University of New South Wales Law Research Series

HOW, WHEN AND WHY DOES FAITH IN LAW'S AUTONOMY FROM POLITICS DECLINE? A COMPARATIVE CONSTITUTIONAL-CULTURAL ANALYSIS

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In Erin Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar, forthcoming)

[2017] *UNSWLRS* 16

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How, When and Why Does Faith in Law's Autonomy from Politics Decline? A Comparative Constitutional-Cultural Analysis

Theunis Roux[*]

Abstract

This paper examines the conditions for a particular kind of constitutional-cultural transformation, one in which a hegemonic ideology of law's autonomy from politics weakens to be replaced by a conception of law, and judicial review in particular, as an adaptable instrument for the pursuit of political goals. A transformation of this sort is famously what is said to have occurred in the United States over the course of the last century. A broadly similar process took place in India after the end of the 1975-1977 Emergency. On the other hand, in Australia in the mid-1980s and in South Africa after 1996, calls for judges to be more candid about the role of extra-legal values in constitutional adjudication did not in the end result in a significant weakening in the ideal of law's autonomy from politics. Likewise, Germany's strongly legalist tradition survived the criticisms of its role in the rise of National Socialism, with the Federal Constitutional Court famously consolidating its authority in the 1950s by construing that country's bill of rights as an 'objective system of values'. The paper uses Millian methods of agreement and difference and within-case process tracing to compare and contrast these five cases. It concludes that, in societies that have adopted a system of strong-form judicial review, a durable weakening in the ideal of law's autonomy from politics occurs when: (1) the existing ideology of legalism is destabilized by a significant exogenous shock; and (2) there exists either a broad-based legal-cultural movement or a group of charismatic judges willing and able to drive the transformation to a new conception of the law/politics relation.

Keywords: constitutional culture, law's autonomy, legalism, comparative historical analysis

This chapter examines the conditions for a particular kind of constitutional-cultural transformation, one in which a hegemonic ideology of law's autonomy from politics weakens to be replaced by a conception of law, and judicial review in particular, as an adaptable instrument for the pursuit of political goals. A transformation of this sort is famously what is said to have occurred in the United States over the course of the last century. Driven first by

[*] Professor of Law, UNSW Australia. I thank the editors of the volume in which this paper is set to appear for their comments on earlier drafts, and also the participants in the October 2016 workshop held at the Northwestern Pritzker School of Law. To be published in: Erin Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar, forthcoming).

the legal realists' attack on formalism and then by the Warren Court's liberal activism, public perceptions of the law/politics relation fundamentally changed. From an idea of constitutional decision-making as guided by technically rigorous, ideologically neutral reasoning methods, judicial review came instead to be seen as an institution through which the left and right sides of politics could pursue their competing visions of the American constitutional project.

Though its particular causes and evolutionary dynamics were different, a broadly similar kind of constitutional-cultural transformation took place in India after the end of the 1975-1977 Emergency. There, the Supreme Court's failure to stand up to the Congress Party's repression of its political opponents badly damaged its reputation. Over the next decade, a group of politically progressive justices adapted many of the Court's central doctrines, transforming it into an institutional voice for the poor. In the process, the legitimating ideology undergirding the Court's authority changed – from an inherited colonial tradition of legal positivism to an understanding of the Court as a politically committed guardian of India's democracy.

What explains these two constitutional-cultural transformations, this chapter asks, and why, when similar transformations were mooted in Australia in the late 1980s and in South Africa in 1998, did they not occur? Why, in turn, did the German Federal Constitutional Court's authority consolidate in the late 1950s and early 1960s around an understanding of the Basic Law as an 'objective order of values' when the post-war transition to rights-based constitutional democracy might just as easily have triggered a move away from Germany's long-standing tradition of legalism?[1]

The chapter uses a 'comparative sequential method' (Falleti & Mahoney 2015) to answer these questions. Part 1 begins by setting out the five developments just mentioned, giving just enough detail to put the main variables in play. Part 2 then focuses on the dependent variable – the constitutional-cultural salience of the ideal of law's autonomy – and classifies the five cases into instances of either successful (positive) or failed (negative) transformation away from this ideal. Part 3 returns to the case studies to tease out the conditions for a successful transformation of this sort. Two conditions in particular are identified: (1) a significant exogenous shock to the complex of ideas through which the law/politics relation is understood; and (2) either a broad-based legal-cultural movement or a group of charismatic judges willing and able to drive the transformation forward. The

[1] 'Legalism' is used here as a shorthand term for a legitimating ideology of law's separability from politics. It is acknowledged that this is but one aspect of a rich concept. See Shklar 1964. On other definitions, US legal culture could be described as extremely 'legalistic'. See, for example, Kagan 2001.

absence of one or the other of these conditions, this part argues, explains the differences between the German, Australian and South African cases, on the one hand, and the US and Indian cases, on the other. Part 4 presents a summing up and conclusion.

1 Five developments

Consider the following developments in the long-run constitutional politics of five countries: (1) the gradual weakening in the US over the last century of the ideal of law's autonomy from politics and the rise instead of a conception of judicial review as a site of political contestation over the meaning of core constitutional principles; (2) the German Federal Constitutional Court's consolidation of its authority in the late 1950s and early 1960s around an understanding of the Basic Law as an 'objective order of values';[2] (3) the rehabilitation of the Indian Supreme Court's reputation after the 1975-1977 Emergency on the back of a politically progressive, pro-poor understanding of its mandate; (4) the 'Mason Court revolution'[3] in late-1980s/early-1990s Australia during which a group of High Court justices attempted to introduce a more substantive, value-laden style of judicial reasoning; and (5) the South African Constitutional Court's decision to keep faith with a liberal-legalist conception of law in the face of calls to treat the 1996 Constitution as a post-liberal project in radical social transformation. In their particulars, all of these developments were products of the contingent political circumstances, institutional dynamics, and legal traditions of the societies concerned. At a more abstract level, however, they were all species of a common phenomenon: the transformation – in some cases successful, in others not – in the constitutional-cultural salience of the ideal of law's autonomy from politics.

In the US, several scholarly accounts point to a weakening over the last century of the ideal of law's autonomy from politics. From a conception of law as 'a structure of impartial and self-executing norms' (Horwitz 1992: 4), law came instead to be seen as an instrument for the pursuit of substantive political goals (Summers 1981; Tamanaha 2006). Most of these studies focus on the *Lochner* era from 1900-1937 when the legal realists exploited the controversy surrounding the Supreme Court's substantive due process reading of the Fourteenth Amendment to explode the myth of law's neutrality. The full transformation of US constitutional culture towards a more instrumentalist conception of law, however, was a more drawn out process than this, with the new legitimating ideology really only stabilizing in the 1970s and 1980s. Part of the reason for this was that the legal realists were not

[2] *Lüth* decision (BVerfGE 7, 198) as extracted and translated in Kommers & Miller 2012: 442-48.
[3] This term was coined by Pierce 2006.

themselves principally concerned with unmasking the politics of constitutional adjudication (Leiter 1997). Rather, their contribution was to critique the idea of law as a self-contained body of norms. The acceptance of this argument helped to destabilize 'Classical Legal Thought' (Horwitz 1992), but it did not immediately suggest an alternative basis on which law's claim to authority in a system of supreme-law judicial review might be reconciled with democratic political authority. At least, the main implication of legal realist thought for that question – that judicial review might be justified by a combination of deference to majoritarian determinations of public policy and wise use of social science – never achieved hegemonic status.[4] Instead, the conception of the law/politics relation that did eventually come to take hold was a product of the Warren Court era and, in particular, that Court's account of constitutional adjudication as the search for the contemporary moral meaning of core political values (Horwitz 1998; Powe 2000). While the Warren Court's liberal activism was condemned as improperly political in conservative circles, there was no simple defaulting back to legalism after 1969. Rather, Republican presidents sought to appoint justices who would offer an originalist, but in reality no less ideologically inflected, reading of the Constitution. In this way, constitutional adjudication in the US has come to be seen as a site of contestation between two grand opposing ideologies, each with its own preferred understanding of key precedents and each with its own preferred interpretive methodology (Kennedy 1997). While drawing on the legacy of legal realism, the stability of the system today depends less on the Supreme Court's deference to social-science-informed, democratic determinations of public policy and more on widespread public acceptance of the role of ideology in constitutional decision-making (Gibson & Caldeira 2011).

In Germany, the Federal Constitutional Court's decision in the 1958 *Lüth* case[5] marked the beginning of an intense period of doctrinal development during which proportionality analysis, that seemingly most subjective of judicial reasoning methods, was transplanted from its origins in Prussian administrative law and used to give a rule-like structure to the review of constitutional rights (Cohen-Eliya and Porat 2013; Bomhoff 2013; Hailbronner 2015: 117-21). In 1949, when the Basic Law was adopted, this outcome was not foreordained. The inclusion of a comprehensive list of fundamental rights in an explicitly 'never-again' constitution might conceivably have disrupted Germany's longstanding tradition of legalism, especially given that tradition's alleged role in the rise of National

[4] Of the Justices, Felix Frankfurter came closest to holding this view (Feldman 2010), but his conception of judicial review was quickly trumped by the Warren Court's justice-seeking activism (White 1982: 173-90).
[5] BVerfGE 7, 198.

Socialism (Radbruch [1946] (2006); Dyzenhaus 1997). But this did not occur. Rather than being seen as extra-legal moral principles, the fundamental rights were treated in *Lüth* and subsequent cases as legally immanent values whose meaning could be objectively determined (Hailbronner 2015). In this instance, therefore, a significant transformation in constitutional form did not produce a concomitant transformation in constitutional culture. Rather, proportionality became the means through which Germany's longstanding, but compromised, tradition of legalism was reinvigorated in a new institutional setting.

In India, the Supreme Court's failure to stand up to the suspension of *habeas corpus* in the 1976 *Shukla* case[6] triggered an anxious re-examination of its doctrines that eventually led to profound changes in the Court's role in national politics. From conservative defender of property rights against the *zamindari* abolition laws, the Court turned into an accessible forum for public discussion of all manner of social grievances and governance failures (Mehta 2005; Robinson 2009; Mate 2013). Canonical accounts of this process stress the role played by a core group of charismatic judges. Personally embarrassed by his performance in the *Shukla* case (Baxi 1985: 121n67), and motivated also by a sincere commitment to progressive politics, Justice P N Bhagwati set about developing a series of doctrines whose authority rested less on their provenance in the constitutional text and more in their moral attractiveness as statements of the Constitution's overriding purposes (Baxi 1985; Sathe 2002). Bhagwati was joined in this endeavor by Justice V R Krishna Iyer, who had not been party to the *Shukla* decision, but who had, like Bhagwati, been appointed by Indira Gandhi on the basis of his reputation as a politically 'committed' judge (Austin 1999: 438n24).Together, Bhagwati and Krishna Iyer transformed both the Court's reasoning style and also its orientation towards democratic politics. In place of the originalism that had marked the Court's early interpretation of the right to 'life or personal liberty',[7] the Court read that provision as guaranteeing a 'fair, just and reasonable' procedure.[8] The Court's approach to constitutional amendments, which had been part of the confrontation between it and the executive during the Emergency, also changed. Through the consolidation of the 'basic structure' doctrine, the Court established itself as the final guarantor of the quality of India's democracy. In the process, a constitutional culture that before independence had been shaped by 'the British legacy of Austinian positivism' (Mate 2013: 63) took on a different character, one more willing to embrace the mutual interpenetration of law and politics. As in the US

[6] *A.D.M. Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.
[7] Article 21. See *A.K. Gopalan v. State of Madras* 1950 SCR 88
[8] *Maneka Gandhi v Union of India* (1978) 1 SCC 248 para 40.

after *Lochner*, the basis for law's claim to authority shifted – from the assumed autonomy of law and legal reasoning processes to the moral attractiveness of the Court's politically progressive reading of the Constitution.

In Australia, Sir Anthony Mason, just before his appointment as Chief Justice in 1987, published an article exhorting his fellow judges to be more candid about the values informing their decisions (Mason 1986: 5). On assuming the leadership of the High Court, Mason and a group of like-minded judges set about developing a series of doctrines that depended on more substantive reasoning methods than the Court had hitherto used (Solomon 1999; Patapan 2000; Pierce 2006). In *Nationwide News v Wills*[9] and *ACTV*,[10] the Court decided that the 1901 Australian Constitution contained an implied freedom of political communication that restricted the federal and state legislatures' capacity to regulate the free flow of political ideas. Mason's own judgment in *Nationwide News* went even further, holding that federal laws that were not directly in power, and which interfered with common law freedoms, could be examined for means-end proportionality.[11] In this way, the Mason Court attempted to transform not only the Court's reasoning style but also its role in Australian politics. Had this initiative succeeded, the Court would have changed from a primarily federalist review body to a forum for assessing the conformance of legislation to substantive principles of political morality. In this instance, however, the transformation stalled. Amidst a public outcry against the politicization of the Court's role, a group of more traditionally minded justices mounted a rear-guard action that drew on the Australian judiciary's long-standing aversion to the making of political value judgments. In *Lange*,[12] the Court eventually settled on an understanding of the implied freedom of political communication that reconciled it with the legalist reasoning methods endorsed in *Engineers*,[13] the seminal 1920 decision around which the Court had first consolidated its authority (Galligan 1987).

In South Africa, American CLS scholar Karl Klare's call to treat the 1996 Constitution as a 'postliberal' project in radical social transformation (Klare 1998) likewise met with a mixed response. Many legal academics enthusiastically signed up to the project, and 'transformative constitutionalism' became a kind of mantra that was ritually invoked in the footnotes of law journal articles (De Vos 2001: 58n23; Botha 2002: 613n9; Van der Walt 2006: 22n236; Liebenberg 2006: 6n2).The Constitutional Court was a little more skeptical,

[9] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[10] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[11] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31.
[12] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[13] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

however, and its decisions generally remained true to the conception of law as anti-politics that had developed among the human rights community during the struggle against apartheid (Ellmann 1992; Roux 2013: 192-201). Some of the judges, to be sure, endorsed 'transformation constitutionalism' as an apt term to describe the 1996 Constitution's underlying philosophy (Moseneke 2002). But they tended to derive this philosophy from a principled reading of the Constitution rather than treating it as an ideological project that had to be superimposed from without. That ongoing commitment to legalism arguably had some drawbacks. In the *United Democratic Movement* case,[14] for example, the Court failed to offer a substantive political analysis of the threat posed to South Africa's democracy by the ANC's electoral dominance. This disappointed some commentators, who saw the Court as missing a golden opportunity to address this pressing problem (Choudhry 2010; Issacharoff 2011). In other cases, however, the Court's presentation of law as a social system distinct from politics had its advantages. In the *Treatment Action Campaign* case,[15] the Court explicitly relied on that conception in a decision challenging then President Thabo Mbeki's denialist views on HIV/AIDS. Less spectacularly, but just as significantly, some of the formalist reasoning techniques that human rights lawyers had used to exploit loopholes in apartheid statutes reappeared in judgments enforcing constitutional rights.[16] In this way, the South African Constitutional Court has generally resisted the call to declare the politicality of its function. Armed with a Constitution that does most of the substantive political theorizing for it, the Court has tended to go the German route of presenting fundamental rights as legal rights whose meaning may be objectively determined.

2 Changing conceptions of law's autonomy

Constitutional cultures, as understood here, are clusters of ideas, shared beliefs, norms and practices about the relationship between legal and political authority.[17] Such cultures, like all cultures, are not static or uniform, and at any one time particular aspects of a constitutional culture may be in flux or in dispute. Constitutional cultures are also highly idiosyncratic, and no one constitutional culture is exactly like another. Nevertheless, it is possible for comparative purposes both to group constitutional cultures together according to their shared

[14] *United Democratic Movement v. President of the Republic of South Africa* 2003 (1) SA 488 (CC).
[15] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras 20-22.
[16] See, for example, *Minister of Public Works v. Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) paras 59, 64-65, 83, 89, 117.
[17] On the idea of legal culture, from which the concept of constitutional culture used here is derived, see Cotterrell 1997; Nelken 2004; Cotterrell 2006 and Nelken 2016. For a related definition of constitutional culture, see Siegel 2006: 1325.

characteristics and also to analyze common patterns in the evolution of constitutional cultures over time. At a sufficiently high level of abstraction, a finite number of ways of reconciling legal and political authority begins to emerge. These ways may be captured in the form of ideal types – stylized, and nowhere actually existing, legitimating ideologies whose characteristic features and evolutionary dynamics are amenable to comparative analysis.[18]

Thus, for example, *authoritarian legalism* describes a constitutional culture in which political authority is in part legitimated by the independence given to judges in defined areas of social life.[19] Judges have final decision-making power in these areas, and may rule on such matters as contractual disputes or rights of inheritance without fear of regime interference. In other areas more sensitive to the regime's power-preserving interests, however, judges routinely defer to political prerogatives. The system as a whole is undergirded by a perverted ideology of law's separation from politics. 'Perverted' because, instead of providing the basis on which law speaks truth to political power, legalism in such constitutional cultures functions to legitimate the distinction between the sphere of private relations, in which law reigns, and the no-go area of regime-sensitive politics. To the extent that political rights, like freedom of speech and security from arbitrary detention, are unreliably enforced in such constitutional systems, authoritarian legalism holds that this is necessitated by the regime's special role in promoting some or other overarching societal interest, such as national security, economic prosperity, or ethnic harmony.[20]

In the same way, it is possible to classify the five constitutional cultures considered here according to certain shared characteristics, and to analyze changes in those characteristics over time. As functioning liberal democracies, political authority in all five societies was premised on the existence of an electoral mandate won under conditions of free and fair political competition. There were distinct differences, however, in the legitimating ideology undergirding law's authority, both between these societies and within these societies over time. In both the US and India, as we have seen, a formerly hegemonic ideology of law's autonomy from politics weakened. In both cases, too, an alternative legitimating ideology arose to take its place – the notion that judicial review, though deeply implicated in

[18] For a more thorough explanation of this approach, see Roux (forthcoming).

[19] Rajah 2012 uses the term 'authoritarian rule of law' to mean roughly what is meant by authoritarian legalism here. See also Tushnet 2015 (using the term 'authoritarian constitutionalism').

[20] We might think here, for example, of Chile under General Augusto Pinochet and Singapore under Prime Minister Lee Kuan Yew as societies that developed an authoritarian legalist constitutional culture of this sort. In both those cases, courts were given significant autonomy to resolve private disputes, but desisted from enforcing political rights in ways that would have threatened the regime's hold on power (Hilbink 2007; Rajah 2012). In Zimbabwe, the ruling ZANU-PF party draws its legitimacy primarily by presenting itself as the sole heir to that country's tradition of revolutionary nationalism (Southall 2013).

politics, is nevertheless (indeed, precisely for this reason) a useful device for pursuing political goals. The precise nature of this alternative legitimating ideology was different in each case. In India, the idea that the main purpose of judicial review was to transform Indian society along more egalitarian lines took hold, whereas in the US the pursuit of competing left-right visions of the constitutional project lay at the heart of the new understanding. For comparative purposes, however, the common characteristic was a decline in the constitutional-cultural salience of the ideal of law's autonomy from politics.

This transformation has not been complete or completely uniform. In the US, prospective Supreme Court justices still appeal to the idea of the Court as a neutral umpire during Senate confirmation hearings (Gibson & Caldeira 2011: 197; Tushnet 2013: ix). Such appeals evidently have some purchase in American constitutional culture or else they would not be made (Leiter 2010: 112). The late Justice Antonin Scalia's promotion of originalism as an interpretive method may also be seen as an attempt (whether genuinely or strategically) to invoke a legalist conception of law's authority. This suggests that the transformation to a more instrumentalist conception of law may have progressed further in certain sections of the constitutional-cultural community than others. To the extent that social survey data can be taken as a reflection of ideological salience, however, there does now appear to be general public acceptance of the idea that ideology plays a legitimate role in constitutional adjudication (Gibson & Caldeira 2011). Further, as a matter of elite academic opinion, the proposition that US constitutional culture has undergone a fundamental transformation towards a more instrumentalist conception of law is today relatively uncontroversial (Summers 1981; Atiyah & Summers 1987; Kagan 2001: 56; Tamanaha 2006).

Similarly, in India, the weakening of the ideal of law's autonomy from politics and the shift to a more instrumentalist conception of law has been a slow-moving, incomplete but nevertheless clearly discernible process. Initially, the rejection of legalism in the 1980s might have been thought to be a temporary phenomenon that was contingent on particular judges' pro-poor commitments. Over time, however, a more durable change has occurred so that Indian constitutional culture's tolerance for ideologically motivated decision-making is today independent of the particular judicial ideology at issue. Indian Supreme Court justices are thus not uniformly left-progressive, as the Court's recent decision on sexual orientation rights illustrates.[21] The Court's interpretation of environmental rights likewise tends to favor middle-class rather than pro-poor concerns (Rosencranz & Jackson 2003). To be sure, these

[21] *Suresh Kumar Koushal* v *NAZ Foundation* (2014) 1 SCC 1; AIR 2014 SC 563.

variations in the Court's ideological direction are not as structured as they are in the US. That is because in India, smaller benches make the development of coherent ideological blocs difficult (Robinson 2013; Chandrachud 2016). The fact that the Supreme Court still controls the judicial appointments process also suggests that the ideologies being reflected are not those of the dominant political coalition but of the New Delhi bar.[22] Nevertheless, there is a broad similarity between the US and India in so far as their constitutional cultures appear to tolerate a much higher degree of ideologically motivated decision-making than is the case elsewhere in the world.

In Australia, the constitutional-cultural transformation that Sir Anthony Mason called for in the late 1980s was not realized. But the fact that the change he saw as being necessary was a change towards greater acceptance of the influence of extra-legal values on judicial decision-making supports the contention that this is a crucial distinguishing factor between constitutional cultures. Mason did not, it is true, go so far as to say that judges should have recourse to their *own* ideological values. Rather, he argued that they should take 'community values' into account, which he assumed would be uniform enough to stabilize decision-making (Mason 1986: 5). Skepticism about that assumption was part of the reason why his call was resisted by more traditionally minded justices. Faced with a choice between a legalist suspension of disbelief in judicial review's imperviousness to ideological influence and US-style alternating left-right ideological projects, the High Court fell back on the formula that had served it so well in the past (Roux 2015). The Australian case thus provides a clear counter-example to the US and Indian cases, and invites consideration of the factors that hindered the transformation to a more instrumentalist conception of law.

Likewise, there is a certain similarity between the constitutional-cultural transformation that Klare argued was a precondition for the realization of the 1996 South African Constitution's moral vision and the transformation that occurred in the US. That correspondence was not coincidental. Klare was an American CLS scholar who endorsed Kennedy's (1997) conception of constitutional adjudication as the pursuit of 'ideological projects' – not just as a descriptive claim about the US but also as a normative claim about how South African judges should approach their task. What Klare saw in South Africa was a jarring contradiction between an entrenched culture of liberal legalism and a state-of-the-art

[22] This has not always been true. Before the Supreme Court wrested control of the judicial appointments process from the executive in the *Second and Third Judges Cases* (*Supreme Court Advocates-on-Record Association v. Union of India* (1993) 4 SCC 441 and *In re Special Reference No. 1 of 1998* (1998) 7 SCC 739; AIR 1999 SC 1) justices like Bhagwati and Krishna Iyer were seen as ideologically loyal to the prime minister who appointed them (Indira Gandhi, in this case).

‘postliberal’ Constitution (Klare 1998: 151-56, 170). His solution for that perceived contradiction was to call on South African judges openly to declare the politics of constitutional adjudication. As Klare saw things, the ‘best interpretation’ of the 1996 Constitution necessarily entailed this interpretive stance (Klare 1998: 187-88). That argument was plainly flawed. The 1996 Constitution’s clear textual commitment to progressive political values meant that a legalist posture was in fact quite well suited to drawing out its moral vision (Roux 2009). As happened in Australia, therefore, the transformation to a more instrumentalist conception of law never got off the ground. But the fact that Klare articulated his call in these terms again lends support to the idea that the strength of the ideal of law’s autonomy is a key distinguishing feature between constitutional cultures.

In Germany, there was no widespread demand for a more instrumental conception of law and thus no failed transformation in that sense. In the debate over the direction of German constitutionalism after the end of the Second World War, only one prominent scholar advocated something approximating legal realism (Hailbronner 2015: 81). Nevertheless, the adoption of a supreme-law Constitution with a long list of fundamental rights in theory constituted a profound challenge to existing public understandings of the law/politics relation. As Hailbronner (2015: 79) puts the point, the revival of legalism was ‘by no means a foregone conclusion. Chances were that the [Federal Constitutional] Court might have turned into a more political institution’. The role of Germany in this comparison is thus that it represents a case where a weakening in the ideal of law’s autonomy was one possible trajectory opened up by a significant change to the formal constitutional system. The fact that this path was not taken means that it provides an interesting additional empirical setting for considering the conditions for this kind of constitutional-cultural transformation.

3 Two conditions

The common theme connecting the five developments considered in previous sections is that they all involved a potential change to the constitutional-cultural salience of the ideal of law’s autonomy. Where they differ is in the extent to which a change of that kind actually occurred. In two cases, the US and India, legalism’s ideological hold significantly weakened. Not just that, but another complex of legitimating ideas, one premised on law’s instrumental usefulness in the pursuit of substantive political goals, came to replace it. In the three other cases – Germany, Australia and South Africa – a transformation of this kind was either

proposed or plausibly entailed by a formal change to the constitutional system, yet did not occur. [23] What accounts for this difference?

Consider the five developments again, this time focusing on the role played by the following two factors: (1) the existence of some or other exogenous shock to the complex of legitimating ideas through which the ideal of law's autonomy from politics had been maintained; and (2) the role played by judges and/or other prominent legal-cultural actors in either resisting the proposed change or promoting it and fashioning an alternative legitimating ideology.

The exogenous shock condition

In economics, an 'exogenous shock' is an event that occurs outside an economic system in the sense that it is not cognizable as a standard change to one or more variables making up that system. In the same way, we might think of an exogenous shock to a constitutional culture as an event that occurs outside the complex of legitimating ideas that ordinarily gives that culture a measure of stability. Such developments might include, for example, a major structural change to the economy, the outbreak of war or another kind of national security crisis, or a significant political realignment that introduces a hitherto repressed group into the political process. When events like that occur, they have the potential to trigger a significant change in public understandings of the law/politics relation, either by driving a formal change to the constitutional system or by triggering public discussion of the legitimate scope of law's authority and its relationship to political authority. Were such developments present in any of the five case studies and, if so, what role did they play?

One of the most influential accounts of the 'transformation of American law' that occurred over the course of the last century points to the presence of just such an exogenous shock. According to Horwitz (1992), the initial drivers for the destabilization of 'Classical Legal Thought' were the profound structural changes to the US economy that occurred during the latter part of the nineteenth century. Rapid urbanization and industrialization after the end of the Civil War, Horwitz argues, prompted state legislatures to intrude ever further into what had previously been thought to be the private sphere of contractual relations. Responding to the dire working and living conditions of the new urban underclass, state legislatures from the 1880s onwards began enacting various types of welfare legislation,

[23] In formal methodological terms, the US and India are positive cases that may be contrasted with the three negative cases of Australia, South Africa and Germany. This allows for a combination of John Stuart Mill's methods of agreement and difference and within-case process-tracing to explore the reason for these divergent outcomes. See Mill (1970 [1888]) as discussed in Skocpol and Somers (1980: 183).

including laws regulating the basic conditions of employment. That development in turn produced a tension between received doctrinal understandings of the scope of the police power and state legislatures' democratic mandates. As further explained by Gillman (1993), state courts during the latter part of the nineteenth century had grappled to develop a clear doctrinal distinction between genuinely public-purpose-regarding regulations and so-called 'class legislation', which merely adjusted market outcomes to favor one special interest group over another. When the Supreme Court started to become involved in these disputes in the 1890s, it took over this distinction in its substantive due process reading of the Fourteenth Amendment. It was the seeming artificiality of that reading that gave proto-realists like Pound (1908: 615-16) and Justice Oliver Wendell Holmes Jr. the target they needed for their attack on formalism.

Legal realism itself, as Leiter (1997) has been at pains to argue, was not centrally concerned with demystifying the politics of constitutional adjudication. Rather, it was about demonstrating the indeterminacy of rule-based decision-making and showing how various extra-legal norms, such as the norms prevailing in the business community, influenced judicial decisions. The legal realist movement, therefore, was not solely responsible for driving the transformation in public conceptions of the law/politics relation that occurred over the last century. As noted earlier, it was not until the bipartisan acceptance of ideologically motivated decision-making in the 1970s and 1980s that this transformation was completed. But the legal realist assault on formalism was clearly a crucial step in this broader transformation process. Without that assault, the Warren Court would not have been able to present the Constitution as the continually evolving meaning of fundamental American political values. It is in this specific sense, then, that the economic changes to which Horwitz (1992) points may be said to have been a necessary condition for the broader transformation process. By destabilizing the premises of Classical Legal Thought, these changes triggered a long-run process of constitutional-cultural development whose end point was the consolidation of a new conception of the law/politics relation.

In the same way, the post-1980 transformation of Indian constitutional culture could be said to have been triggered by an exogenous shock. In this instance, the shock was a profound political realignment that saw the Congress Party's rule seriously challenged for the first time. The entire sequence of events is too complex to relate here. The key point was that, despite her resounding 1971 election victory, widespread popular opposition to Prime Minister Indira Gandhi's rule began to develop in 1974 (Guha 2007: 447-88). The reason for this rapid deterioration in Gandhi's fortunes had to do partly with a downturn in India's

economy following the 1973 oil crisis, and partly with her failure to address corruption within the Congress Party, particularly at state level (Guha 2007: 475). In January 1974, a student uprising began in Gujarat (Guha 2007: 477). This spread rapidly to Bihar and other northern states. In March 1974, the students asked Jayaprakash Narayan, an old Congress Party stalwart, to head their movement. The protests rolled on for a further year under Narayan's leadership, culminating in a mass rally in Delhi attended by 750 000 people (Guha 2007: 477). While all of this was going on, the Allahabad High Court had been hearing a challenge to Gandhi's 1971 election to the Lok Sabha that had been brought by her losing opponent, Raj Narain (Austin 1999: 314-19). The alleged wrongdoing – the use of government vehicles and other state resources to assist her in her campaign – hardly seemed significant in light of the ease of Gandhi's election victory. On 12 June 1975, however, the Allahabad High Court ruled in Narain's favour, thereby throwing the continuation of Gandhi's prime ministership into doubt. Encouraged by her son, Sanjay, Gandhi moved to declare an internal state of emergency on 25 June 1975. A list of her political opponents had by this time already been drawn up, and thousands of arrests, mostly on very thin pretexts, were made. Two days afterwards, on 27 June, a presidential order was issued suspending the right to approach a court for enforcement of Article 21 of the Constitution (no deprivation of life or liberty with due process) (Baxi 1980: 80).

The Supreme Court decided the central legal challenge to the denial of *habeas corpus* in *Shukla*.[24] In the ten High Court cases considered in this appeal, seven had softened the impact of the presidential order by holding that it did not override the ordinary administrative-law grounds for challenging a detention order (Baxi 1980: 79-80). Khanna J, in his famous dissent, took a different, but equally plausible approach, arguing that Article 21 was not the sole repository of the right to personal liberty. Rather, there were various statutory rights against arbitrary deprivation of liberty that had survived both the presidential order of 27 June and s 18 of the Maintenance of Internal Security Act (which purported to override all existing common law and natural rights). Since it did not apply to these rights, Khanna J concluded, the presidential order could not be said to have completely ousted the High Courts' power under Article 226 to issue writs of *habeas corpus* (Baxi 1980: 79-80).

The existence of these plausible alternative arguments fuelled the public's sense that the majority's decision in *Shukla* to uphold the presidential order was motivated by political considerations – at worst, a craven capitulation to political pressure, at best, a strategic

[24] *A.D.M. Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

attempt to protect the Court from attack. While not justified by a fair reading of the majority judgments (Baxi 1980: 79-116), the general feeling that the majority had sought refuge in legal technicalities when the substantive injustice of the denial of rights was clear, badly damaged the Court's reputation. In January 1978, for example, the *Times of India* published a statement on its front page by a group of concerned Bombay lawyers and public intellectuals claiming that neither Bhagwati nor Chandrachud, the judge next in line for the chief justiceship, was a fit and proper person for the job. Their opinions in *Shukla*, it was argued, had been 'arrive[d] at … in total [dis]regard to precedent, by reasoning manifestly unsound, and [dressed up] by expressions that will testify only to a marked inclination to rule in favour of the State' (Austin 1999: 338). Such open and direct public criticisms of sitting judges had never before been heard (Gadbois 2011: 254).

It was in these circumstances that Bhagwati and Krishna Iyer set about constructing an alternative basis for the Court's authority. Without directly attributing the Court's failure in *Shukla* to legalism, these two justices used the space created by the destabilizing impact of that decision to drive a transformation, first in the Court's doctrines and reasoning processes, and then in public conceptions of the Court's legitimate role in national politics. As the Court's new role became institutionalized and publicly accepted, a new understanding of the law/politics relation, one more tolerant of ideologically motivated decision-making, consolidated around it. Rather than the work of a broad-based intellectual movement, legalism's hold on the constitutional-cultural imagination in India was thus weakened through the work of a group of charismatic judges. The dynamics of the transformation process were in this sense quite different from the equivalent US process. As in the US, however, a crucial initial condition for the transformation was an exogenous shock to the existing legitimating ideology. In both cases, the transformation from legalism to instrumentalism was not simply the working through of legalism's internal developmental logic (cf. Nonet & Selznick [1978] (2001)). It was precipitated by events that had their origins outside this complex of legitimating ideas.

In the German case, the distinction between external political developments and legalism's internal developmental logic is harder to draw. On standard accounts, legalism was both impacted by, and also a facilitating cause of, the rise of National Socialism. In the best known version of this analysis, Radbruch ([1946] 2006: 6) argued that 'positivism, with its principle that "a law is a law", [had] … rendered the German legal profession defenseless against statutes that are arbitrary and criminal'. This was more than just a failure of intellectual resources in Radbruch's view. It was that the positivist mindset had made it easier

for the legal profession to separate out the obvious injustice of Nazi law from the question of its validity. In this way, legalism did not just fail to prevent, it also in some sense aided and abetted the collapse of the Weimar Republic.

Twelve years later, Radbruch's argument was at the center of the famous Hart-Fuller debate (Hart 1958; Fuller 1958). There, Hart defended legal positivism against Radbruch's charge that it had facilitated the rise of National Socialism. That view, Hart argued, overlooked the fundamentally liberal intuition behind legal positivism, viz. that the separation of law and morality allows an uncluttered examination of the moral worth of laws (Hart 1958: 615-21). To this, Fuller replied that Hart had failed to see the enormity of Nazi Germany's interference with ordinary principles of legality. A more morally laden conception of law, in Fuller's view, would have prevented the legal profession from becoming the 'ramparts' that so easily fell to the National Socialist assault (Fuller: 648-661).

In analytic legal philosophy, Hart is generally taken to have had the better of this exchange. In Germany, too, legal positivism is seen as having survived the challenge from natural law (Bomhoff 2013: 223). At least, legal positivism has evolved into a more sophisticated 'value formalism' that, on the one hand, has assimilated the lesson that law, to qualify as such, should conform to minimum principles of political morality but, on the other, treats those principles as objective legal norms that may be enforced in ideologically neutral terms (Hailbonner 2015: 111-114). This outcome has to do with the factor considered in the next section – the need for either a broad-based intellectual movement or group of charismatic justices willing and able to exploit the crisis of legalism to drive the transformation to a different conception of the law/politics relation. For the moment, the point is that the convulsions of the Second World War clearly did pose a significant challenge to the German tradition of legalism, but that the legitimating power of this ideology did not in the end collapse. In combination with the US and Indian cases, this suggests that an exogenous shock may be a necessary but not a sufficient condition for the kind of constitutional-cultural transformation considered here.

The Australian case provides a direct contrast to the German. In Australia, as we shall see, the second condition *was* clearly satisfied. What was missing was an exogenous shock comparable to those that occurred in the US, India and Germany. To be sure, when Sir Anthony Mason issued his call for judges to be more open about the role of extra-legal values in decision-making, the institutional and cultural setting in which the High Court was operating was changing in certain respects. These changes included the passage of the Australia Acts in 1986, which saw the High Court clearly identified for the first time as the

final court of appeal in Australia (Solomon 1999; Patapan 2000: 18; Pierce 2006), the adoption elsewhere in the world of charters of fundamental rights that was starting to trigger a global conversation about the role of constitutional courts in enforcing substantive political values (Patapan 2000: 19), and the appointment to the High Court of judges who had been exposed to a more sociological, policy-oriented style of legal reasoning by Sydney law professor Julius Stone (Patapan 2000: 20-24). These changes were not insignificant. None of them, however, was anything like the external economic or political developments that had challenged legalism's hold in the US, India, and Germany. Rather, they were all in the nature either of slowly developing contextual changes or internal legal-cultural influences. The adoption of the Australia Acts in 1986 was thus the culmination of a gradual process that had been going on since 1968 when appeals from the High Court in federal matters were abolished. The rise of global constitutionalism, too, was a gradual process, in which Australia's national identity could be said to have been defined precisely by its refusal to produce a constitutional statement of core political values. Finally, Professor Stone's impact as a charismatic teacher of students who later went on to serve on the High Court was an internal legal-cultural factor rather than an external political development. While his teachings influenced the motivations of the Mason Court judges in calling for a constitutional-cultural transformation, Stone's legal realist conception of constitutional adjudication did not on its own discredit the existing tradition of legalism. That work was left to the reformist justices themselves, who struggled to find any obviously existing crisis of legalism to which they could point (Roux 2015). Of the five cases, therefore, Australia is the one in which the exogenous shock condition was most clearly not satisfied.

In South Africa, the collapse of apartheid, whose legal system had, like Nazi Germany's, been associated with a debased version of legal positivism, in theory constituted a profound challenge to legalism. Many of the same debates that had taken place in Nazi Germany in the aftermath of World War II thus played themselves out in South Africa in the 1980s, as the apartheid regime was beginning to weaken. The Hart-Fuller debate, for example, was prescribed reading for law students at the University of Cape Town, and every major South African legal philosopher was required to develop their own position on the implications of this debate for the South African case (Dugard 1971, Wacks 1984, Cameron 1987, Mureinik 1988). When the 1996 Constitution came to be drafted, there was a clear sense, as had been the case in post-war Germany, that the legal system needed to be 'remoralized'. And, as in Germany, a never-again Constitution was adopted with a

comprehensive list of fundamental rights. In this sense, a new constitutional-cultural path opened up, one in which the law/politics relation might plausibly have been reimagined.

In truth, however, legalism was never fully discredited in South Africa. The main reason for this was that the struggle against apartheid was in part waged through law – not by invoking a natural-law morality to which apartheid laws should conform, but by presenting common-law principles of freedom from arbitrary detention, equal treatment and the like as legally immanent values conditioning the interpretation of apartheid statutes (Dyzenhaus 1991, Ellmann 1992). In this way, a sense of law as an autonomous realm of principles that could be used to control the abuse of political power was preserved (Meierhenrich 2008). Indeed, that understanding became very powerful in the human rights community, and appeared to have been vindicated when the apartheid regime fell. In the South African case, therefore, while the circumstances of the transition to constitutional democracy clearly presented an opportunity to interrogate legalism, there are doubts about whether that legitimating ideology was truly destabilized.

In summary, in four of the five cases (the US, India, Germany and South Africa) there were circumstances, such as war, profound economic changes or a significant political realignment that in theory threatened public confidence in the ideal of law's autonomy from politics. The strength of that ideal only declined in two of those cases, however. This suggests that an exogenous shock is a necessary but not a sufficient condition for a constitutional-cultural transformation from legalism to a more instrumentalist conception of law. An exogenous shock, we might say, puts the ideal of law's autonomy from politics under scrutiny and unleashes a public debate about how the law/politics relation might be reconceived. How that debate turns out, however, depends on whether there are legal-cultural actors willing and able to drive the transformation forward. It is to this second condition that the discussion now turns.

The broad-based legal-cultural movement or charismatic judicial actor condition

Constitutional-cultural transformations, the previous section has argued, begin with an exogenous shock – an external development that challenges the hegemonic complex of ideas through which the law/politics relation is understood. A shock of this kind is a necessary condition for the transformation, but it is not sufficient. Since legitimating ideologies are complexes of ideas, exogenous shocks are not self-identifying – they need to be constructed by legal-cultural actors with an interest in challenging the status quo. In the same way that successful social revolutions begin with 'overtly political crises', but are then driven by 'a

purposive, mass-based movement' (Skocpol 1979: 24, 14), constitutional-cultural transformations depend on actors willing and able to drive the transformation forward.

In the US, as we have seen, the economic changes identified by Horwitz (1992) triggered a growing tension between law's claim to authority as a technically rigorous, scientific discipline and political authority claims based on popular democratic mandates. Doctrinal norms relating to the scope of the police power, which were based on a principled, historically well-founded understanding of the US Constitution as a political contract for limited government, began to rub up against state electoral mandates to enact welfare legislation. The tension between these two authority claims was real enough, but it needed explaining. For the 'crisis of Classical Legal Thought' to develop into a more thoroughgoing challenge to legalism, someone or some group had to exploit it and propose a plausible alternative conception of the law/politics relation.

The role played by the legal realist movement in this respect has been so well documented as to make any brief restatement appear superficial (in addition to Horwitz 1992 see Twining 1973; Duxbury 1995; Leiter 1997; Tamanaha 2010). Even to describe legal realism as a 'movement' is to invite charges of ignorance about just how organized its members were or what their self-conception as a group of legal academics, practicing lawyers and judges was (Horwitz 1992: 169). The purpose here, however, is not to say anything new about legal realism, but simply to offer a brief account that can be used for comparative purposes.

The key point to stress is the way in which both Progressive-Era thinkers and the legal realists constructed the crisis of Classical Legal Thought so as to suit their particular purposes. In his famous dissent in *Lochner*, the acknowledged 'intellectual godfather' of the legal realist movement, Justice Oliver Wendell Holmes Jr., thus identified the source of the problem as being the majority justices' formalism – their presentation of their private economic ideology as the necessary linguistic meaning of the Fourteenth Amendment. 'The Fourteenth Amendment does not enact', Holmes famously stated, 'Mr. Herbert Spencer's Social Statics.'[25] Roscoe Pound, in his equally famous critique of 'mechanical jurisprudence', essentially repeated this argument. 'The conception of freedom of contract', he wrote, 'is made the basis of a logical deduction ... [but the] court does not inquire what the effect of such a deduction will be, when applied to the actual situation' (Pound 1908: 616).

[25] *Lochner v. New York* 198 U.S. 45, 75 (1906).

While forceful and effective, neither of these criticisms of *Lochner* was entirely accurate. The real problem with the decision, as Gillman (1993) demonstrates, was not the majority justices' strained deductive logic, but their attempt to remain true to the reigning doctrinal understanding of the Fourteenth Amendment when the economic premise for that understanding had collapsed. Justice Peckham's majority opinion in *Lochner* thus shows very little trace of the *textual* formalism with which it has been charged. Indeed, the text of the Fourteenth Amendment is nowhere even cited. Rather, the opinion is a straightforward application of settled precedents relating to the scope of the police power, viz. that state legislatures have the right to prohibit contracts only where such laws may reasonably be construed as conserving public morals, health and safety. Whether Justice Peckham was correct in deciding that the maximum-hours law in *Lochner* failed this test is open for debate. The charge that his application of the test was formalistic, however, is overblown. Holmes and Pound's critique of *Lochner*, it is now clear, had more to do with the opportunity it presented to set out their own distinctive conception of law and judicial decision-making than with the actual crisis in Classical Legal Thought.

Though breaking with Pound on a personal level, Karl Llewellyn, Jerome Frank and the other leading legal realists essentially built on his criticisms of the alleged conceptualism of *Lochner* when developing their own critique of formalism (Horwitz 1993). Rather than the application of a gapless system of rules, they famously argued, judicial decisions should be seen as discretionary choices influenced by extra-legal norms. Since legal rules, such as those governing the interpretation of statutes, could be manipulated to justify either outcome, what mattered was the judge's intuitive sense, based on his or her practical experience, of what justice required (Twining 1973, Duxbury 1995).

These criticisms, it is now agreed, downplayed the determinacy of law in the vast number of cases that are not litigated. They also underplayed the role of background norms of legal culture in stabilizing judicial decision-making, a point on which Llewellyn later recanted (Llewellyn 1960). Nevertheless, the legal realist movement was largely successful in its principal aim of drawing attention to the discretionary nature of judicial decision-making. Building on the platform created by Holmes and Pound, and drawing further support from other intellectual currents, such as Deweyan pragmatism, the legal realists successfully exposed law's pretensions to being a determinate science.

For a broad-based legal-cultural movement to exploit a crisis in the complex of legitimating ideas undergirding a system of judicial review, this brief account suggests, it is not necessary for that crisis to be accurately identified. Provided that there is a crisis of some

kind, the diagnosis at the time need not conform to what we, with the wisdom of hindsight, would now say was its actual nature. Equally and relatedly, the path followed by a constitutional culture in response to such a crisis need not correspond to what we might now think was a logical solution to the crisis. Broad-based legal-cultural reform movements inevitably have their own intellectual agendas, and may be influenced by contemporaneous developments that have little to do with the crisis that provides the initial space for their activities. What matters is whether the existing tradition of thinking about the legitimate basis for law's authority is indeed destabilized, and whether the movement is able effectively to capitalize on this for its own purposes.

Standard accounts of the transformation of Indian constitutional culture after the 1975-1977 Emergency do not attribute a significant role to a broad-based legal-cultural movement. Rather, the central figures in the Indian drama are said to be judges acting as legal-cultural vanguardists – exploiting the crisis of legalism triggered by the Court's poor performance in *Shukla* to drive a new conception of the law/politics relation. The central role of Justices Bhagwati and Krishna Iyer in this respect has already been mentioned. Both had been appointed by Indira Gandhi before the Emergency on the strength of their reputations as politically committed judges. When she returned to power in 1980, they were given the political space to re-invent the Supreme Court as an institutional voice for the poor and other marginalized groups. While Gandhi's own pro-poor populism was arguably cynical (Austin 1999), Bhagwati and Krishna Iyer's political convictions were by all accounts sincere (Baxi 1985: 113). Rather than a strategic bid for curial power, therefore, their development of such doctrines as the Court's epistolary jurisdiction and justiciable rights to livelihood must be seen as a principled re-imagining of the Court's role in national politics.

In Germany, as we have seen, there was little intellectual support for a more instrumentalist conception of law. Martin Drath was the most prominent of only a few legal scholars committed to a more 'legal realist' understanding of constitutional adjudication (Hailbronner 2015: 80-82). In her analysis of the Federal Constitutional Court's post-war record, Michaela Hailbronner argues that this might have been because legal positivism provided German legal professionals with a way of avoiding moral culpability for their part in the evils of National Socialism. 'By blaming positivism, lawyers could shift responsibility to existing structures rather than accept their individual guilt' (Hailbronner 2015: 76). Another factor, Hailbronner suggests, was the idea that the problem in Nazi Germany had been the instrumentalization of law in service to authoritarian ends, i.e. law had not been *separate enough* to provide a bulwark against the rise of National Socialism. On that analysis,

the logical way forward was that ‘[l]aw should one again serve as a guideline for politics rather than merely its handmaiden’ (Hailbronner 2015: 76). In this way, an exogenous shock that might have served as a trigger for a thoroughgoing re-examination of legalism in fact provided momentum for the re-invigoration of that tradition, albeit with the difference that positive legal norms were seen to be infused with the values emanating from the Bill of Rights.

In South Africa and Australia, by contrast, there were strong voices calling for the adoption of a more instrumentalist conception of law. In the former case, Klare specifically pitched his call for ‘transformative constitutionalism’ as a call for the transformation of South Africa’s prevailing culture of liberal legalism (Klare 1998). In Australia, several well-placed judges, including at one point a majority of the High Court, openly supported a move to recognize the role of extra-legal values in constitutional adjudication. Although neither of these initiatives could be described as a broad-based legal-cultural movement, these calls were at least as strong as the charismatic leadership provided by Bhagawati and Krishna Iyer in India. And yet both failed to produce the desired transformation. The explanation for this outcome lies both in a certain weakness in the initial condition for the transformation and in the absence of a supportive environment once the call had been made.

In the Australian case, as we have seen, there was no real exogenous shock to the prevailing ideology of legalism, which by the 1980s had become very established (Pierce 2006). In the absence of that condition, Mason and his fellow justices in a sense had to invent a crisis where none really existed. In doing so, they ran into a severe (and quintessentially Australian) ‘if it ain’t broke don’t fix it’ problem. More than this, their intervention appeared to generate a crisis of its own as the Mason Court’s doctrinal innovations triggered a high degree of public controversy about the Court’s role. All of these factors helped to contain Mason’s transformative call and drive a return under subsequent chief justices to the safe haven of legalism. The Australian case thus strongly suggests that the mere existence of a sympathetic judiciary is not a sufficient condition for the kind of constitutional-cultural transformation considered here. The existing tradition of legalism needs to be destabilized by a significant exogenous shock if legal-cultural actors intent on driving the transformation are to succeed.

The earlier discussion of South Africa has already pointed to the survival of a nobler vision of law as anti-politics under apartheid. Thus, there are doubts here, too, about the significance of the exogenous shock to legalism. In addition, South Africa in 1996 was at a very different stage of legal and political development compared to the US in either the 1920s

or the 1970s. Although legalism was well entrenched as a hegemonic discourse (Chanock 2001), the transition to democracy raised the question of whether the rule-of-law state that had served white sub-society could be spread to benefit the majority black population (Meierhenrich 2008). There had also been a strong socialist tradition within the ruling African National Congress, which was inclined to a crude instrumentalist conception of law. Under those conditions, the South African Constitutional Court under Chief Justice Arthur Chaskalson decided that liberal rule-of-law institutions were fragile and that the ideal of law's autonomy from politics needed to be preserved (Roux 2013). In the result, while enthusiastically endorsed by legal academics, there was little elite judicial support for implementing Klare's call to declare the politics of constitutional adjudication. While endorsing the idea of the 1996 Constitution as a transformative document, the judges of the Chaskalson Court, in their extra-curial statements and judicial practices, presented the Constitution as a body of legal norms whose meaning could be discerned through ideologically neutral reasoning process. The fact that the 1996 Constitution was not just plausibly open to a politically progressive, pro-poor reading, but in fact could not be interpreted in any other way (Roux 2009), helped to sustain this fundamentally legalist conception of the Court's role.

South Africa for these reasons represents a case where neither of the conditions for a successful transformation to a more instrumentalist conception of law was fully satisfied: the first because a nobler vision of law as anti-politics survived the transition to democracy, and the second because, though mooted in academic circles, the most powerful legal-cultural actor, the Constitutional Court, had little inclination to drive the change.

4 Conclusion

The preceding discussion may be summarized in the form of the following table:

	US	**India**	**Germany**	**Australia**	**South Africa**
Significant exogenous shock to prevailing ideology of legalism?	Yes	Yes	Yes	No	No
Broad-based legal-cultural movement with interest in exploiting crisis?	Yes	No	No	No	No
Judges capable and willing to drive transformation to new legitimating ideology?	Yes	Yes	No	Yes	No

The findings captured in the table support an inductively derived theoretical conjecture that, in societies that have adopted a system of strong-form judicial review, a durable weakening in the ideal of law's autonomy from politics, and its substitution by a more instrumentalist conception of law, occurs when: (1) the existing ideology of legalism is destabilized by a significant exogenous shock; and (2) there exists either a broad-based legal-cultural movement or a group of charismatic judges willing and able to drive the transformation forward. Further research is required to test this conjecture and to explore the dynamics of constitutional-cultural change in different settings.

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