Lehman's (1984) article, the author argues in favor of an intuition based approach to decision making in law which counters the critique of formalism by Legal Realism.

acknowledgement of options, and personal reflection on the choices made, would characterize non-formalistic decisions, as would contemplation of difficulties or doubts in the decision-making process. We assume that this tendency has increased over time, with less emphasis on discretion and doubts and more formalism following Justice Barak's retirement.

6. The Relationship between Facts and Norms

According to a formalist perspective, judges apply legal norms based on the objective determination of facts. Many legal disputes are about facts, and judges are considered professional fact-finders who use the laws of evidence to distinguish fiction from truth in a definitive way. In a formal system, there is a clear separation between the determination of facts and the application of norms. Judges perceive themselves as professionals who are capable of overcoming any potential biases and who have the ability to differentiate between real justice and the appearance of justice (Rosen-Zvi 2005). Critics of formalism maintain that the legal determination of facts is biased and is influenced by a variety of factors, including the setting, and the emotional and cultural background of the judges (Frank 1930). Contrary to the formalistic assumption that facts are first determined and described, while norms are later applied, critics claim that norm application is embedded in the descriptions of the facts, and therefore a non-judgmental determination of facts does not exist. Contemporary scholars of law and literature have continued to develop this critique by pointing to the close connection between storytelling and fact-finding, as well as the importance of narrative theory in understanding the way courts decide facts (Brooks & Gewirtz 1996). Thus a formalistic decision would present the facts of the case as external to and independent of the judgmental act, while in a non-formalist decision, the judge will include emotions and evaluative predicates while presenting

the facts. We will examine the changes in the presentation of facts and norms over time, assuming that decisions that contain references to the interpretation of facts and to the emotions of the participants are less formalistic. We also predict that like the other markers of formalism, here too we will find a move to less formalism over time.

7. Professional Legal Rhetoric

Formalism is related to the use of professional language. "Legal language" refers to more than any particular practice and assumption of the law. It includes the use of legal terminology, special syntax, the avoidance of emotional and everyday language expressions, and the application of legal reasoning that is associated with a specific sequential structure (Danet 1980; Gibbons 2004; Bhatia et al. 2014). The use of professional language also defines the boundaries of legal practice and produces legitimacy and acceptability (Livermore, Riddell and Rockmore 2017). However, as critics have pointed out, judges regularly deviate from professional language. They may quote poetry or literary texts (Kearney 2003); they may adopt elements and stylistic devices from other registers and even include humor in their decisions (Marshall 1989; Rushing 1990). The use of professional language that is often inaccessible to laypersons is a basic feature of legal formalism[6]. Evidence of the move away from formalism would be the inclusion of non-legal registers in the decision, the use of poetry, expressions from popular culture, or references to literature and art. We assume that such deviations from formalism will be very rare.

8. Institutional Boundaries

One of the tenants of legal formalism is the idea of preserving boundaries between the different institutions in society, and ensuring that the professional competence of each

[6] See Owens, Wedeking & Wohlfarth (2013) who suggest that justices strategically obfuscate the language of their decisions in order to evade congressional review.

branch of government is maintained without extensive interventions by the judiciary (Hart & Sacks 1958). This principle also refers to the relationship between instances of the same court, so that a judge will not intervene in a lower court decision unless very specific types of errors have occurred. This implies a conservative approach to judging. Scholars who have studied judicial activism have emphasized the role of courts in influencing and controlling other branches of governance and in promoting human rights values (Wright 1968; Wallace 1981; Halpern & Lamb 1982; Holland 1991; Shapiro 1995; Kmiec 2004). Thus, we suggest that judges who intervene in the decisions of other institutions would be regarded as non-formalistic. In cases of the civil and criminal appeals that we examined, there is always a question of intervention in the decision of the previous instance. In constitutional and public cases (High Court of Justice - HCJ)[7] intervention is debated in reference to the administrative or executive branch or other professional courts. We assume that over time there will be less rhetoric of maintaining institutional boundaries and more actual intervention, and therefore less formalism.

9. Rationalism and the Inner Logic of Legal Spheres

According to formalism, the basic quality of law as a system of norms is related to the deductive relations between principles and rules, as well as to the horizontal differentiations among the various fields of the law. Law is a logical system in which coherence and systematization are of paramount importance, and each field of law is characterized by unique and distinct principles (Cox 2003). The counter argument to the above assumption is that the boundaries of the law are flexible, and given to new

[7] The Israeli Supreme Court functions both as the final instance appellate court in all civil and criminal cases, and as the first and last instance in its role as the High Court of Justice (HCJ). People can petition the HCJ to seek relief from administrative decisions of public agencies.

demarcations in accordance with the needs and problems that arise. According to this parameter deviation from formalism will occur when an explicit declaration is made regarding the innovation or boundaries-blurring role of the decision. We will examine whether such rhetoric has increased over time, and suggest that some decline has occurred on this parameter since the 1980s (Mautner 1993).

10. The Gap Between "Law in the Books" and" Law in Action"

In formalistic thinking, there is an assumption that the statement and application of a norm will produce changes in reality, and that "law in the books" corresponds to "law in action". Here too, the claim is formalistic in that it regards the rationality of law as a mechanism to control reality. The counter-claim is that law in action is different from law in the books, and that legal writing has, at best, only an indirect connection to social change. The origin of this critique goes back to the sociological jurisprudence movement developed by Roscoe Pound (1908; 1910), which criticized legal studies for their emphasis on legal rules and decision-making, while ignoring the social context and implications of those decisions (Hunt 1978). Legal Realists continued to challenge the overemphasis on norms and on court opinions, and have developed a positivist approach based on the empirical analysis of the interaction between norms and reality (Schlegel 1995; Leiter 1999). Scholars of law and society have expanded this critique in academic debates and empirical research about the ability of legal rules and decisions to produce social change (Rosenberg 1991, 2008). In general, a formalistic judge takes the implementation of legal norms for granted, without referring to the effect of the rules or the difficulties of ensuring compliance with the decision, whereas deliberation regarding these issues would be signs of non-formalism. We do not expect that acknowledgement of the difficulties of implementing the decision will occur often in legal rhetoric, although we do expect

that over time judges will express more awareness of the gap between law in the books and law in action.

These 10 constructs of formalism were operationalized as a code used in the content analysis of 2,086 judicial decisions of civil and criminal appeals and public law cases. It thus joins the growing body of scholarly research of legal decisions that use content analysis in order to provide a more systematic and objective way to document what courts do and say than conventional interpretive techniques (Hall & Wright 2008)[8]. It should be noted that this study does not seek to develop or test a theory of judicial decision making or opinion writing. Rather, it strives to describe trends and generate conjectures about the nature of legal rhetoric in Israeli Supreme Court opinions, and to stimulate questions about similar phenomena elsewhere. In the following section, we elaborate on the details of the research procedure.

II. METHODOLOGY

Using data from the legal database Nevo[9], we examined changes in formalism over time in Israeli Supreme Court cases. We identified our population as all primary decisions marked "judicial opinions", and not just technical decisions, that were longer than two pages and were written between the years 1948 and 2013. We based our sample strategy on the distribution of decisions by the Supreme Court of Israel in each of its functions as the final appellate court in civil and criminal cases and as the High Court of Justice (HCJ) over the years. From that pool of all judicial decisions we

[8] Hall & Wright (2008) note that content analysis is particularly suitable in cases that debunk conventional legal wisdom. We sought to examine what has become common knowledge among Israeli legal scholars, i.e., that there has been a decline in formalism over time.

[9] Nevo is regarded as the most complete commercial database of Israeli judicial opinions, and it claims that it receives all the judicial decisions directly from the Supreme Court.

sampled every four years, for three consecutive months each year in the early years, and two consecutive months each year from 1986 on, beginning with a different month each year. There were two reasons for oversampling in the earlier years. For one, in the early years, selected decisions of the Supreme Court were published by the Bar Association, based on the editors' assessments of their importance and precedential nature. Only in 1985 did the Supreme Court start computerizing all its decisions, and a few years later, the Bar Association and commercial enterprises began producing CD- based and on line full text decisions. Today, there are more than five commercial databases that publish Court decisions, and the most comprehensive one, Nevo, has also added to current decisions those opinions that were previously unpublished in print form. The problem is that unless we go through court files, there is no way of knowing how many of the early decisions were unpublished. In addition, there is a large gap between the number of decisions made by the Supreme Court in the early years compared to current numbers, and we wanted to have less of an imbalance between the number of decisions in each time period.

Thus our sample matches the proportion of decisions for each year and each particular instance with the actual number decided by the court during each year and in the particular court function, slightly weighting the early years. Altogether, there were 2,086 opinions in our sample, including 664 criminal, 849 civil and 573 public law (HCJ) cases.

In order to examine the claims about the changes in Israeli decision writing over time as discussed above, we divided the research years into four periods of time 1948-1979, 1980-1994, 1995-2006 and 2007-2013. This grouping was chosen, because it reflected periods during which there were changes in legislation, in the identity of the

Justices of the Supreme Court and in public opinion and academic perceptions about the Supreme Court.

As we noted previously, building on the claims and counterclaims of advocates and opponents of the formalism debate, we created a code of ten parameters that distinguished between formalistic and non-formalistic rhetoric in judicial decision writing. A series of one to seven yes/no questions were used to determine the formalism of each parameter, for a total of 31 binary variables (see Table 1). Apart from two questions (Var46 and Var47), all questions were coded as" 0" if the particular phenomenon referred to by the variable was not present in the decision and "1" if it occurred. For purposes of analysis, we recoded the 29 binary variables so that "1" reflects the formalistic option (i.e., either the presence or absence of the particular criterion). The coders were six trained law students. To ensure correct coding and inter-coder reliability, sixty decisions were coded by all coders in order to determine the reliability of the coding scheme and the clarity of the variables. The Cohen's Kappa test of reliability among the six coders ranged from 0.71 to 1.00, with an average of 0.825 across the coders and variables.

Table 1. Description of Variables Used in Content Analysis*

1. The introductory framing of the decision (refers to the first 2 pages of the decision)	
(Var21) *Legal intro*: Does the decision open with a legal question or issue?	Y
[If "yes" for Var21, go to Var22 and Var23:]	
(Var22) *Policy:* Is the legal question presented as one of policy?	N
(Var23) *Ideological1*: Is the legal issue presented as an ideological or value choice issue?	N
(Var24) *Non-legal sources*: Does the decision open with a quote from external sources (non-legal)?	N
(Var25) *Facts-norms*: Does the decision open with a presentation of the facts of the case?	Y
[If "yes" for Var25, go to Var26]	
(Var26) *Facts*: Does the decision present the facts in the first paragraph of the decision?	Y
(Var27) *Authority*: Does the decision open with a question of jurisdiction?	Y
2. Reliance on extra-legal arguments	
(Var28) *Extra-legal:* Does the decision refer to extra-legal research (i.e., economics, sociology, etc.)?	N
(Var29) *Cultural*: Does the decision refer to common knowledge and cultural understandings?	N
3. Reliance on policy arguments and legal principles	
(Var30) *Purpose*: Does the decision refer to the purpose of the relevant statute?	N
(Var31) *Principles*: Does the decision present principles such as equality, freedom, security, as inferred from legal texts?	N
(Var32) *Balancing*: Does the decision refer to the balancing of principles and/or rights?	N
(Var33) *Policy*: Is the decision presented as geared to the fulfillment of social purposes or based on social policy considerations?	N
4. Impartiality and impersonality	
(Var34) *First person*: Does the decision explicitly mention personal reflection and deliberation— e.g. "I think," "I believe," "in my opinion"?	N
5. Judicial discretion and choice	
(Var35) *Difficulty*: Is there reference to the difficulty in deciding the case?	N
(Var36) *Discretion*: Is the decision presented as a product of discretion (as opposed to the product of logical/legal reasoning and/or necessity)	N
6. The relationship between facts and norms	
(Var37) *Description of facts*: Does the decision include a description of the facts of the case?	Y
[if "yes" for var37, go to var38 and var39:]	
(Var38) *Feelings of parties*: Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties?	N
(Var39) *Facts, previous instance*: Does the decision include a reference to the facts as presented by previous instances or other opinions?	Y
(Var40) *Legal/other truth*: Does the judge make a distinction between legal truth and factual truth (legal facts and social/other facts)?	N

Table 1 (continued). Description of Variables Used in Content Analysis*

7. Professional legal rhetoric	
(Var41) *Personal experience*: Does the decision include events from the judges' own personal experience or life history?	N
(Var42) *Popular culture*: Does the decision include references to literature, art, popular culture, poetry, humor, etc.?	N
(Var43) *Slang*: Does the decision include slang or popular idioms?	N
(Var44) *Poetic style*: Does the language of the decision stylistically diverge from ordinary legal writing?	N
8. Institutional boundaries	
(Var45) *Intervention:* Does the court intervene in the decision/operation of other institutions?	N
[if "yes" for var45, go to var46 and var47:]	
(Var46): *Institution of intervention*. Regarding which institution does the court present itself as intervening?	
1. Administrative branch	
2. Legislative branch	
3. Other professional courts (labor, rabbinic, military), lower courts	
(Var47): *Authority to intervene*: Does the court determine that it has the authority to intervene?	
1. No, it determines that it does not have the authority to intervene	
2. Yes, it determines that it has the authority, but will not intervene	
3. Yes, it determines that it has the authority to intervene and does intervene	
9. Rationalism and the inner logic of legal spheres	
(Var48): *Departure:* Does the decision mention that it is a departure from current legal norms and practice?	N
(Var49): *Innovative*: Does the decision mention that it is an innovative or boundary breaking decision?	N
10. Law in the books and law in action	
(Var50): *Implementation:* Does the decision refer to the difficulty of implementation?	N
(Var51): *Forwarded for implementation*: Is the decision forwarded to other institutions for implementation?	N
(Var52): *Overcoming implementation problems*: Does the decision mention ways of overcoming the hurdles that might prevent implementation?	N

*The formalistic option is indicated, Y=Yes, N=No

Note: The results presented below do not address variables 22, 23, and 26 in an attempt to streamline the analysis because they did not contribute any added value to the discussion.

III. RESULTS: THE FORMALISMS OF LAW AND THEIR FLUCTUATIONS OVER TIME

As mentioned previously, we expected that in general, on each of the parameters of formalism, the first period (1948-1979) would be marked by formalistic writing, the second (1980-1996) would reflect the decline of formalism, while there would be a return to formalism in the mid-90s (1997-2007) that would increase after the retirement of Chief Justice Barak in 2006 (2008-2013). Tables 2 -11 present the means and standard deviations for each parameter of formalism in each of these four periods of time, with the formalistic option on each criterion scored as 1. Thus, the means in Tables 2-11 represent the percentage of all judges' opinions that exhibited the formalistic option on each parameter during each period of time. We employed a one-way analysis of variance (ANOVA) test for time differences in the formalism of each parameter. In addition to the F test which indicates whether changes over the entire time period are statistically significant, we also present a Bonferroni post-hoc test to isolate the particular years in which the differences between the means of formalism are significant.

A. The introductory Framing of the Legal Decision

As we noted above, features of decision openings that indicate a move away from formalism include framing the issues to be decided as policy and value matters, rather than as legal questions; ignoring questions of jurisdiction in the introduction; not referring to the facts of the case in the opening; and including references to sources external to the law at the beginning of the decision. Table 2 reveals there were differences in both the extent of formalism indicated by these variables, and their trajectories over time. From the earliest period, about half the decisions opened formalistically by presenting the decision as a legal question, and continued to do so over time (46% to 53%). The only exception was the period from 1980 to 1995, when

the number of opinions that opened with a legal question dropped to 27%. Even more decisions opened with a formalistic reference to the facts of the case (from 76% to 86%) and on this variable there was a significant increase in formalism over time. The results of the formalism of other variables on this parameter were mixed. While hardly any opinions opened with a quote from non-legal external sources, formalistic references to jurisdictional matters rose from 15% of all opinions during 1948-1979 to 42% during 2008-2013. Still, most judges did not begin the opinion with jurisdictional matters, which would have been the formalist way of framing the decision.

Table 2: Means and Standard Deviations of Formalism in the Introduction of the Decisions over Time

1. The Introductory Framing of the Legal Decision [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var21 Does the decision open with a legal question or issue? [Yes]	0.46*** (0.50)	0.27*** (0.44)	0.53 (0.50)	0.46 (0.50)	24.23***
Var24 Does the decision open with a quote from external sources (non-legal)? [*No*]	1.00 (0.04)	1.00 (0.05)	0.99 (0.08)	1.00 (0.05)	0.98
Var25 Does the decision open with a presentation of the facts of the case [*Yes*]	0.76** (0.43)	0.84 (0.37)	0.82 (0.38)	0.86*** (0.35)	6.93***
Var27 Does the decision open with a question of jurisdiction? [*Yes*]	0.15 (0.36)	0.19*** (0.39)	0.33* (0.47)	0.42*** (0.49)	47.90***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

Overall we can see that while judges did not use the formalistic options on all features of the opening of the decision, there was an increase in the tendency to frame

the decision formalistically over time. Although precedential cases sometimes introduce legal cases in a non-formalistic manner (Alberstein 2012), in an empirical test of a random sample of cases, such framing is not common.

B. Reliance on Extra-legal Arguments

Formalists regard law as a closed discourse, and judges are expected to make decisions only in reference to this universe. Our findings suggest that in contrast to claims about the decline of formalism on this feature raised by Mautner (1993), legal decisions continue to rely largely on legal arguments, without reference to other forms of knowledge. Results in Table 3 indicate that overall there are no statistically significant differences between the various periods of time in the use of extra-legal arguments.

Table 3: Means and Standard Deviations of Formalism in the Reliance on Extra-legal Arguments over Time

2. Reliance on Extra-legal Arguments [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var28 Does the decision refer to extra-legal research (i.e., economics, sociology, etc.)? [No]	0.99 (0.07)	0.98 (0.14)	0.98 (0.15)	0.98 (0.15)	5.58
Var29 Does the decision refer to common knowledge and cultural understandings? [No]	0.93 (0.26)	0.96** (0.19)	0.90 (0.30)	0.92 (0.28)	4.56**

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

One exception is the period of 1996-2007, in which we find a minor but statistically significant decline in the proportion of decisions that did not rely on common

knowledge compared to the previous period (1980-1995), so that formalism declined from 96% of all opinions to 90%. Nevertheless, on this parameter, formalism still remains extremely high over time and the tendency to rely on knowledge outside the legal sphere did not increase in the eighties, as Mautner (1993) maintained.

C. Reliance on Policy Arguments and on Legal Principles

Formalism is associated with decision making based strictly on legal norms, whereas the decline of formalism is related to outcomes that pursue policy goals and are inspired by values and principles. It is on this measure that we found the most significant decline in formalism over time, and the greatest support for Mautner's thesis. Here the transformation of legal rhetoric in Israeli case law is clear: rather than relying basically on legal rules, there is now a significant use of the rhetoric of policy and principles in legal decisions. Each of the variables on this parameter indicates a move away from formalism when comparing the earliest and current periods (Table 4). Judges are more likely to refer to the purpose of the statute in their writings (9% of all opinions in 1948-1979 compared with 21% in recent years); they are more likely to mention principles such as "equality and freedom" (7% to 32%)[10], and to refer to the balance between principles and/or rights (17% to 36%). Moreover, judges were not only more likely to cite social purposes and polices, but to increasingly present their decisions as *founded* on such sources (12% in the first period compared to 36% in the most recent one). However, it should be noted that despite the decline in formalism on this measure, on average about 64% to 93% of judges' decisions across time were strictly based on legal norms. Moreover, contrary to our expectation for a formalist revival since the mid-nineties and after the retirement of Chief Justice

[10] The decision was coded as referring to principles when it did so without clearly presenting these principles as a consequence of the two Basic Laws

Barak, the decline in formalism is mainly attributed to the years 1996-2007, with no statistically significant change in the later years, 2008-2013. We have added a figure that graphically represents these trends (Figure 1). We offer an interpretation for these interesting patterns in the discussion.

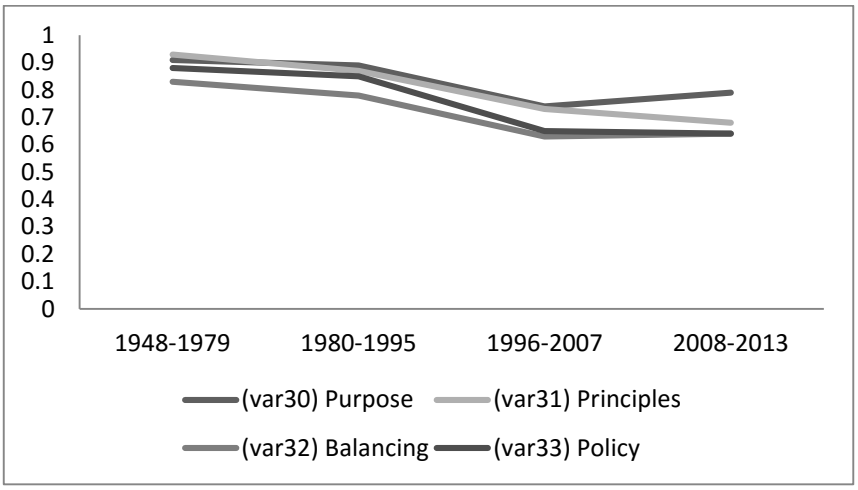
Table 4: Means and Standard Deviations of Formalism in the Reliance on Policy Arguments and on Legal Principles over Time

3. Reliance on Policy Arguments and on Legal Principles [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var30 Does the decision use the words "purpose" of the relevant statute? [No]	0.91 (0.29)	0.89*** (0.32)	0.74 (0.44)	0.79*** (0.41)	25.30***
Var31 Does the decision present principles such as equality, freedom, security as inferred from legal texts? [No]	0.93* (0.26)	0.87* (0.34)	0.73 (0.45)	0.68*** (0.47)	53.70***
Var32 Does the decision refer to the balancing of principles and/or rights? [No]	0.83 (0.38)	0.78*** (0.41)	0.63 (0.48)	0.64*** (0.48)	29.10***
Var33 Is the decision presented as founded on the fulfillment of social purposes, social policy considerations? [No]	0.88 (0.33)	0.85*** (0.35)	0.65 (0.48)	0.64*** (0.48)	52.00***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

Figure 1. Reliance on policy arguments and on legal principles



D. Impartiality and Impersonality

In light of the growing interest in recent decades in self-expression, emotions, and individual styles in judging, we expected to find more first person expressions and references to emotions over time. Surprisingly, we found a decline in the use of personal rhetoric over the years. Whereas before the 1980's about half of all opinions used first person expressions, in recent years, judges are more formalistic, as 62% of all opinions during 2008-13 avoided personal reflection and deliberation (Table 5).

One explanation for this phenomenon may be related to the results on the previous parameter, i.e., judges may balance other anti-formalistic trends, such as more policy-talk, with less personal or first person expressions in order to maintain a basically formal opinion. That said, however, despite the rise in formalism on this measure, on average about 38% to 45% of legal decisions over time involve personal expressions. Thus, notwithstanding the decline in recent years, even when formalism was the norm, judges often inserted their persona into their decisions, rather than presenting them as a consequence or outcome of the impersonal application of legal rules.

T**able 5: Means and Standard Deviations of Formalism of Impersonality over Time**

4. Impersonality (Use of First Person Expressions) [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
var34 Does the decision explicitly mention personal reflection and deliberation—e.g. "I think," "I believe," "in my opinion"? [No]	0.45*** (0.50)	0.51 (0.50)	0.59 (0.49)	0.62*** (0.49)	14.80***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

E. Reference to Discretion and Choice

Despite the fact that judicial discretion is an integral part of the decision- making process, the formalist notion of the mechanical application of legal rules does not leave room for expressions of doubt on the part of the judge, or the acknowledgement of discretion in arriving at his/her ruling (Pound 1908; Barak 1989). Following this argument, we expected to find an increase in judges' references to discretion and choice during the periods when formalism was said to decline in Israeli decision writing. Our findings demonstrate that judges rarely express doubts or difficulties in the process of decision making. Nonetheless, we found a minor yet statistically significant decline in formalism on this variable during the years 1996-2007 (Table 6). While before the mid-90s about 95% of all opinions reflect no difficulties in reaching a verdict, in 1996-2007 the percentages dropped to 90%. A similar pattern was found for references to discretion: until the mid-1990's, about 70% of judges' opinions did not mention discretion, whereas during the third period, the figure dropped to 60% indicating a less formalistic configuration. In the most recent period, formalism rose again to 68% of the opinions in 2008-2013 (see the graphic representation of these

trends in Figure 2). Overall, it appears that judges refer to discretion in decision-making in at least 27% of their opinions, while they acknowledge difficulty in deciding the case in up to 10% of their writing. Apparently, even a formalistic approach can accommodate a limited suggestion of judicial discretion.

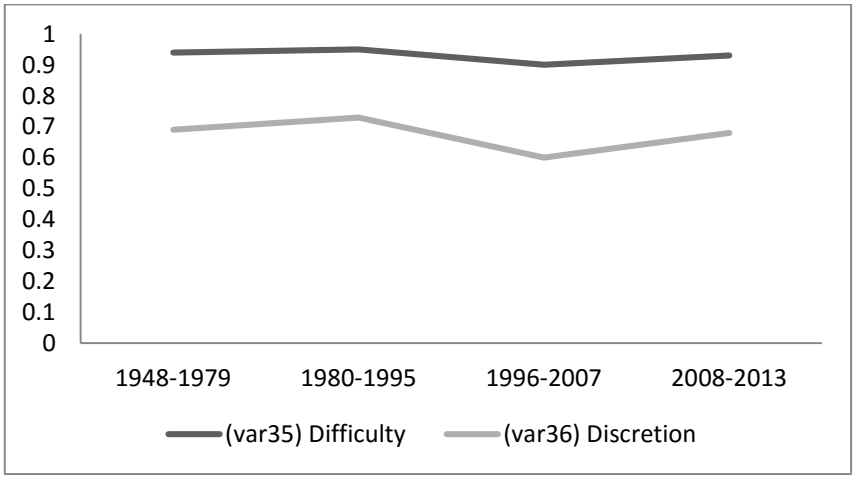
Table 6: Means and Standard Deviations of Formalism in Reference to Discretion and Choice over Time

5. Reference to Discretion and Choice [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var35 Is there reference to the difficulty in deciding the case? [No]	0.94 (0.23)	0.95*** (0.21)	0.90 (0.30)	0.93 (0.26)	4.35**
Var36 Is the decision presented as a product of discretion or as the product of legal/logical reasoning and/or necessity? [legal/logical/necessity]	0.69 (0.46)	0.73*** (0.44)	0.60* (0.49)	0.68 (0.47)	6.30***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

Figure 2. Reference to discretion and choice



F. The Relationship between Facts and Norms

The formalist emphasis on the facts of the case as separate from norm application led us to expect that there would be a more explicit separation between facts and norms during the periods that have been portrayed as undergoing a decline in formalism. Contrary to our expectations, we found that there was a clear increase in the focus on facts associated with formalism over time: 80% of all opinions before the 1980's include a description of the facts of the case, compared to almost 90% between 1980 and 2007 and 85% in the most recent period (Table 7). In order to determine whether decisions that refer to facts in a formalistic manner continue in this vein on other features as well, we examined whether the description of the facts included non-formalistic elements, such as reference to the emotions of the parties. However, those cases that reported the facts of the case continued using the formalistic option, and more than 90% did not mention the emotions of the parties across all periods of time.

Another indication of the formalism of decisions is the distinction between legal and other facts. Although judges rarely made a distinction between legal and other facts (84% to 93%), they were more likely to do so in recent years (15%) than in the early periods (only 7% in the eighties). Thus, while in general the increased focus on facts indicates a move to formalism, the reference to different types of facts indicates the emergence of non-formalistic elements in recent years.

Table 7: Means and Standard Deviations of Formalism in the Relationship between Facts and Norms over Time

6. The Relationship between Facts and Norms [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var37 Does the decision include a description of the facts of the case? *[Yes]*	0.80** (0.40)	0.88 (0.33)	0.87 (0.33)	0.88*** (0.33)	8.06***
If "yes" for Var37, then:					
Var38 Does the judge's description of the facts of the case include a description of the feelings, attitudes, emotions of the parties? *[No]*	0.94 (0.24)	0.94 (0.25)	0.90 (0.30)	0.92 (0.27)	1.97
Var39 Does the decision include a reference to the facts as presented by previous or other opinions? *[Yes]*	0.31*** (0.47)	0.19*** (0.39)	0.36 (0.48)	0.31 (0.46)	9.50***
N	565	383	393	428	
Var40 Does the judge make a distinction between legal truth and factual truth (legal facts and social/other facts)? *[No]*	0.90 (0.29)	0.93*** (0.25)	0.84 (0.37)	0.85* (0.50)	9.65***
N	642	324	262	285	

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

G. Professional Judicial Rhetoric

The decline in formalism in judicial writing in Israel that is part of the taken for granted view of legal scholars since Mautner's (1993) analysis, was also associated with a perception of a loosening of professional language, and an increased tendency to legal writing that could be accessible to the wider Israeli public. Again, contrary to our expectations, our findings confirm the formalistic nature of professional legal writing (Table 8).

Table 8: Means (and standard deviations) of Formalism addressing Professional Judicial Rhetoric Norms over Time

7. Professional Judicial Rhetoric [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var41 Does the decision include events from the judges' own personal experience? *[No]*	0.99 (0.10)	0.99 (0.08)	0.99 (0.09)	0.99 (0.06)	0.46
Var42 Does the decision include references to literature, art, popular culture, poetry, humor etc.? *[No]*	1.00 (0.04)	0.99 (0.10)	0.98 (0.13)	0.98* (0.14)	4.04**
Var43 Does the decision include slang or popular idioms? *[No]*	0.81*** (0.39)	0.68*** (0.47)	0.81 (0.39)	0.80 (0.40)	11.10***
Var44 Is the language of the decision self-consciously literary, i.e., stylistically contrary to ordinary legal writing? *[No]*	0.95 (0.22)	0.97* (0.16)	0.93 (0.25)	0.92 (0.27)	5.17**

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

In all time periods, over 90% of the decisions did not include references to the judges' own personal experience, did not include references to popular culture or artistic expression, and did not use language that was contrary to the conventional professional legal genre. The only deviation from this trend was the appearance of slang or popular expressions in about 20% of the decisions in most of the periods, with a slight rise to about 30% during 1980-1995. It is difficult to explain why there was less formalism on this variable than the others on this parameter. We suggest that contrary to the other variables, the use of which would mark the decision as unprofessional or non-legal, the inclusion of popular idioms in the decision can increase its comprehensibility without affecting its standing as a legal document.

H. Institutional boundaries

We expected that judges would be most activist during the tenure of Barak as Chief Justice, and that this would be reflected in an increased tendency for judicial intervention in other institutions and legal rhetoric that ignores institutional boundaries. Table 9 indicates that in about 60% of judicial opinions in 1948, there was no intervention in the activities of other institutions. However, over time opinions became *more* formalistic, so that by the most recent period, more than 80% of the decisions did not interfere with other institutions. Of those opinions in which judges intervened in the operation of other institutions (644 over all time periods), the vast majority (88%) interfered with professional courts and lower instances, with 11% interventions in the administrative branch, and 1% in the operation of the legislative branch (not shown in Table 9). The fact that the majority of interventions were in the context of the Court's traditional supervisory role may be related to other factors in addition to an increase of formalism. One reason that over time the Supreme Court was increasingly likely to maintain institutional boundaries may be interpreted in the

context of the development of Israel's administrative institutions. Over time, the Court appears willing to rely on the judgments of other institutions, and thus is less likely to intervene in their decisions.

Table 9: Means and Standard Deviations of Formalism in the Maintenance of Institutional Boundaries over Time

8. Institutional Boundaries [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var45: Does the court intervene in the decision/operation of other institutions? *[No]*	0.57*** (0.49)	0.70 (0.46)	0.74 (0.44)	0.81*** (0.39)	28.90***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

I. Rationalism and the Inner Logic of Legal Spheres

Judges tend to maintain a conservative approach to current legal norms and practices, at least in terms of calling attention to any departure from traditional procedures. In all time periods, judges mentioned they were departing from practice or writing an innovative decision in less than 2% of the opinions (Table 10). In other words, in their writing judges exclusively rationalize their decisions within the inner logic of legal sphere.

Table 10: Means and Standard Deviations of Formalism in the Rationalism and the Inner Logic of the Legal Sphere over Time

9. Rationalism and the inner logic of legal spheres [No/yes] to indicate formalism	1948-1979 (n=711)	1980-1995 (n=437)	1996-2007 (n=451)	2008-2013 (n=487)	F
Var48 Does the decision mention that it is a departure from current legal norms and practice? *[No]*	0.99 (0.08)	1.00* (0.05)	0.98 (0.15)	0.99 (0.10)	3.32*
Var49 Does the decision mention that it is an innovative or boundary–breaking decision? *[No]*	1.00 (0.05)	1.00* (0.05)	0.98** (0.13)	1.00 (0.05)	4.85**

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

J. The Gap between "Law in the Books" and "Law in Action"

In accordance with formalist legal rhetoric, judges are unconcerned with the application of their decisions, taking for granted the convergence of social reality with legal opinions. A move away from formalism would be found in references to the application of the norm. We found high levels of formalism on all three items in this construct (Table 11). Judges addressed the difficulties of implementing their decisions or ways of overcoming these difficulties in less than 10% of the opinions, and thus they appeared to take for granted that there was no gap between their decision and reality. In only a few more cases, 10% to 14%, were judges slightly less formalistic and delegated the implementation of their decision to other parties or institutions. What is interesting is that the third period- from 1996-2007- was the least formalistic of the four time frames, and on two variables (the difficulty of implementation, and ways of overcoming these difficulties) was significantly if only slightly lower than the

previous period). It is tempting to attribute this finding to the tenure of Justice Barak as Chief Justice during this period.

Table 11: Means and Standard Deviations of Formalism in the Gap between "Law in the Books" and "Law in Action" over Time

10. The Gap between "Law in the Books" and "Law in Action" [No/yes] to indicate formalism	1948-1979 (n=299)	1980-1995 (n=217)	1996-2007 (n=338)	2008-2013 (n=379)	F
Var50 Does the decision refer to the difficulty of implementation? *[No]*	0.98 (0.15)	0.98* (0.15)	0.94 (0.23)	0.95 (0.21)	4.47**
Var51 Is the decision forwarded to other institutions for implementation? *[No]*	0.88 (0.32)	0.89 (0.31)	0.86 (0.34)	0.90 (0.31)	0.85
Var52 Does the decision mention ways of overcoming the hurdles that might prevent implementation? *[No]*	0.97 (0.18)	0.98*** (0.15)	0.91 (0.28)	0.93*** (0.25)	9.44***

*P<0.05, **P<0.01, ***P<0.001

Note: Asterisks in Column 2 (1948-79) indicate statistically significant differences between the means shown in Columns 2 and 3 (1980-95). Asterisks in Column 3 indicate statistically significant differences between the means shown in Columns 3 and 4 (1996-2007). Asterisks in Column 4 indicate statistically significant differences between the means shown in Columns 4 and 5 (2008-13). Asterisks in Column 5 indicate statistically significant differences between the means shown in Columns 5 and 2.

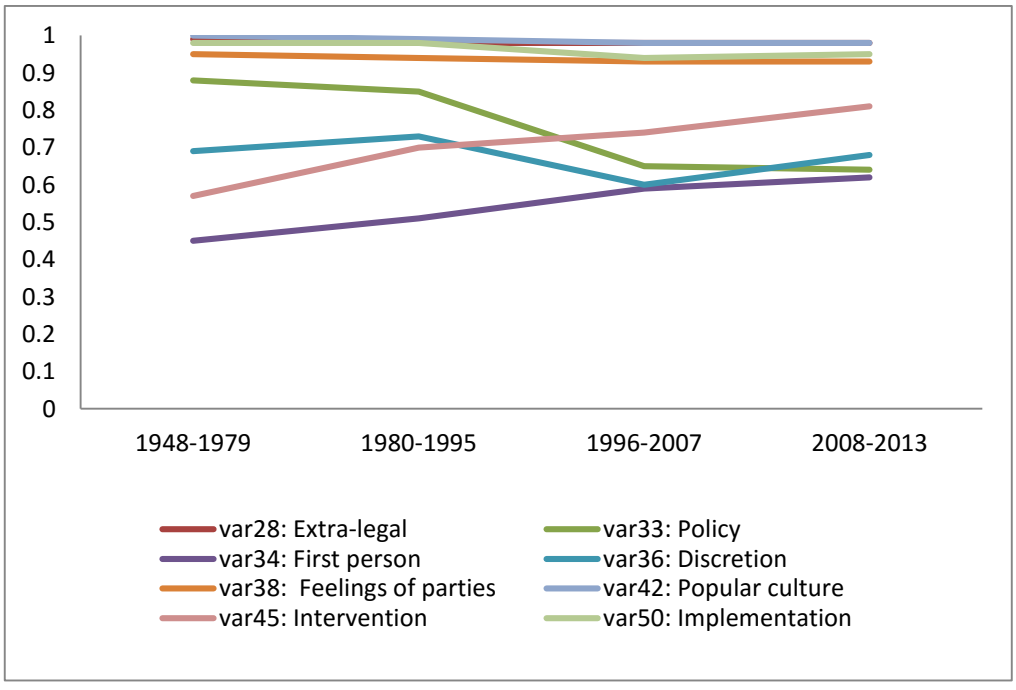
V. DISCUSSION

Although law students who study hard cases are often exposed to creative and anti-formalist modes of decision-making, we found that in Israel, when using a random sample of routine legal opinions, formalism is the prevailing mode of legal rhetoric. Legal rhetoric does not rely on extra-legal arguments (Var28), does not include references to art or popular culture (Var42), does not refer to the emotions of parties in describing the facts of a case (Var38), and does not address the difficulties of applying legal norms (Var50).

Notwithstanding this high level of formalism, our data show two additional patterns indicating changes in formalism over time. These are patterns of increase and decline in specific variables that have been regarded as indicators of formalism. In terms of the increase in formalism, our data suggest that over time judges tend to use fewer personal expressions as their rhetoric becomes more professional (Var34), and, surprisingly, are less likely to intervene in the decisions of other institutions (Var45). (See Figure 3 for a schematic representation of the trajectories of all the variables together).

These results are interesting for two reasons. First of all, these variables were fairly low to begin with, and despite their increase over time, in the last period they still were less formalistic than the others. Moreover, the fact that even in the period which is generally accepted as part of the formalist era, there is some personal expression and institutional intervention seems to indicate that contrary to formalist theory, these deviations are acceptable, at least to a limited degree

Figure 3. A schematic representation of the trajectories of main formalism variables



One explanation for the increase of these two variables may be that the criticism of Chief Justice Barak and the activist tendencies he was associated with put pressure on justices to refrain from obvious anti-formalistic rhetoric, even if in essence the outcomes were not restrained or if other aspects of formalism were contravened in their decision-writing. This may also tie in to our previous suggestion that justices will balance the formalistic and anti-formalistic tendencies within a particular decision so that their opinion as a whole does not stray too far from formalist tendencies.

In terms of the decline of legal formalism, we found that over time judges' opinions include more references to policy (Var33) and legal discretion (Var36). The most significant and stable decline in formalism was found in the use of policies, legal principles and purposes. Legal rhetoric has shifted dramatically on this parameter since the 1948, when 12% of the opinions used the language of policies, to the most recent period when one quarter of the judges include references to policy and social purposes when writing their decisions. Is this a sign of the decline of formalism? Can claims about the decline of formalism be justified by this finding? We would like to suggest a different interpretation that is consonant with the theoretical development of this parameter in legal literature. We find that while the trend to greater policy and principles rhetoric reflects a decline of one type of formalism, at the same time it points to the emergence of a new phase that can be defined as formalistic in a different sense. The use of policy arguments or legal principles reflects a particular reconstruction of the critique of formalism in reference to the indeterminacy of legal rules as promoted by Legal Realism (Fisher et al. 1993). It introduces an instrumental perspective to legal decision-making that may be regarded as domesticating the Legal Realist critique, while developing new legal

rhetoric (Peller 1988). Some have already considered the introduction of policy and principles to be a more developed stage of formalism (Weinrib 1993). Ernest Weinrib (1988) adopted this new version of formalism and celebrated it as the true representation of the inherent qualities of law. According to Weinrib (1988: 950-957) "immanent moral rationality" is what formalism offers the law, and such a quality is central to any understanding of the functions and importance of law. Weinrib regards formalism in this new phase as the law's aspiration to be clean of politics, values, ideology and emotions.[11] Using policy arguments and purposive language thus keeps judicial writing within the realm of law. Our research suggests that legal writing reflects the emergence of a formalism described by Weinrib, which we term Stage II Formalism.

Stage II Formalism is also evident in the reference to discretion and choice, which as we found, also increased over time, indicating a decline of formalism. We can see that the decline in formalism appears particularly when we look at judges' tendency to acknowledge the very fact that they have discretion. The concept of judicial discretion has undergone various transformations in legal literature, moving from a perception of unbounded authority, such as Weber's Kadi-justice (Rheinstein 1954), in which decisions are influenced by a range of legal, moral, political and emotional considerations (Schneider 1991) , to weaker notions of discretion, such as the one defined by Dworkin (1963, 1977, 1978).[12] Recent writers assume that "the thesis of

[11] For a critical view of the use of policies and purposes as only pretending to escape politics and external arguments see Unger (1986: 79). "Formalism in this context is a commitment to, and therefore also a belief, in the possibility of a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."

[12] Jurisprudential writing has discussed discretion in relation to hard cases. The most famous debate was between H.L.A. Hart and Ronald Dworkin, who disagreed whether judges have discretion in the strong or weak sense in hard cases. Dworkin's "one right answer" thesis has been challenged by Hart (1994) and others (e.g., Raz

judicial discretion does not claim that in cases where discretion may be exercised anything goes". Such cases are governed by laws "which rule out certain decisions" (Raz 1972: 843). While acknowledging the dangers of absolute discretion (Davis 1971), contemporary judges perceive structured discretion and reasoned elaboration as important aspects of their role (White 1973). It seems that Israeli justices feel that acknowledging discretion and choice in their opinions does not challenge the legitimacy of the formal decision. In other words, judges' references to discretion reflects a perception of legal decision making that does not equate discretion with an escape outside the boundaries of law. Indeed, the fact that from the earliest period, discretion was mentioned in about one quarter of the decisions seems to indicate that it was also legitimate to a more limited extent in rule-governed formalism.

When examining the various trends of formalism, it is apparent that formalism does not decline significantly on all its dimensions. On the contrary, many forms of formalism remain stable and high, while others increase over time. However, even on those parameters in which formalism remained high, there was often a slight decline in the period of 1996-2007 (variables 29, 40, 48, 49, 50, 52), that coincides with Barak's tenure as Chief Justice of the Supreme Court. Thus, on some indicators, despite the very formalistic nature of judicial writing, the trend was in line with those who spoke of a decline in formalism.

It is compelling to ask, in light of our surprising finding about legal impersonality and impartiality, whether judges seek to maintain a balance in the use of different elements of formalism. For example, do judges balance a decline in formalism at the policy level, with an increased formality in professional rhetoric? Do judges balance

1979). They assume that not every legal question has a right answer, and in difficult cases at least two alternative decisions are possible.

their emphasis on discretion with a growing frame of formalism in the introduction? Do judges use more personal language when rule-based formalism is their style? It may be suggested that the formalist ship of law sails safely when one or two tenets are declining, but it cannot release itself altogether from all formalistic bonds.

What our research has not resolved, and what can be viewed as a limitation of this study, is the question of what weight should be assigned to each measure of formalism. Claims against formalism have developed at different stages of legal history, and some of the characteristics attributed to formalism have become more popular and familiar, and therefore more significant in classifying legal decisions as formal or not. It seems that Mautner's depiction of the decline of formalism in Israeli judicial decisions is based largely on three features: the insertion of liberal political ideas into law; the rise of purposive interpretation and policy discourse; and the increased acknowledgment of judicial discretion. Our findings support the decline of formalism on the last two parameters.

Nonetheless, other parameters, such as the use of impersonal language associated with an objective detached perception of law, the preservation of institutional boundaries, and the legalistic framing of the text of decisions, have always been considered distinctive traits of a functioning, formal legal system On these we did not find the expected decline over time, and at this stage we can only suggest that there is a possible interplay between the various features of formalism, so that judges do not completely diverge from the formalistic mold.

This research addresses formalism as a complex multidimensional phenomenon, and does not emphasize one measure of formalism over another. Now that there is a clearer empirical picture of the trends of each parameter of legal formalism in Israeli

legal rhetoric, the floor is open for various interpretations about the relative weight of each measure.

VI. SUMMARY AND CONCLUSION

This paper examined the extent to which critical claims about the formalism of law are implemented in the legal rhetoric of Supreme Court decisions. Our findings suggest that on most measures, there was little evidence of the much-debated decline in formalism. However, the rise in the reference to judicial discretion and the incorporation of policy goals as a basis for decision-making do follow the expected change in judicial rhetoric. We argue that these findings may indicate a reconstructed genre of formalism, which we termed Stage II Formalism. Thus, although legal rhetoric adheres to the "Stage I Formalism", i.e., the aspects traditionally associated with formalism, on most measures, it seems that the deviations and decline discussed in the literature can in fact reflect a reconstruction of formalism that incorporates policy and discretion into the formal legal realm. In other words, legal realism and other critical schools have not replaced formalism, but have changed it in significant ways.

This research presents the findings of a four-year empirical study that sought to examine the extent to which claims about the decline in formalism were evident in legal writing in routine cases. Like other research that relies on content analysis, it provides a way of systematically and objectively analyzing legal phenomena in a large number of opinions. Thus, unlike other work that has studied anti-formalistic trends mainly in relation to a small number of "hard" or "precedential" cases, our analysis encompasses a large number of routine cases decided by the Supreme Court. However, as others have noted (Hall & Wright 2008:99), content analysis based

research cannot provide the deeper understanding of individual opinions that comes from traditional interpretive techniques. Moreover, the main aim of this study was to determine whether the features that have been said to indicate formalism in legal opinions do indeed act in a similar way, and to trace the trajectory over time of each of these elements of formalism. We acknowledge that there are many case characteristics that may also potentially influence the formalism of legal opinions, and we anticipate conducting further research to identify patterns of formalism among, for example, the different fields of law represented in the data (criminal cases, public law and civil cases) and between hard cases (frequently quoted in other cases) and routine cases. Future research could also analyze the relationship of the parameters of formalism to other independent variables such as the number of opinions quoted, the length of decisions, and the particular judges who wrote the decisions. It would thus be possible to provide profiles of Supreme Court justices in relation to formalism.

Understanding the formalisms of law is important in order to understand law in action. Contrary to current notions of formalism, our research demonstrates that it is not so much the case that formalism exists or not, but that there is an intricate interplay between the various aspects of formalism. Legal texts today and even in the past reflect both the aspiration for formalism, as well as its deviations and judges may attempt to balance these in their opinions. The fluctuating paths of legal rhetoric are therefore neither completely in the direction of formalism or away from it, but reflect the trends in social and jurisprudential development in negotiation with formalistic aspirations.

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