

**Foreword: The Boundaries of Judicial Power:
Public Interests, Sectarian Values and Conceptions of the Good in the
Israeli Supreme Court**

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Some considerations, reasons and values are considered to be important but not subject to judicial control or scrutiny, because they are considered to be exclusively the province of either the legislature or the executive (e.g., security or, more generally, public interests), or of private individuals (e.g., religious values or, more generally, conceptions of the good). The scope of reasons and values which are appropriately evaluated and used (partially or exclusively) by courts is a matter of dispute, and it may change from time to time. This Article examines this question in light of recent developments in the Israeli Supreme Court and, in particular, in light of a process of incorporating considerations, reasons, interests or values which were formerly considered or understood to be extrajudicial into judicial reasoning. After establishing that the Israeli Supreme Court has incorporated into its decisions considerations and values which were traditionally considered extrajudicial, and identifying the techniques used by courts to incorporate such considerations, I evaluate the desirability of such incorporation. More specifically, I examine critically the dominant theory concerning the incorporation of reasons and values into judicial reasoning and propose an alternative.

Part One examines the techniques used by the Supreme Court to incorporate considerations into judicial opinions by classifying such considerations as legally binding (and enforceable by the courts). The Article identifies two different techniques of incorporation:

Incorporating public interests into judicial reasoning by a) presenting the public interest (e.g., the interest in security) as an aggregation of distinct individual interests rather than as a genuinely collective or public interest irreducible to the interests of the members of the public; and b) blurring the distinction between public interests that a public entity can or may legitimately pursue and individual legal rights that bind public entities. More specifically, the Israeli Supreme Court has expanded the scope of the considerations classified as rights and narrowed the scope of considerations that are identified as “merely public interests.” A clear example is the willingness of the Supreme Court to recognize and protect a personal right to security and consequently to limit other conflicting rights, such as the right to family life.

Incorporating private or sectarian considerations or values into judicial reasoning by blurring the distinction between considerations that a public entity (including courts) can or has to consider and private or sectarian considerations or values that a public entity is barred from considering ((such as religious values or conceptions of the good).

Through these techniques of incorporation, interests, reasons and values that were traditionally considered to be exclusively the province of the legislature, the executive or of private individuals are to a large extent being deployed by courts.

After identifying the different techniques of incorporating different considerations and values into judicial decisions, in Part Two I examine the reasons justifying the incorporation of such considerations into judicial reasoning. The purpose of the discussion is to examine which reasons and values are, properly speaking, reasons and values which courts may or ought to incorporate in their decisions.

Under one influential tradition, the decision regarding which reasons can be incorporated into the judicial process is based on epistemic considerations. The question which body (individuals, the legislature, the executive or courts) ought to incorporate a consideration into its decisions ought to be answered on the basis of the question of which entity is more likely to decide correctly. Under this view (the instrumental-epistemic view), the court has to consider reasons and values if and only if it is more likely to evaluate their weight correctly and decide in accordance with reason. The Article rejects the instrumental-epistemic approach and defends an alternative. More specifically, I argue that a consideration ought to be evaluated by the court not because courts are epistemically superior with respect to it, but because it is a consideration which ought not to depend upon the discretion of executive or legislative bodies. The recognition of a legally enforceable right expresses the fact that considering the interest at stake is not discretionary and is not subject to the whims or judgments of the executive or the legislative branch. Considerations or reasons ought to be evaluated by the court not (only or primarily) because courts are more likely to evaluate them appropriately, but also because such considerations are not to be left to the whims of the executive or legislative branch.

A legal right is not designed (only) to guarantee the materialization of protected interests or values (such as liberty, equality or dignity). A legal right is designed to guarantee that the decision with respect to the interest or consideration will not hinge upon preferences, judgments or whims of the legislature. Hence the reason justifying the incorporation of reasons and values is not (only) a consequentialist or utilitarian reason, i.e., a reason based on the epistemic superiority of the judicial branch; rather, the reason is to guarantee that the decision does not hinge upon the discretion or whims of public officials or legislators.