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## Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches†

*A fundamental issue of judicial review of administrative agency action is what materials a reviewing court is permitted to consider. Under a system of closed review, the reviewing court cannot consider evidence that was not introduced at the agency level, reasons that the agency did not assert when it made the decision, or arguments that were not advanced at the agency level. A system of open review permits the agency to consider new evidence, reasons, and arguments. The United States usually practices closed review of all forms of agency action (including formal and informal adjudication, rulemaking, and policy implementation). In contrast, Israel often allows open review of all forms of agency action (even though Israel's system of administrative law is derived from the British model of closed review). This Article seeks to describe and explain this marked difference. In part, the difference relates to the fact that the United States relies much more heavily than does Israel on the initial decision rather than on judicial review to reach the correct result. As a result, in the United States agencies are required to observe decision-making procedures at the initial decision level that ensure the assembly of a record and a set of reasons suitable for judicial review, whereas this is not the case in Israel. In addition, Israeli practices relating to standing, jurisdiction of the Supreme Court (which serves as the trial court for important administrative law cases), the scope of judicial review, and doctrines of selective enforcement all differ sharply from the corresponding practices in the United States. These Israeli practices could not function well under a system of closed review.*

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## INTRODUCTION

A central issue in judicial review of administrative agency action is the determination of what materials a reviewing court is allowed to consider. Can the court consider *evidence* that the agency<sup>1</sup> did not consider? Can it consider *reasons* for the agency action that the agency did not assert when it took the action in question? Can it consider *arguments* that the private party failed to make during administrative consideration of the matter?

We can imagine a spectrum between completely closed and completely open judicial review. At the closed end of the spectrum, the court would consider no evidence that the agency had not considered (“closed record”), no reasons that the agency failed to assert when it made the decision (“closed reasons”), and no arguments except those made during agency consideration of the matter (“closed arguments”). At the open end of the spectrum, the court would ignore everything that had occurred at the agency level; all of the evidence and argument would be new and the court would be indifferent to the reasons the agency gave for its decision.

This paper considers the U.S. and Israeli practice on this issue. The United States falls close to the *closed* end of the spectrum. The United States is an outlier; it may have the most closed system of judicial review of any country in the world. Most other countries use open review, either in courts of general jurisdiction or in specialized administrative courts (although some countries close review of tribunal decisions). Israel originally followed the British model of closed review as practiced in the United Kingdom around 1950, but changed its practice and now falls closer to the *open* end of the spectrum. We seek to explain why these countries have followed different paths and speculate about the relationship between openness of the judicial review process and other doctrines of judicial review.<sup>2</sup> By focusing on the conflicting review practices of the United States and Israel, we hope to shed light on a fundamental but understudied problem of administrative law. We believe that the issue of whether judicial review should be open or closed is not merely a technical or procedural question. Rather, it reflects important policy choices and is closely related to central administrative law doctrines. The choice between open and closed review fundamentally affects the balance of power between administrative agencies and reviewing courts.

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1. We use the term “agency” in the sense that it is used in U.S. law, meaning a governmental unit (other than a court or a legislature) having delegated power to implement government policy. The term includes governmental units with various titles used throughout the world, such as ministries and departments. It also includes both units situated within the executive branch of government and those that are independent of the executive branch. This Article considers U.S. federal administrative law, not state or local practice.

2. In another article, we considered the implications of the choice between open and closed review on the role of government attorneys who represent agencies on judicial review. See Michael Asimow & Yoav Dotan, *Hired Guns and Ministers of Justice: The Role of Government Attorneys in the United States and Israel*, 49 ISR. L. REV. 3 (2016).

Part I of this Article discusses closed judicial review practice in the United States, while Part II addresses open judicial review in Israel. Part III speculates on why the judicial review practices of the United States and Israel diverge so sharply.

## I. U.S. PRACTICE: CLOSED JUDICIAL REVIEW

In general, the United States practices closed judicial review regardless of the *type of agency action* that is subject to review. In other words, it does not matter whether the action in question is formal or informal adjudication, rulemaking, or a government policy-implementation decision that is neither adjudication nor rulemaking. However, because U.S. courts recognize a number of exceptions to closed review practice, the United States falls near the closed end of the open/closed spectrum but does not quite reach it.

In understanding the U.S. practice, it is helpful to consider the type of agency action that is subject to judicial review.

### A. *Formal and Informal Adjudication*

We define adjudication as agency action of *specific* applicability.<sup>3</sup> The norm in U.S. administrative adjudicatory practice is *formal adjudication*, meaning that the agency conducts an *evidentiary hearing* to resolve a dispute between the government and a private party (or occasionally between two private parties). Evidentiary hearings (which usually resemble adversarial judicial trials) are often required by the due process clause of the federal constitution<sup>4</sup> as well as by the Administrative Procedure Act (APA),<sup>5</sup> by statutes applicable to particular administrative schemes, or by procedural regulations. However, formal adjudication by no means fills the administrative adjudicatory space. There are many schemes of adjudication with respect to which no provision of the Constitution or of a statute, executive order, or procedural regulation requires an evidentiary hearing or, indeed, any procedure at all. We refer to these cases as *informal adjudication*.

The term “formal adjudication” is often used to describe the types of hearings described by the APA. The initial decisionmaker in APA formal adjudication is an agency official called an Administrative Law Judge (ALJ) who works for the agency in question but has substantial de jure and de facto decisional independence. However, we use the

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3. This definition is not the same as that provided by the federal Administrative Procedure Act, 5 U.S.C. § 551, which does not properly distinguish between adjudication and rulemaking. Sometimes the term “quasi-judicial” is used to describe adjudicatory action. In many countries, agency adjudicatory decisions are referred to as “administrative acts.” Israeli practice distinguishes between quasi-judicial, quasi-legislative, and administrative action. *See infra* Part II.A.

4. U.S. CONST. arts. V (relating to the federal government), XIV (relating to state or local government).

5. 5 U.S.C. §§ 551, 554, 556–557.

term “formal adjudication” more broadly to include evidentiary hearings required by due process or by statutes other than the APA, or by other sources of law such as executive orders or procedural regulations. For example, disputes about deportation are resolved by formal trial-type hearings required by specific statutes (and in many situations by due process); however, the federal APA is inapplicable to immigration cases,<sup>6</sup> meaning that the initial decisionmaker is not an ALJ.

In formal adjudication, the decisionmaker must be impartial and cannot have any adversarial involvement in the case (such as having served as an investigator or advocate on the agency’s behalf). The decisionmaker cannot consider any evidentiary inputs except those introduced at the hearing (the “exclusive record” rule). U.S. judicial practice calls for closed review of agency adjudicatory decisions in both formal and informal adjudication. As we will observe, however,<sup>7</sup> the case for closed review is much stronger for formal than for informal adjudication.

### 1. Closed Record

The closed record is deeply rooted in U.S. legal culture. In ordinary litigation, an appellate court is confined to the record made before the trial court.<sup>8</sup> Because of separation of powers, the closed record approach seems even more natural in the world of administrative adjudication,<sup>9</sup> since the court is reviewing action taken by a coordinate branch of government rather than by a lower court. Indeed, the APA judicial review provision (applicable to review of all types of agency action) requires that a court “shall review the whole record,” which at least implies a closed record.<sup>10</sup>

The closed record requirement reflects important efficiency concerns. In the case of formal adjudication, the hearing has already generated an organized and complete record for judicial review, consisting of the transcript of testimony and argument and documents submitted into evidence. It would be costly and cause significant delays for the reviewing court to make a new record by taking evidence that the agency had not considered.<sup>11</sup> Moreover, judicial review

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6. See *Marcello v. Bonds*, 349 U.S. 302 (1955).

7. See *infra* text accompanying notes 22–24.

8. See Jeffrey C. Dobbins, *New Evidence on Appeal*, 90 MINN. L. REV. 2016 (2012).

9. For a history of the closed record rule in federal administrative adjudication, see Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 933–36 (1993).

10. 5 U.S.C. § 706 *in fine*. The final clause of the provision reads in whole: “In making the foregoing determinations [regarding the legality of the administrative action], the court shall review the *whole record* or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” *Id.* (emphasis added). The “whole record” language in the APA means that a court must consider the evidence in the record that detracts from the agency’s conclusion as well as the evidence that justifies it. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951).

11. See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3 (2015).

of formal adjudication often takes place at the appellate-court rather than the trial-court level; appellate courts are not equipped (and not accustomed) to conduct trials.

In addition, U.S. judicial review is constrained by *deference* doctrines that would be undermined if a reviewing court could consider new evidence. Judicial review of agency fact finding is limited by the “substantial evidence” test, meaning that the reviewing court must sustain “reasonable” findings of fact by the agency even if the court disagrees with them.<sup>12</sup> If the reviewing court could consider new evidence, the court would become the fact finder and the “substantial evidence” test would be negated. Moreover, if the court could consider new evidence, the private party would have a perverse incentive to hold back its best evidence until the judicial review phase, in order to deny the agency a chance to consider (and perhaps discredit) it. In U.S. parlance, this practice is referred to as “sandbagging.”

## 2. Closed Reasons

In U.S. administrative law, agencies must state the reasons for their actions in order for reviewing courts to evaluate the rationality of those actions.<sup>13</sup> The reasons must be stated contemporaneously with the agency decision, not advanced for the first time at the judicial review stage. The source of the “closed reasons” rule in the United States is the first *Chenery* case.<sup>14</sup> The two *Chenery* cases involved decisions by the Securities and Exchange Commission (SEC) requiring officers of a utility company to relinquish a large profit earned by acquiring preferred stock while administering the company’s reorganization, then converting it to common stock. The rationale for the SEC’s decision in *Chenery I* was that the insiders violated equitable fiduciary duty doctrines. The Supreme Court reversed, holding that equity rules did not support the SEC’s decision. The SEC argued that its decision could be justified by a different reason, namely its experience in administering public utility reorganizations. However, the Supreme Court refused to consider this reason because it was a “post hoc” rationalization offered for the first time on judicial review.<sup>15</sup>

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12. 5 U.S.C. § 706(2)(E).

13. For discussion of the centrality of the reason-giving requirement in U.S. administrative law, see Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1817–23 (2012); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387. For a comparative account of reason giving, see Peter Cane, *Records, Reasons and Rationality in Judicial Control of Administrative Power: England, the US and Australia*, 48 ISR. L. REV. 309 (2015).

14. Sec. & Exch. Comm’n v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1942).

15. See *id.* at 95: “We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” The SEC then re-decided the case, this time justifying the decision by its administrative experience. The Supreme Court upheld the SEC’s decision. Sec. & Exch. Comm’n v. *Chenery Corp.*, 332 U.S. 194 (1947).

The closed reasons rule is justified by considerations derived from the separation of powers.<sup>16</sup> The SEC is responsible for administering the securities law and it must make the initial decision about whether that law justified the sanction it imposed.<sup>17</sup> Consideration by the courts of post-hoc rationalizations for agency decisions would be inconsistent with the SEC's statutory responsibility and would make the court, rather than the agency, the instrument of policy articulation.

The *Chenery* rule also makes good pragmatic sense. It promotes rigorous reasoning by agency staff professionals and agency heads, because it induces them to settle on a rationale as part of the decision-making process. It helps to ensure that the reasons will be supported by the written record. It means that the agency's reasons are determined by the agency's professionals (such as scientists and experienced staffers) and by politically responsible agency heads, rather than by government lawyers on judicial review.<sup>18</sup> Moreover, a policy of requiring agency decisionmakers to furnish contemporaneous explanations enables parties to decide whether they have grounds for an appeal.<sup>19</sup>

In addition, the *Chenery* rule is justified by considerations relating to agency accountability. It forces agency heads to articulate their positions in overt ways that facilitate political oversight of those positions. Otherwise, the agency could avoid disclosure of its reasoning (and thus forestall a political backlash) if no party sought review or the case was settled rather than decided by an appellate court. In all of these ways, *Chenery* contributes to the integrity of discretionary decision making.

### 3. Closed Arguments

The "closed arguments" rule (also known as "issue exhaustion") requires a private party to raise at the agency level every argument that the party wishes to raise at the judicial review level.<sup>20</sup> Any

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16. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007) (grounding *Chenery* in delegation doctrine and arguing that a condition of delegation is that agencies identify their reasons for acting); Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CINN. L. REV. 817 (2012) (criticizing rigid application of the *Chenery* doctrine).

17. *Chenery I*, 318 U.S. at 88.

18. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1043 (2011).

19. See *T Mobile South v. City of Roswell*, 134 S. Ct. 2361 (2014) (finding that the local government decisionmaker had to furnish a reason statement contemporaneously with its land use decision in order to permit private parties to decide whether to appeal within the short statutory limitation period).

20. See, e.g., *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946). In *Aragon*, the Court said: "A reviewing court usurps the agency function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Id.* The closed argument rule originated in the context of formal adjudication but is now applied to the review of all forms of agency action.



argument not made at the agency level is considered to have been waived. Again, this rule serves interests arising out of separation of powers, deference, and efficiency. The agency should have an opportunity to remedy a procedural defect or to apply its expertise to a policy objection before a court considers those issues. Moreover, the *Chevron* doctrine requires a court to uphold any reasonable agency interpretation of an ambiguous statute.<sup>21</sup> If the court could entertain arguments about statutory interpretation that the agency never considered, *Chevron* would be undermined.

#### 4. Closed Review of Informal Adjudication

The same closed review rules apply to judicial review of decisions reached by informal adjudication.<sup>22</sup> However, the circumstances of formal and informal adjudication are quite different. In informal adjudication, an agency may never have conducted an evidentiary hearing (or any kind of hearing) and is not limited by the exclusive record requirement. Often, the agency makes its decision by considering economic or environmental studies and informally consulting the parties. Nevertheless, the Supreme Court ruled that judicial review of informal adjudication decisions must be on the basis of a closed record, consisting of all materials considered by responsible agency staff members.<sup>23</sup> These materials may consist of a large number of documents contained in many paper or electronic files. Assembling such a “record” poses serious practical difficulties. In addition, the closed reasons rule applies, even though the agency might not have been legally required to state reasons, and the closed arguments rule applies even though there was never an organized procedure by which the private parties could make arguments. Because of the differences between formal and informal adjudication, the case for closed review of decisions reached by informal adjudication is tenuous.<sup>24</sup>

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21. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A related doctrine requires a reviewing court to uphold an agency’s interpretation of its own regulation unless plainly erroneous or inconsistent with the regulation. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 412, 414 (1945).

22. As discussed above, informal adjudication means adjudication that is not conducted according to a legally required evidentiary hearing. See *supra* text following note 5.

23. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (involving review of an agency’s rejection of an application to open a bank); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (reviewing an agency’s rejection of a petition to modify a nuclear reactor license). If the reviewing court is unable to decide the case based on the administrative record or on the agency’s contemporaneous statement of reasons, it should remand the case to the agency for further consideration. See *Camp*, 411 U.S. at 143.

24. See David S. Black & Gregory R. Hallmark, *Procedural Approaches to Filling Gaps in the Administrative Record in Bid Protests Before the U.S. Court of Federal Claims*, 43 PUB. CONT. L.J. 213 (2014) (discussing problems of closed review of judicial review of government contract litigation); Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57, 89–97 (2009) (addressing problems of closed record review of IRS-collection due process decisions).

### B. Rulemaking

“Rulemaking” is the process for adoption of “rules,” meaning agency action of general applicability.<sup>25</sup> The APA prescribes public notice and opportunity for comment before a rule is adopted.<sup>26</sup> As developed by post-1946 case law and practice, the “notice and comment” system generates a “record” consisting of the documents prepared by the agency staff in formulating the rule, public comments, transcripts of public meetings, material such as scientific studies that the agency considers, required agency analyses (such as environmental impact statements), and a thorough statement of reasons. The statement of reasons must explain why the agency disagreed with material public comments.

Judicial review of rules is closed, meaning that at the judicial review stage, neither side<sup>27</sup> can introduce new evidence, the private party cannot make arguments that were never raised by anyone during the comment period,<sup>28</sup> and the agency cannot bring forth new reasons.<sup>29</sup> The closure doctrines fit well with the APA rulemaking procedure, because the process generates a complete and organized record and a complete reasons statement. As in the case of adjudication, the rationale for closed record review of rules arises out of concern with efficiency, separation of powers, and deference to agency expertise. In addition, judicial review of rules usually occurs in appellate courts before the rule is ever enforced; as a result, no evidence about how the rule operates in practice is available.<sup>30</sup> The parties who seek pre-enforcement review are typically the same ones

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25. In American practice, the terms “rule” and “regulation” mean the same thing, and the words are used interchangeably in this article. This definition is not the same as that provided in the federal APA, which fails to adequately distinguish rulemaking from adjudication. *See* 5 U.S.C. § 551(4).

26. 5 U.S.C. § 553. The APA also provides for “formal rulemaking,” which involves a trial-type process, but this procedure is virtually never used. An enormous body of law implements the APA’s deceptively simple informal rulemaking provisions. *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012).

27. It is unclear whether the agency can include material in the rulemaking record that was considered by the agency heads but was added after the close of the comment period, so that outsiders never had an opportunity to challenge it. *See* LUBBERS, *supra* note 26, at 293–99.

28. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148–50 (D.C. Cir. 2005) (holding that arguments not raised during the rulemaking process are waived because they are not the kind of clear points that the agency must raise on its own). *See* ADMIN. CONFERENCE OF THE U.S., STATEMENT 19: ISSUE EXHAUSTION IN PREENFORCEMENT JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING (adopted Sept. 25, 2015); Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?* (Sept. 5, 2016), <http://ssrn.com/abstract=2764937>.

29. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 49–50 (1983) (rejecting a government attempt to supply post-hoc reasons for the agency’s rejection of mandatory airbags).

30. Pre-enforcement review of rules has become the norm because the Supreme Court has ruled that such challenges are generally ripe for review. *See Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).



that were involved in the rulemaking process, so they have no new evidence or arguments to offer at the judicial review stage (unless they have strategically held them back by “sandbagging,” which obviously should be discouraged).

However, there are practical and theoretical arguments against closed record judicial review of rules that do not arise in connection with formal adjudication. The rulemaking record includes all materials “considered” by the agency staff and agency head during the rulemaking process, whether these materials are helpful to the agency or to opponents of the rule. There may be an immense amount of such material. Moreover, there are numerous conceptual and practical problems of deciding what should be included and excluded from the rulemaking record.<sup>31</sup>

The agency must anticipate that its rule will be challenged in court, so it must contemporaneously assemble and organize all this material in preparation for judicial review. Because of the closed reasons requirement, an agency’s statement of reasons for the rule must anticipate every possible objection that challengers to the rule might raise. The closed argument rule requires challengers to raise every conceivable argument against the rule (without knowing what form the final rule will take), forcing them to submit voluminous comments. The closed review requirements thus generate massive rulemaking records, including a statement of reasons that may run to hundreds of pages. All of this is a major contributor to what U.S. commentators

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31. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975). ACUS recently adopted a recommendation concerning the record for judicial review of rules. Under ACUS Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, available at <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>, all materials “considered” by the agency should be included in the administrative record that is certified to the reviewing court. According to the recommendation, the term “considered” means that the document was reviewed “by an individual with substantive responsibilities in connection with the rulemaking,” even if the reviewer disagreed with the document (unless the individual determined that it was not germane to the subject matter of the rulemaking). Since an agency normally has a proposed rule under consideration for a lengthy period before it is proposed for public comment and for a lengthy period after the comment period closes, and since numerous staffers have “substantive responsibilities in connection with the rulemaking,” a potentially enormous number of documents must be certified to the reviewing court. Even so, it is unclear whether certain kinds of documents must be included. For example, what about memoranda summarizing telephone conversations or documenting discussions with outsiders, with representatives of other agencies, or with White House staff or the Office of Management and Budget? What about material the agency staff derived from internet searches, rejected drafts, and the like? See generally LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING (2013), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking> (consultant’s report to the Judicial Review Committee of the Administrative Conference of the United States) [hereinafter BECK, AGENCY PRACTICES]; Leland E. Beck, *Judicial Review of Final Rules and the Administrative Record Problem*, 40 ADMIN. & REG. LAW NEWS, Fall 2014, at 11. What about material contained in pre-decisional staff memoranda (which is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(5))? See LUBBERS, *supra* note 26, at 295–97.

call “rulemaking ossification.”<sup>32</sup> And the agency must do all of this for every rule it adopts (whether or not through notice-and-comment), even though many rules are never reviewed at all.

Although many rules are reviewed before they go into effect, others are not reviewed until they are enforced or otherwise applied. This may occur years or decades after the rule is adopted. While the case law allows the enforcement target to challenge the legality of the rule, even if statutory time limits on challenges to the rule have expired,<sup>33</sup> the closed review requirements apply to such challenges. The challenger is allowed to introduce new evidence to establish that the rule does not apply to the challenger or that the challenger did not violate the rule. However, the challenger is not permitted to bring forth new evidence or arguments that the rule is contrary to the governing statute or unreasonable.<sup>34</sup> Application of closed review doctrines in this situation gives rise to serious concerns that do not arise in connection with pre-enforcement review. Often, persons against whom the rule is enforced did not know about or chose not to participate in the notice-and-comment process, or never imagined that the rule could be applied to them.

### C. *Judicial Review of Policy Implementation*

The universe of policy-implementation decisions is enormous.<sup>35</sup> Policy implementation includes agency decisions such as designing highway routes, priority setting, maintaining databases, allocating budgeted funds between programs, approving state Medicaid rate adjustments,<sup>36</sup> administering grant-in-aid programs managed by states,<sup>37</sup> managing public institutions such as hospitals or prisons, conducting environmental impact assessment, holding architectural

32. See Jerry Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185 (1994); Thomas O. McGarrity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

33. See Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2223–35 (2011).

34. See *RSR Corp. v. Env'tl. Prot. Agency*, 102 F.3d 1266 (D.C. Cir. 1997). In *RSR*, a statute permitted a challenge to the rule within ninety days after it was adopted and precluded challenges thereafter. *RSR* challenged the rule three years after adoption, when the rule was applied to it. *RSR* was barred from introducing evidence of a new scientific study that it claimed would undermine the rule. However, it was allowed to introduce evidence challenging the agency's determination that the rule applied to it. *Id.* at 1271.

35. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1840–41 (arguing for a constitutional duty to supervise agencies that carry out policy-implementation functions); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L.J. 95, 125–26 (2003) (contending that the APA is deficient by failing to structure policy-implementation decisions).

36. See Brietta R. Clark, *APA Deference After Independent Living Center: Why Informal Adjudicatory Action Needs a Hard Look*, 102 KY. L.J. 211 (2014).

37. See Karen M. Tani, *Administrative Equal Protection: Cooperative Federalism in the Shadow of the Fourteenth Amendment*, 100 CORNELL L. REV. 825 (2015).

design competitions, making decisions involving multiple uses of public lands, siting airports or power plants, protecting endangered species habitats, and countless other examples. These types of governmental decision making involve a mix of fact finding, legal interpretation, law application, policy making, and policy application, mixed up with concerns about political repercussions, public relations, federalism, budget constraints, and public administration. The APA suggests that agency action is either rulemaking or adjudication. But this dichotomous approach works poorly when it comes to policy implementation. Policy-implementation decisions are neither adjudication (since they are not directed at specific private parties) nor rulemaking (since they do not establish general rules), as this Article has defined those terms.<sup>38</sup> Most policy implementation is not judicially reviewable, but some of it is.

Judicial review of policy-implementation decisions involves different considerations than review of adjudication or rulemaking. The case for closed record review of such decisions is uneasy<sup>39</sup> because the decision-making process does not generate a structured evidentiary record and assembling it is a laborious and deeply problematic process. The record should contain all of the materials that responsible staff members considered in making the decision. As a result, agency staff must scrutinize vast quantities of disorganized and widely dispersed files. Similarly, the process may not give rise to a thoughtful agency statement of reasons and may not furnish an opportunity for the private parties to make arguments.

The key decision about judicial review of policy implementation is *Overton Park*.<sup>40</sup> The federal Department of Transportation (DOT) decided to provide funds to construct an interstate highway through a park in Memphis, even though a statute prohibited building roads through a park unless there was no “feasible and prudent” alternative route.<sup>41</sup> The agency did not explain how its decision to route the road through the park was consistent with the statute. The process of planning the highway route consumed many years, involved a costly and contentious decision-making process, and was based on a

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38. See *supra* notes 3, 25 and accompanying text; *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 147 (finding that many agency actions cannot be classified as either adjudication or rulemaking).

39. See generally Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. AM. U. 179 (1996); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984); James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301 (2008); Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575 (2009).

40. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

41. For a detailed treatment of the legislative background to this provision, see Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—Of Politics and Law, Young Lawyers and the Highway Goliath*, in *ADMINISTRATIVE LAW STORIES* 258, 268–78 (Peter Strauss ed., 2006).

complex mix of planning, political, and economic considerations, as well as park protection. Although there were numerous public hearings about the highway route, there was no organized process by which the agency constructed a record suitable for judicial review of the decision. Indeed, it was unclear whether the Department's heavily political decision was reviewable at all.

The Supreme Court held that the decision to route the highway through the park was reviewable; the statutory "feasible and prudent" provision provided a legal standard by which the agency decision could be reviewed.<sup>42</sup> The Court held that DOT's discretionary decision on routing the highway should be reviewed under the APA's standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"<sup>43</sup> (hereinafter referred to as the "arbitrary and capricious" test). Although such review should be deferential, the court should engage in "thorough, probing, in-depth review."<sup>44</sup> This language gave birth to the now well-recognized federal practice of "hard-look" review of discretionary action.<sup>45</sup>

The Supreme Court ruled that review of the highway routing decision was closed, and that review should be based on the record before the agency, rather than on a new record constructed at the judicial review stage.<sup>46</sup> This holding is questionable, because the APA explicitly recognizes the possibility of de novo judicial review when the agency decision resulted from a process that did not generate an exclusive record.<sup>47</sup> The Supreme Court distorted the legislative history of this provision and gave it a narrow construction that made it inapplicable to the *Overton Park* situation.<sup>48</sup>

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42. Because the statute provided a legal standard, the judicial review exception for action "committed to agency discretion" in the APA, 5 U.S.C. § 701(a)(2), was inapplicable.

43. 5 U.S.C. § 706(2)(A).

44. *Overton Park*, 401 U.S. at 415.

45. See, e.g., *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497 (2007) (hard-look review of EPA's choice not to regulate carbon dioxide motor vehicle emissions); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (hard-look review of decision not to require automatic seat belts); *Bus. Roundtable v. Sec. & Exch. Comm'n*, 647 F.3d 1144 (D.C. Cir. 2011) (hard-look review of SEC's economic analysis in support of a change in proxy rules).

46. "That review is to be based on the full administrative record that was before the Secretary at the time he made the decision." *Overton Park*, 401 U.S. at 420.

47. "A reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F).

48. At the time the APA was adopted, the general understanding was that courts would provide de novo review of any agency action that was not required by statute to be based on an exclusive record. The APA's legislative history confirms that Congress intended that this practice would continue. The House Committee wrote:

In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determina-

According to *Overton Park*, DOT was not legally required to state the reasons for its choice of route. However, if it failed to provide a reasons statement, the reviewing court should determine those unstated reasons. If necessary, the court should require the officials who made the decision to testify concerning their reasoning process, but they could not come up with new reasons for their actions.<sup>49</sup> Thus *Overton Park* established that the closed reasons requirement of *Chenery* applied to policy-implementation decisions, even though no statute or other source of law required the agency to state its reasons for taking action. The consequence of this decision was a lengthy trial that attempted to reconstruct what DOT officials knew or should have known.<sup>50</sup> The judge determined that the Secretary of Transportation had not seriously addressed the availability of a feasible and prudent alternative, so the matter was remanded to the Secretary for a new decision.<sup>51</sup>

Later cases overruled this aspect of the *Overton Park* decision. An inadequately explained discretionary decision is not to be reviewed through a trial that ascertains the reasons for the agency action. Instead, the reviewing court is limited to the materials considered by the decisionmaker (a closed record). If the decision cannot be reviewed on the basis of this record or the contemporaneous reasons given by the agency, the case must be remanded to the agency to reconsider the case and supply a new reasons statement.<sup>52</sup>

#### D. *Exceptions to Closed Review*

In general, the United States practices closed judicial review of all forms of agency action. Nevertheless, reviewing courts recognize a number of rather nebulous exceptions to the various closed review doctrines. In general, these exceptions (many of them questioned in academic writing and

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tion of any relevant question of law must be determined on record somewhere and if Congress has not provided that an agency shall do so, then the record must be made in court.

H.R. REP. NO. 79-1980, at 45–46 (1946). See Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 755–56, 763–68 (1975); Stephen F. Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 417–24 (1975) (observing that APA legislative history indicates that Congress intended a broad use of the provision for de novo trials).

49. 401 U.S. at 420:

But since the bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary’s action was justifiable under the applicable standard.

50. *Citizens to Preserve Overton Park v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972). See Strauss, *supra* note 41, at 329.

51. The highway was never completed. Strauss, *supra* note 41, at 332.

52. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), discussed *supra* note 23.



in the case law) apply only to “unusual circumstances justifying a departure from this general rule.”<sup>53</sup> Because most cases do not present “unusual circumstances,” reviewing courts reject most attempts to introduce new evidence, new reasons, or new arguments at the judicial review stage.

### 1. Closed Record Requirement

Because new evidence is usually offered for the purpose of impeaching the agency decision, reviewing courts typically reject it.<sup>54</sup> Nevertheless, various more or less problematic exceptions to the closed record rule have emerged.

#### a. Completion of the Record

Some cases involve attempts to complete the record because the challenger claims that the agency failed to include materials that should have been included. These might be documents that some member of the agency staff had considered during the decision-making process and that support the challenger’s argument that the decision is arbitrary and capricious. Or the agency may have excluded from the record documents offered by a party that should have been considered. If the challenger establishes a *prima facie* case that the record is incomplete, it may be allowed to engage in discovery proceedings to determine what additional materials should be included.<sup>55</sup>

#### b. Procedural Failures or Bad Faith

It is possible to supplement the record to establish that the agency action is tainted by some form of bad faith or by violation of a procedural norm that cannot be established by the existing record.<sup>56</sup> This

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53. See, e.g., *Frontier Fishing Corp. v. Pritzker*, 770 F.3d 58, 63 (1st Cir. 2014) (holding that the administrative law judge did not abuse his discretion in refusing to admit evidence in a remanded case that a party had failed to introduce during the earlier hearing); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (finding that the lower court did not abuse its discretion in refusing to add to the record post-decisional letters to the agency that disagreed with the agency’s conclusions).

54. See generally BECK, AGENCY PRACTICES, *supra* note 31, at 67; Saul, *supra* note 39; Rohlf, *supra* note 39; Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333.

55. McMillan, Jr. & Peterson, *supra* note 54, at 340–50, 367–73; *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 33–37 (N.D. Tex. 1981) (discovery was authorized to obtain all evidence considered by the agency where the record was obviously incomplete); *Env’tl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 660–61 (D.D.C. 1978) (holding that an agency cannot skew the record in its favor by excluding information in its own files that are pertinent to the proceeding in question).

56. *Overton Park*, 401 U.S. at 420 (“[T]here must be a strong showing of bad faith or improper behavior before such inquiry may be made.”); *Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47 (D.C. Cir. 2013) (exception limited to “gross procedural deficiencies”); *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 196 (E.D.N.Y. 2013) (considering non-record evidence because of agency bad faith). See Saul, *supra* note 39, at 1308 (noting that every circuit has recognized this exception); BECK, AGENCY PRACTICES, *supra* note 31, at 72.



exception arises most frequently in the review of adjudicatory disputes. For example, a closed record would fail to disclose newly discovered evidence revealing that the decisionmaker was biased, received improper *ex parte* communications from outsiders or from adversarial staff members, or was subjected to political pressure.

### c. National Environmental Policy Act Cases

The National Environmental Policy Act (NEPA)<sup>57</sup> is a federal statute that requires an agency to consider environmental effects in its decision making. If a project might have a major effect on the environment, the agency must prepare an environmental impact statement (EIS). Some cases suggest that an open record is appropriate in NEPA cases where the issue is the adequacy of the environmental impact statement (EIS).<sup>58</sup> The purpose of the EIS is to inform the public and the agency of all of the major environmental effects of a particular decision. On review, a challenger might assert that the agency failed in its investigative function by not taking account of certain negative environmental impacts, even though these impacts had not been raised by public comments in the record or discussed by the agency. According to some cases, a reviewing court must be allowed to resort to non-record evidence to determine “whether an EIS has neglected to mention a serious environmental consequence, or otherwise swept stubborn problems or serious criticism under the rug.”<sup>59</sup> Other cases disagree with this analysis and enforce a closed record in all NEPA cases.<sup>60</sup> Other NEPA cases have employed open records to show that an agency has committed itself to a project before preparing its EIS (so-called “predetermination”).<sup>61</sup>

### d. Failure to Consider Relevant Factors

Some cases allow a challenger to introduce evidence to establish that the agency failed to consider relevant factors in making a

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57. 42 U.S.C. §§ 4321–4347.

58. *See French, supra* note 9.

59. *County of Suffolk v. Sec’y of the Interior*, 562 F.2d 1368, 1384–85 (2d Cir. 1977) (citations and internal quotation marks omitted). However, some courts have indicated that the challenger should first seek to supplement the record at the agency level before attempting to introduce the new material in court. *See, e.g., Lands Council v. Powell*, 395 F.3d 1019, 1029 n.10 (9th Cir. 2005).

60. *Cronin v. Dep’t of Agric.*, 919 F.2d 439, 443–45 (7th Cir. 1990) (precluding use of new evidence in a NEPA case because the agency should have the first opportunity to pass on such evidence).

61. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716–17 (10th Cir. 2010); Jesse Garfinkle, *Scope of Reviewable Evidence in NEPA Predetermination Cases: Why Going Off the Record Puts Courts on Target*, 39 B.C. ENVTL. AFF. L. REV. 161 (2012).

discretionary decision (or that it took into account factors it should not have considered, but without actually mentioning them).<sup>62</sup>

#### e. Technically Difficult Cases

Some cases allow a reviewing court to receive evidence to help it understand difficult technical issues.<sup>63</sup>

#### f. Predictive Information

Some cases allow material that postdates agency consideration in order to determine whether agency predictions turned out to be correct.<sup>64</sup>

### 2. Closed Reasons

Numerous cases allow exceptions to the closed reasons requirement.<sup>65</sup> Some cases permit an agency to furnish additional material illuminating the previously stated reasons for its action, as opposed to providing a new rationalization for that decision.<sup>66</sup> Still

62. "It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *ASARCO, Inc. v. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980). See similarly *District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015); *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1987); *McMillan, Jr. & Peterson*, *supra* note 54, at 356–59. But see *Young*, *supra* note 39, at 229–42 (criticizing the use of extra-record evidence to demonstrate the irrationality of the decision).

63. See *Arkla Expl. Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984):

The district court's admission of explanatory evidence served to help the court understand the complex nature of petroleum geology. It also served the related and equally important purpose of educating the court as to the kinds of scientific, technical, and economic data that are relevant to a legally correct determination.

See also *McMillan, Jr. & Peterson*, *supra* note 54, at 359–60; *BECK, AGENCY PRACTICES*, *supra* note 31, at 70; *Young*, *supra* note 39, at 232–33, 242–45.

64. *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 540 F.2d 1023, 1034 (10th Cir. 1976) (accepting post-promulgation evidence to establish that the agency's predictions were correct and thus not vulnerable to challenge); *BECK, AGENCY PRACTICES*, *supra* note 31, at 71. In *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467, 516–17 (2002), the Supreme Court relied on post-promulgation data provided by the litigants to establish the reasonableness of FCC regulations.

65. See *Murphy*, *supra* note 16, at 858–74 (arguing that courts often ignore the closed reasons rule when it is convenient to do so). A court can also deploy a harmless error analysis when it wishes to avoid the rule against consideration of new reasons. In addition, the common practice of remanding without vacating the agency decision has the effect of negating the closed reasons requirement. Remand without vacation allows the agency action to go into effect while the agency corrects the *Chenery* problem by stating acceptable reasons.

66. *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81–82 (2d Cir. 2006) (rejecting the agency's explanation; since the original decision was unexplained, any explanation would be a new rationalization); *Black & Hallmark*, *supra* note 24, at 234–43 (noting that agencies are permitted to supplement the record with explanations contained in affidavits and by materials prepared during bid protests to the Government Accountability Office).

others refuse to apply *Chenery* when it seems nonsensical to do so.<sup>67</sup>

### 3. Closed Arguments

The courts apply the closed argument rule in a somewhat flexible manner.<sup>68</sup> This is unsurprising, given that the closed argument rule (often described as “issue exhaustion”) is a branch of the doctrine of exhaustion of remedies, a set of rules that is subject to numerous exceptions.<sup>69</sup> Thus, the Supreme Court allowed a Social Security applicant to raise issues on appeal that he had not raised in an unsuccessful attempt to obtain review of an ALJ decision from the Social Security Appeals Council.<sup>70</sup> The Court recognized that parties seeking disability benefits are often unrepresented by lawyers and may be quite unsophisticated; moreover, the proceedings are inquisitorial in nature and the Appeal Council has primary responsibility for identifying the issues.

## II. ISRAELI PRACTICE: OPEN JUDICIAL REVIEW

In contrast to the United States, Israeli case law contains relatively little discussion of the question of open or closed judicial review. Nevertheless, Israeli practice has moved away from the British practice of closed review to a position located closer to the open end of the spectrum.<sup>71</sup> Despite the lack of developed doctrines, the Israeli

67. See, e.g., *Bagdonas v. Dep’t of the Treasury*, 93 F.3d 422 (7th Cir. 1996) (accepting the explanatory affidavit of an official who was responsible for an earlier unexplained decision).

68. See Lubbers, *supra* note 28 (listing numerous exceptions to the application of issue exhaustion in rulemaking and expressing concern about aggressive use of issue exhaustion to block judicial review of rules); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1307–12 (1997) (discussing numerous exceptions to the closed argument rule in adjudication). Most of the exceptions parallel the exceptions to the exhaustion of remedies requirement. One such exception applies if “manifest injustice would result from the court’s refusal to entertain the unpreserved issue on judicial review.” *Id.* at 1309–10. Arguments not raised before an agency might be considered by the court in “exceptional circumstances,” such as “in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.” *Flynn v. Comm’r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001). New arguments may be considered in cases in which an agency has a duty to examine key assumptions even if nobody objected during the comment period. *Okla. Dep’t of Env’tl. Quality v. Env’tl. Prot. Agency*, 740 F.3d 185 (D.C. Cir. 2014). Since agencies lack power to decide on-the-face constitutional arguments, these need not be raised during the rulemaking process. *Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 134 S. Ct. 2550 (2014).

69. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 15.2 (5th ed. 2010).

70. *Sims v. Apfel*, 530 U.S. 103 (2000).

71. Regarding the English practice, see *infra* text accompanying notes 91–92. Peter Cane contends that U.K. practice has not always followed the closed record rule. See Cane, *supra* note 13.

practice of open review influences many aspects of administrative law and interrelates with major judicial review issues.

Unlike the United States, Israel has yet to adopt a comprehensive statute that regulates administrative procedures.<sup>72</sup> The principles governing administrative procedure are largely the product of case law developed by the High Court of Justice (HCJ). The HCJ is the Israeli Supreme Court sitting in its capacity as the superior administrative court. Judicial review in Israel is carried out either by the HCJ, which functions as a court of first and last instance in many of the most important administrative cases, or by the administrative courts (which are district courts sitting in administrative cases and hear the bulk of the less important administrative cases). In the latter situation, the decisions of the administrative courts are subject to appeal before the HCJ.<sup>73</sup>

#### A. *Types of Administrative Procedure*

Israeli administrative law does not contain mandatory procedures for “rulemaking” and “adjudication.” Instead, and following in the footsteps of U.K. administrative law, the case law distinguishes *quasi-judicial* and *quasi-legislative* actions.<sup>74</sup>

Quasi-legislative functions include the formation of regulations and administrative policies or guidelines. No general statutory procedure

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72. Recently the Israeli Ministry of Justice proposed a bill providing for general administrative procedure. See ISR., MINISTRY OF JUSTICE, TAZKIR HOK: SIDREI MINHAL (HASDART AVODAT HARASHUT HAMINHALIT VEZCHUIOT HAPONE LARASHUT [WHITE PAPER: ADMINISTRATIVE PROCEDURE (AGENCY PROCEDURE AND RIGHTS OF CITIZENS ADDRESSING ADMINISTRATIVE AGENCIES)] (2014) (on file with authors).

73. When a civil or criminal dispute arises in Israel, it normally makes its way to a county court. County court decisions are appealed to the district court. Only a handful of such cases reach the Supreme Court, which considers only questions of law raised by the case, a function referred to as “cassation.” The Supreme Court also sits as an appellate court for cases involving certain serious criminal offenses or significant civil disputes. Such cases are tried by the district court and then heard on appeal by the Supreme Court. This procedure also applies to decisions of administrative tribunals. See Administrative Affairs Courts Law, 5760–2000, SH No. 1739 p. 190. Prior to 2000, all cases involving public agencies exercising their legal powers (other than decisions of tribunals) were brought directly before the Supreme Court (sitting as the HCJ) and resolved by the HCJ with no further appeal. A law passed in 2000 routed less important administrative cases to the district courts (referred to as administrative courts for purposes of this function). See *id.* Therefore, the Supreme Court in Israel serves three different functions: as a court of cassation, a court of appeal, and a court of first (and last) instance for the more important administrative law judicial review cases. The Supreme Court has fifteen judges, who normally sit in panels of three (except in unusually important cases, where the panel is composed of a larger, uneven number of judges).

74. There is a third category, known as “administrative action,” to which the principles of natural justice (i.e., fair hearing and the requirement of neutrality) do not apply. However, the definition of “administrative action” is relatively narrow and the definition of “quasi-judicial” is wide. Quasi-judicial action includes almost any administrative action that may prejudice a private interest. See HCJ 3/58 Berman v. Minister of Interior 12(2) PD 1493, 1504 (1958); HCJ 76-77/63, 79/63 Trudler v. Election Officer 17 PD 2503, 2515 (1963). Administrative action is not further discussed in this article.

regulates the formation of regulations, except for the minimal requirement for publication in the official register.<sup>75</sup> However, many specific statutes contain additional requirements of consultation or approval by a Knesset (parliamentary) committee.<sup>76</sup> In addition, under guidelines adopted by the Attorney General, government authorities that adopt regulations must coordinate policies with other governmental units and consult experts and interested groups.<sup>77</sup> Israeli law does not include notice-and-comment procedures and excludes quasi-legislative procedures from the requirements of natural justice.

Nevertheless, the Supreme Court has imposed some important procedural requirements on agencies engaged in quasi-legislative decision making. For example, it ruled that agencies must provide reasons for policy decisions in some cases.<sup>78</sup> In addition, the HCJ has established that agencies that create policies must conduct a rational process of decision making. The requirements include systematic data collection, data processing, consultation with experts, review of professional reports, formation of general policies, assessments of alternatives, and (in some cases) generation of reasoned decisions.<sup>79</sup> These decisions do not amount to requiring agencies to create a record; as a result, discussion of the “record” in the context of judicial review of quasi-legislative actions is virtually nonexistent.

Quasi-judicial actions include individualized decisions such as licensing and state benefits. Such decisions are subject to the requirements of natural justice, meaning a neutral decisionmaker and a hearing at which the private party has an opportunity to tell its side of the story. Agencies are required to provide reasons for quasi-judicial decisions.<sup>80</sup> However, natural justice does not require agencies to utilize adversarial procedures.<sup>81</sup>

75. See Interpretation Ordinance, 5714–1954, § 17, SH No. 166 p. 2 (Isr.); CrimA 213/56 Att’y Gen. v. Alexandrovitz 11 PD 695 (1957).

76. For example, there is a general requirement for approval by a Knesset committee in case of regulations that carry potential criminal sanctions. See Penal Code, 5737–1977, ch. 1 (Basic Provisions), § 2(b).

77. Isr., Att’y Gen. Guideline No. 1.0001 (The Obligation to Consult Under the Law); Isr., Att’y Gen. Guideline No. 1.0002 (Administrative Guidelines), available at <http://index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/10004.pdf>. The Attorney General Guidelines apply to any unit of the central government (including all government offices) and may carry some formal binding force according to rulings of the HCJ. See, e.g., CA 3350/04 Gen. Manager of the Ministry of Interior v. Shenan (June 13, 2007) (unreported).

78. HCJ 2159/97 Regional Council Hof Ashkelon v. Minister of Interior 52(1) PD 75, 88–89 (1998). See also the discussion of the requirement to provide reasons and the Administrative Procedure Amendment (Statement of Reasons) Law 1958, *infra* text following note 115.

79. See HCJ 297/82 Berger v. Minister of Interior 37(3) PD 29 (1983) (per Shamgar, J.); HCJ 987/94 Euronet v. Minister of Commc’ns 48(5) PD 412 (1994). It is unclear to what extent these requirements apply to the formation of regulations. In any event, there is no duty to give a statement of reasons for regulations. The law regarding policy making (not performed by regulations) is less clear. See HCJ 2159/97 *Ashkelon*.

80. See *infra* text accompanying note 83.

81. See HCJ 3/58 Berman v. Minister of Interior 12(2) PD 1493, 1504 (1958); HCJ 531/79 Siat Halikud v. City Council of Petach Tikva 34(2) PD 566 (1980).

### B. *The Three Stages of Adjudicatory Proceedings*

There are typically three procedural stages for adjudicative proceedings.<sup>82</sup> The first is the initial administrative decision. In Israel, the initial decision is usually investigatory in nature and can be written by the investigator. Such proceedings are subject to the principles of natural justice. The decisionmaker is required to give reasons.<sup>83</sup>

The second (or "reconsideration") stage is often an appeal to an administrative tribunal which conducts a *de novo* merits review of the initial decision. Israel has no unified system of administrative tribunals like those in the United Kingdom or Australia.<sup>84</sup> The statute that regulates a specific field may provide for an appeal to a tribunal and define the powers and procedures of the tribunal. The Administrative Tribunals Law of 1992 provides the procedural framework for administrative tribunals and ensures their independence *vis-à-vis* the agencies,<sup>85</sup> but it only applies to those tribunals that are specified in the addendum to the statute. Therefore, most administrative tribunals are not subject to its general requirements, and are governed exclusively by the provisions of the specific statute at issue.<sup>86</sup> The Administrative Tribunals Law itself refers to the administrative record of agencies only indirectly in the context of the right of the appellant to have access to "documents in the possession of the authority relating to the decision," and does not confine the parties or the tribunal to such documents.<sup>87</sup>

The third stage (or the second stage if there is no tribunal or other form of administrative reconsideration) is judicial review conducted by either the administrative court or the HCJ.<sup>88</sup> At this stage the reviewing court holds the power to grant any remedy should it find the decision illegal. The judicial review stage is governed by the principle of deference to the original decision of the agency, meaning that the court should not replace the administrative policies with its own policy preferences. The court should interfere only on the basis of some illegality such as *ultra vires*, illegal purposes, or unreasonableness. Correspondingly, the court is not supposed to second-guess the

82. See Asimow, *supra* note 11.

83. Under the Administrative Procedure Amendment (Statement of Reasons) Law, 5719–1958, SH No. 264 p. 7. For an English translation of the law, see PUBLIC LAW IN ISRAEL 196–210 (Itzhak Zamir & Allen Zysblat eds., 1996).

84. In Australia, the Administrative Appeals Tribunal provides for reconsideration of the initial decisions of nearly all federal agencies. Similarly, in the United Kingdom, the First Tier Tribunal provides for reconsideration of the initial decisions of most government agencies. See Asimow, *supra* note 11, at 28.

85. Administrative Tribunals Law, 5752–1992, § 3, SH No. 1385 p. 90.

86. See Moshe Landau, *The Administrative Tribunal Law: An Introductory Note*, in PUBLIC LAW IN ISRAEL, *supra* note 83, at 189.

87. Administrative Tribunals Law, § 30(a) (translated by authors).

88. See Administrative Affairs Courts Law, 5760–2000, SH No. 1739. For an explanation of the distribution of judicial review cases between the administrative courts and the HCJ, see also *supra* note 73.



process of fact finding by the agency unless the administrative decision was not based upon “reasonable” evidence.<sup>89</sup> As we discuss later, however, Israeli courts apply the reasonableness test more broadly than in the United Kingdom, the United States, and many other countries.<sup>90</sup>

### C. *Closed and Open Judicial Review in Israel*

#### 1. The Record on Judicial Review

During the first two decades after Establishment, Israeli administrative law followed in the footsteps of English law with respect to the administrative record. Under English law, courts could overturn administrative decisions only if the action was *ultra vires* (which was the main ground for judicial review) or if there was an error on the face of the record (i.e., in the text of the decision).<sup>91</sup> Consequently, English courts had no need to consider issues relating to the administrative record, meaning the evidence presented to the agency.<sup>92</sup> Early decisions by the HCJ demonstrated loyalty to English doctrine, although even at that period the meaning of the term “record” (for purposes of applying the rule that courts could consider only errors appearing “on the face of the record”) remained rather vague.<sup>93</sup>

During the 1960s, however, the HCJ openly diverged from the English rule that confined the reviewing court to consideration of the terms of the decision rather than to the record of what occurred before the agency.<sup>94</sup> In the leading case of *Trudler v. Election Officer*,<sup>95</sup> the respondents argued that the petitioners’ attack on the Officer’s decision was not directed to an error on the face of the record and that the court was precluded from discussing any evidence or arguments not on the record. Justice Berenson pointed to the fact that

89. HCJ 442/71 *Lanski v. Minister of Interior* 26(2) PD 337 (1972); HCJ 987/94 *Euronet v. Minister of Commc’ns* 48(5) PD 412 (1994); HCJ 10907/04 *Soldoch v. Mayor of Rehovot* ¶¶ 30–35 (2010) (unreported). In applying the reasonableness standard, the court does not differentiate between review of tribunal and non-tribunal decisions.

90. See *infra* Part II.D.3.

91. See J.M. EVANS, *DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 109–10 (4th ed. 1980).

92. See *Cane*, *supra* note 13.

93. See, e.g., HCJ 69/55 *Boulos v. Minister of Dev.* 10 PD 673, 680 (1956); HCJ 20/59 *Kinsley v. Registrar of Communal Corp.* 14 PD 2297, 2307 (1960) (per Zilberg, J.). It is worth noting that further developments in English law also tied the question of the administrative record to the scope of the duty of agencies to provide reasons for their decisions. See, e.g., H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 228, 793 (10th ed. 2009).

94. It is worth mentioning that in civil (commercial) law, the courts of appeal are limited to the record developed at the original trial. See *Civil Procedure Regulations* 5744–1984, § 453, KT 4685 p. 2220 (Isr.). The regulations also acknowledge exceptions (see *id.* § 457) that were interpreted quite liberally by the Supreme Court. See CA 105/05 *Dahan v. Kason* (Nov. 10, 2005) (unreported). This rule also applies to civil litigation to which a public agency is a party. See, e.g., CA 546/04 *Jerusalem Municipality v. Kupat Holim Klalit* ¶¶ 17–23 (Aug. 20, 2009) (unreported).

95. HCJ 76-77/63, 79/63 *Trudler v. Election Officer* 17 PD 2503 (1963).

even the House of Lords of England at the time showed a tendency to expand this narrow approach, and then said the following:

I can see no reason why the court would not be able to see all the materials that were presented before the administrative agency . . . and under the special circumstances of the current case, it seems to me that we should take a step forward and admit all the evidence brought by the petitioners which were not presented before the Officer. The petitioners were not party to the original proceedings and therefore cannot be limited to the evidence that the original parties brought or did not bring [before the Officer]. This court should deal with the issue at stake on the basis of all the pertinent evidence, including those materials presented by petitioners.<sup>96</sup>

In *Trudler*, the Court opened the gate for the reviewing court to consider new evidence offered by third parties who were not parties to the original proceedings.<sup>97</sup> However, this decision had a much broader effect, because it was interpreted to permit a reviewing court to consider new evidence presented by parties who did participate in the original proceeding.<sup>98</sup> Nevertheless, the exact scope of the *Trudler* doctrine is far from clear; the case law remains eclectic and devoid of systematic development. The following sections consider in greater detail the various implications of opening review to factual evidence, arguments, and reasons not considered by the agency.

## 2. Open Record

Under Israeli administrative law, agencies are required to gather data, establish the facts, and base their conclusions upon “reasonable” evidence.<sup>99</sup> In the absence of formal proceedings at the initial decision level, in many cases the first stage at which a “record” is created is at the stages of appeal to a tribunal or judicial review. Accordingly, to the extent that the HCJ in judicial review refers to constraints related to the “record,” it is difficult to distinguish between references to the administrative record created at the initial decision level by the agency and to the record established by the judicial echelons below the HCJ (i.e., the tribunal or the administrative court).<sup>100</sup>

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96. *Id.* at 2516 (translated by authors).

97. The decision in *Trudler* was tied to the Court’s ruling that the petitioners had standing to attack the decision despite not having been parties to the original administrative proceedings. *See id.* at 2510–12. For a more detailed discussion of the relationship between the concept of open record and the standing doctrine, see the discussion *infra* Part II.D.1.

98. *See infra* text accompanying notes 103–105.

99. *See infra* Part II.D.3. This rule applies to all kind of decisions, including those that are quasi-legislative.

100. Petitions disposed of by the administrative courts are subject to appeal before the HCJ. *See supra* note 73.

In any event, the law regarding the possibility of introducing new evidence at the judicial review stage remains unclear. The general practice of both the HCJ and the administrative courts is to reject new evidence, since admitting such evidence would undermine the required deference to the factual conclusions of the authorized agency.<sup>101</sup> For that reason, courts often reject attempts by the parties to present new evidence at the judicial review stage.<sup>102</sup> However, the enforcement of this norm is inconsistent. In some cases, courts open the door to new evidence,<sup>103</sup> particularly in cases of petitions that involve issues of fundamental human rights and in immigration cases.<sup>104</sup> There seems to be no distinction in this respect between cases in which the administrative “record” was established during the initial administrative decision and cases in which there was an appeal to an administrative tribunal prior to the judicial review stage.<sup>105</sup>

Some fundamental doctrines relating to judicial review support the general rule against the presentation of new evidence. First, judicial review is based on affidavits prepared by the parties. Oral testimony and cross-examination require special permission by the reviewing court, which is rarely given.<sup>106</sup> Logically, this restriction

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101. See *infra* text accompanying note 111.

102. See, e.g., AdminA 1217/08 Hermelin v. Manager of Prop. Tax (June 24, 2010) (unreported); AdminPet 2513-09 Magar v. City of Tel Aviv (Aug. 30, 2013) (unreported).

103. See HCJ 76-77/63, 79/63 Trudler v. Election Officer 17 PD 2503 (1963); HCJ 620/85 Miari v. Chairperson of the Knesset 41(1) PD 169, 278 (1987); OM 6436/07 Carmeli v. Israeli Land Auth. (Oct. 14, 2012) (unreported); AdminA 5674/04 Friedman Hachshori Ltd. v. City of Tel Aviv (July 28, 2004) (unreported) (enabling petitioners to bring new arguments and evidence that were not included in their response to the original petition); AdminPet 1920-02-12 Kakal v. Nazarat Municipality (Oct. 22, 2013) (unreported) (allowing the presentation of new evidence that supported arguments raised in the original petition); AdminA 8256/12 Zoning Board of Rishon Letzion v. Neot Mizrahi (July 31, 2014) (unreported) (considering new evidence presented by the petitioner, but ultimately rejecting its position and allowing the Board’s appeal). See also Itzhak Zamir, *Evidence in the High Court of Justice*, 1 MISHPAT UMIMSHAL [LAW & GOV’T] 295, 320–21 (1993).

104. AdminA 12282/11 Brahana v. Ministry of Interior (Nov. 30, 2011) (unreported); HCJ 9420/09 Ploni v. Minister of Justice ¶¶ 21–23 (Mar. 10, 2010) (unreported) (allowing the petitioner to bring new evidence regarding the dangers he would be exposed to if extradited to Ukraine); AdminPet 40886-07-11 Amenapo v. Immigration Authority (Nov. 10, 2013) (unreported).

105. AdminA 4875/12 Grumer v. Appellate Zoning Bd. of Tel Aviv (Nov. 3, 2013) (unreported). In *Grumer*, an appellate board quashed the original decision of a zoning board on factual grounds. The administrative court reversed and re-established the original decision by the zoning board. In the Supreme Court, the justices could not agree on which of the two zoning boards enjoys better capability to evaluate the facts and what should be the standard of judicial review in such a case. The majority decided to dismiss the appeal while emphasizing the better ability of the original board to review the factual basis for the zoning decision).

106. According to the High Court of Justice Procedure Regulations, 5744–1984, § 18, KT 4685, oral testimony and cross-examination require the approval of the Court. In practice, cross-examination in the HCJ is extremely rare. See Zamir, *supra* note 103, at 312. The procedures before the administrative courts regarding oral testimony and cross-examination are somewhat more lenient than those of the HCJ, but the court must give permission, which is rarely granted. See Administrative Affairs Courts Regulations (Procedure), 5760–2000, § 15, KT 6070 p. 171.

to affidavits would not preclude the parties from using affidavits to introduce new evidence at the judicial review stage. However, the historical development of the affidavit rule before the administrative courts suggests that the default rule for Israeli judicial review is a closed record.

As mentioned above, until 2000 the HCJ served as the exclusive court for judicial review of all administrative cases. The HCJ was overwhelmed with administrative cases and was too busy to hear oral testimony.<sup>107</sup> In 2000, the Knesset passed a law that moved most administrative petitions to the administrative courts (in which a single judge of the district court performs the task of judicial review).<sup>108</sup> Although the new statute also limited evidence to affidavits, it enabled the administrative judge to grant permission for oral testimony and cross-examination.<sup>109</sup> Since, unlike the HCJ, the administrative courts were not expected to suffer from the problem of overwhelming caseloads, some commentators argued that these courts should be more willing to accept oral evidence rather than affidavits. The HCJ, however, was quick to negate this assumption. In *Sorchi v. Interior Office*, the Court explained:

By accepting the new statute, the legislature aimed “to keep the substantive and procedural distinctiveness of administrative law as developed by the High Court of Justice” . . . Indeed, in some cases the administrative court may be called upon to provide an independent evaluation of the facts . . . but in this case petitioners did not establish a cause to diverge from the general rule under which, in administrative proceedings, the court does not hear testimony or establish facts . . . . Even if petitioners seek to bring new testimony, the place to do this is before the respondent [agency], not before the administrative court.<sup>110</sup>

The *Sorchi* decision demonstrates that while Israeli courts do not espouse a clear and consistent doctrine of closed record, they are not willing to adopt a general rule of open record either.

Another rule that connects well to this (partly) closed record approach is the rule regarding *deference* to the agency’s factual conclusions, particularly with respect to the agency’s resolution

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107. See Zamir, *supra* note 103, at 312–14.

108. Administrative Affairs Courts Law, 5760–2000, SH No. 1739. See *supra* note 73.

109. See Administrative Affairs Courts Regulations (Procedure) § 15.

110. AdminA 10811/04 *Sorchi v. Interior Office* ¶¶ 10–11 (Barak, J.) (Mar. 17, 2005) (unreported) (translated by authors). See also AdminA 9018/04 *Mona v. Ministry of Interior* (Sept. 12, 2005) (unreported). In *Mona*, Justice Adiel wrote: “The administrative court is not supposed to put itself in the place of the authorized agency . . . and this rationale applies to the mission of establishing the facts . . . . [T]he Court is not supposed, as a general rule, to conduct the agency’s job of establishing the facts.” *Id.* ¶ 13 (translated by authors).

of conflicting expert opinions. In civil litigation, the general rule is that each party presents expert testimony and opinion and the court decides which expert opinion to prefer. In judicial review of agency action, however, the court is not expected to delve into the disagreements among experts. Instead, it should respect any factual conclusion by the agency based on expert opinion, unless such expert opinion is fundamentally flawed or flatly unreasonable.<sup>111</sup> This rule of deference towards an agency's factual findings and its resolution of conflicting expert opinions corroborates the basic concept that the factual basis for the administrative decision is to be established at the agency level—not in the courtroom.

### 3. New Arguments at the Judicial Review Stage

There is no clear-cut rule in Israeli law that limits the parties to the legal and policy arguments they raised before the administrative agency or before a tribunal. Nevertheless, the path for raising new arguments is not wide open. Rather, courts often denounce attempts by the parties to raise arguments not raised before the agency as a forbidden “change of front.”<sup>112</sup> In such cases, the courts may dismiss the new arguments without considering them on the merits, or give a short and reluctant look into the merits before dismissing them.<sup>113</sup> Here, again, the doctrine does not seem to differentiate between arguments not raised before the agency at the initial decision stage, those not raised before a lower court or tribunal, and those that both parties failed to raise in their original affidavits at the judicial review stage.<sup>114</sup>

### 4. New Reasons at the Judicial Review Stage

Israeli statutory administrative law contains no provisions concerning evidence and arguments in administrative proceedings. However, the Administrative Procedure Amendment (Statement of Reasons) Law 1958 requires agencies to provide reasons for their decisions.<sup>115</sup> While the statutory language refers primarily to

111. HCJ 13/80 “Nun” Tin Industry v. Ministry of Health 34(2) PD 693 (1980); HCJ 3186/03 State of Israel v. Ein Dor 58(4) PD 754 (2004); HCJ 8109/01 Reshtnik v. Minister of Transp. (May 8, 2003) (unreported).

112. *E.g.*, AdminA 29028-04-13 Hativ v. Ein Kenia Local Council (July 8, 2013) (unreported). *See also* CA 546/04 Jerusalem Municipality v. Kupat Holim Klalit (Aug. 20, 2009) (unreported).

113. *E.g.*, AdminA 33481-07-12 Zalk v. Zoning Bd. of Cent. Dist. (June 23, 2013) (unreported); AdminPet 35244-07-13 Frenier v. Municipality of Lower Galili ¶ 29 (Jan. 21, 2014) (unreported). *See also* AdminPet 12466-01-12 Pardes Ltd. v. Tel Aviv Dist. App. Comm. for Planning & Constr. ¶ 49 (Aug. 26, 2013) (unreported); AdminPet 32826-09-13 Sheleg Lavan Ltd. v. The Company of Bus. & Fin. of Local Gov't Ltd. ¶ 56 (Nov. 28, 2013) (unreported).

114. *Compare* AdminA 13-04-29028 *Hativ with* AdminA 12-07-33481 *Zalk*. *See supra* text accompanying notes 99–100.

115. 5719–1958, SH No. 264 p. 7. *See supra* note 83 and accompanying text.

*quasi-judicial* decisions, the case law has expanded the duty to give reasons to some quasi-legislative and policy decisions.<sup>116</sup> The obligation to provide reasons requires an agency to state the factual basis for the decision as well as the legal and policy grounds on which it is based.<sup>117</sup>

This comprehensive duty to state the reasons for the decision at the agency level would seem to preclude an agency from stating new reasons for its actions at the judicial review stage. However, the HCJ's decisions on this point are less decisive and more flexible than their American counterparts.<sup>118</sup> In the leading case of *Hilron v. Fruit Council*,<sup>119</sup> the HCJ responded to the argument that the agency is prohibited from providing reasons in court that are different from those provided in its original statement as follows:

It is certainly inconceivable that when the agency's original reasons were wrongful and it chooses to drop them in court, the court would be compelled to decide for the petitioner, even when other reasons are revealed which preclude a decision in his favor, such as reasons based on express statutory language. If it is revealed that the agency advances new reasons in order to support a decision that was erroneous as given, the court may get the impression that the new reasons are disingenuous and aimed to serve as a lip service to justify a baseless decision. And if the new reason requires additional factual findings, the court may remand the decision to the agency in order to conduct such factual investigation . . . but, despite the judicial suspicion which such post-hoc reasons receive in court . . . we found no support for the view that the court should disregard them just because they were raised [only in court].<sup>120</sup>

Under the rule in *Hilron*, agencies are allowed to raise post-hoc rationalizations for their actions even if they differ from those provided in their original statement of reasons (or if the agency failed to provide reasons at all).<sup>121</sup> Sometimes, the judicial suspicion towards post-hoc

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116. See Administrative Procedure Amendment (Statement of Reasons) Law, 5719–1958, §§ 2(a), 2A, SH No. 264 p. 7; HCJ 153/77 Sasson Faraj v. Municipality of Petach Tikva 31(3) PD 427, 434 (1977); CA 10419/03 Dor v. Ramat Hadar (Sept. 5, 2005) (unreported); HCJ 2159/97 Regional Council Hof Ashkelon v. Minister of the Interior 52(1) PD 75 (1998); HCJ 4733/94 Naot v. Mayor of Haifa 49(5) PD 111 (1996).

117. CA 30/56 Ben Harosh v. Benefits Officer 7 PD 931, 933 (1956); CA 142/70 Shapira v. Dist. Branch of the Israeli Bar Assoc. 25(1) PD 325, 335 (1971) (Kister, J.); HCJ 518/78 Avrami v. Minister of Transp. 32(3) PD 675, 678 (1978).

118. See the discussion of the *Chenery* principle *supra* text accompanying notes 13–15.

119. HCJ 75/76 Hilron Ltd. v. Fruit Comm. 30(3) PD 645 (1976).

120. *Id.* at 649 (translated by authors).

121. See, e.g., HCJ 8437/99 Habad Kindergarten v. Minister of Educ. 54(3) PD 69, 94–96 (2000); AdminA 823/12 Kalisa v. Ministry of Hous. ¶ 29 (Aug. 8, 2013) (unreported) (Barak-Erez, J.); CA 456/92 Agaberia Bros. Ltd. v. VAT Manager (Aug. 21,



rationalizations causes the court to ignore those reasons or remand the case back to the agency.<sup>122</sup> In most cases, however, courts consider such reasons, despite expressing their discontent with post-hoc rationalizations, and usually do not quash the decision or even remand the case.<sup>123</sup>

#### *D. Open Judicial Review and General Israeli Doctrines of Judicial Review*

The flexible attitude of the Israeli courts towards allowing new evidence, new arguments, and new reasons at the judicial review stage is tied to central doctrines of judicial review as developed by Israeli courts—each of which is strikingly distinct from American law and practice. Those doctrines could not function well under a regime of closed review. Indeed, rather than being a routine matter of judicial procedure, the question of open or closed review goes to the heart of any judicial review system.

##### 1. Standing

In the past, Israeli law adhered to a narrow concept of standing (somewhat similar to the “injury in fact” approach currently used by U.S. courts).<sup>124</sup> Under this doctrine, the petitioner had to establish a *personal interest* in the state action that was *direct* and *substantial*.<sup>125</sup> This approach began to change during the 1970s,<sup>126</sup> and was

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1997) (unreported); CA 4027/10 Yadid Eliyahu v. VAT Manager (Mar. 8, 2012) (unreported). Failure to provide reasons does not normally amount to a ground for judicial annulment of the decision. Rather, the court may allow the agency to provide reasons at the judicial review stage or remand the case to the agency to provide such reasons. See Administrative Procedure Amendment (Statement of Reasons) Law § 6; AdminA 34551-03-13 Vaaknin v. Perminger (Sept. 16, 2013) (unreported); ALA 10629/04 Azulai v. Soldiers’ Benefits Officer (Sept. 27, 2005) (unreported). In exceptional cases when the lack of reasons signifies deep flaws in the decision the court may order annulment. *E.g.*, HCJ 3/04 Local Zoning Bd. of Tzefat v. Minister of Interior (Dec. 26, 2005) (unreported).

122. See, e.g., HCJ 7177/95 Eurogam v. Investments Council 50(2) PD 1, 8 (1996); HCJ 197/81 Freidman v. Mayor of Eilat 36(2) PD 425, 430 (1983); HCJ 809/86 Yankovitz v. Mayor of Ramat Hasharon 41(4) PD 309, 319 (1987).

123. See sources cited *supra* note 121; see also CA 700/89 Israeli Elec. Co. v. Malibu Ltd. 47(1) PD 667, 678 (1993). For a relatively rare exception where the court concluded that the agency’s post-hoc rationalization could not be trusted and therefore ordered the provision of a business license to the petitioner, see HCJ 517/72 Snocrest (Israel) Ltd. v. Mayor of Bnei Brak 27(1) PD 632 (1973).

124. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

125. HCJ 11/79 Mirkin v. Minister of Interior 33(1) PD 502 (1979); HCJ 331/80 Hatishbi v. Commander of Tel-Aviv Police Station 34(4) PD 113 (1980); HCJ 287/69 Meiron v. Minister of Emp’t 24(1) PD 337 (1970); HCJ 348/70 Kfir v. Religious Council of Ashkelon 25(1) PD 685 (1971); HCJ 26/76 Bar Shalom v. Israel Land Admin. 31(1) PD 796 (1977).

126. The decision in *Trudler v. Election Officer* marked the first signs of that development. Before reaching the question of the record, Justice Berenzon concluded that the petitioners had standing to attack the respondent’s decision. See HCJ 76-77/63, 79/63 *Trudler v. Election Officer* 17 PD 2503, 2510–12 (1963).

completely abandoned during the 1980s when the HCJ developed an expansive doctrine of “public petitioner.”<sup>127</sup> This doctrine enables almost anyone to bring petitions to court against almost any administrative or executive action. Among other things, it enables citizens to challenge decisions relating to the appointment of senior executive officials, budgetary appropriations, and the provision of benefits, licenses, and any other governmental goods to parties other than the petitioners themselves.<sup>128</sup>

This expansive concept of standing is inconsistent with a strict concept of closed review. Most of these “third party” petitioners were not parties to the administrative decisions they subsequently challenge in court. In these kinds of proceedings (which are commonplace in Israeli public law), there is no “original” stage at the agency level designed to deal with the petitioners’ evidence and arguments (save, perhaps, the pre-litigation letter or documentation they are required to send the relevant decisionmaker before going to court).<sup>129</sup> Hence, the first time that the “record” for the litigation is shaped is at the judicial review stage.<sup>130</sup>

## 2. Jurisdiction

A second important doctrine refers to the jurisdiction of the HCJ. Under the Basic Law: The Judiciary, the jurisdiction of the Supreme Court sitting as the HCJ is broadly defined. The Basic Law authorizes the HCJ to “hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court or tribunal.”<sup>131</sup> The HCJ defined this provision as enabling it to “seize” jurisdiction from any court or tribunal when the HCJ deems its direct and immediate involvement to be necessary. As a result, the HCJ may decide to deal with an undecided case under the jurisdiction of another court or tribunal.<sup>132</sup>

127. HCJ 910/86 Ressler v. Minister of Def. 42(2) PD 441, 477 (1988), *available in English at* [http://elyon1.court.gov.il/files\\_eng/86/100/009/Z01/86009100.z01.pdf](http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf) (see ¶ 36 of the translation).

128. *See, e.g.*, HCJ 4267/93 Amitai—Citizens for Judicial Watch v. Prime Minister of Israel 47(5) PD 441 (1993) (petition for dismissal of a minister on bribery allegation); HCJ 6770/10 Green Party v. Gov’t of Israel (Jan. 5, 2011) (unreported) (attacking an appointment of the chief of staff); HCJ 287/91 Kargal v. Inv. Agency 46(2) PD 852 (1992) (attacking budgetary appropriation to a third party).

129. *See* YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* 172–87 (2014).

130. *See* discussion of the *Trudler* case *supra* text accompanying note 95.

131. Basic Law: The Judiciary, 5744–1984, § 15(c), SH No. 1110 p. 78, *translated at* [http://knesset.gov.il/laws/special/eng/basic8\\_eng.htm](http://knesset.gov.il/laws/special/eng/basic8_eng.htm). Israel has no formal constitution. Instead the Knesset has adopted Basic Laws that enjoy constitutional status. *See* Allen Zysblat, *Introduction: The System of Government, in PUBLIC LAW IN ISRAEL*, *supra* note 83, at 1; Itzhak Zamir, *Rule of Law and Civil Liberties in Israel*, 7 CIV. JUST. Q. 64, 65 (1988).

132. *See, e.g.*, HCJ 6163/92 Eisenberg v. Minister of Bldg. & Hous. 47(2) PD 229 (1993), *available in English at* [http://elyon1.court.gov.il/files\\_eng/92/630/061/Z01/92061630.z01.pdf](http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf). In *Eisenberg*, the HCJ decided to deal with a petition directed

This extraordinary capacity of the HCJ is used rarely and has no obvious U.S. counterpart. However, its existence suggests profound implications with respect to the whole system of judicial review,<sup>133</sup> including issues relating to the record. In order to seize control over a case under the jurisdiction of a lower court or a tribunal, the HCJ must be able to “construct” the record for its own purposes. If one adds to this exceptional rule of jurisdiction the considerable flexibility and informality of the procedure at the HCJ (and the administrative courts in general),<sup>134</sup> it seems that a strict, formalistic rule of closed review is foreign to the culture of administrative litigation in Israel.<sup>135</sup>

### 3. Reasonableness

Since the early 1980s, the HCJ has developed an expansive doctrine of reasonableness, which serves as the principal pillar of judicial review and a major vehicle to advance its activist ideology. Under this concept, the reviewing court is called upon to examine the administrative decision at stake and make sure that its result is not “extremely unreasonable.”<sup>136</sup> Accordingly, it calls for an independent judicial evaluation of the reasonableness of the decision and depends on a particular judge’s assessment of the meaning of this standard.<sup>137</sup>

As examples of particularly intrusive exercises of judicial assessment of reasonableness, the HCJ ordered the Prime Minister to fire cabinet members<sup>138</sup> and ordered the government to rethink its policies

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against the appointment of a senior government official who was involved in a public scandal, even though the case was under the jurisdiction of the labor tribunal. *See also* HCJ 2208/02 Maha Salame v. Minister of Interior 56(5) PD 950 (¶ 2) (2002) (Barak, C.J.).

133. *See* DOTAN, *supra* note 129, at 44–45.

134. *See id.* at 26–29.

135. *Id.*

136. *See* HCJ 910/86 Ressler v. Minister of Def. 42(2) PD 441, 477 (1988), *available in English at* [http://elyon1.court.gov.il/files\\_eng/86/100/009/Z01/86009100.z01.pdf](http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf); HCJ 8379/06 Eduardo v. Minister of Def. (May 29, 2007) (unreported), *available in English at* <http://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense>. *See also* RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, JUDICIAL ACTIVISM AT THE HIGH COURT OF JUSTICE 9–11 (2000). *Chevron*-style deference is not recognized by Israeli courts. Instead, agency interpretations merit no deference at all since the courts view themselves as the ultimate readers of the law. *See, e.g.*, HCJ 3648/97 Stamka v. Minister of Interior 53(2) PD 728, 743–46 (¶¶ 8–11) (1999) (Cheshin, J.); HCJ 693/91 Efrat v. Minister of Interior 71(1) PD 749 (1993).

137. It is worth noting that while the *terminology* used by the HCJ with regard to “reasonableness” is somewhat similar to that of the courts in England—*see* Associated Picture Houses Ltd v. Wednesbury Corp. [1948] 1 KB 223, 233–34 (U.K.)—the doctrine that has developed in Israeli law is far more penetrative and expansive.

138. *See, e.g.*, HCJ 3094/93 Movement for Quality in Gov’t in Israel v. State of Israel 47(5) PD 404 (1993), *available in English at* [http://elyon1.court.gov.il/files\\_eng/93/940/030/Z01/93030940.z01.pdf](http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf); HCJ 4267/93 Amitai—Citizens for Judicial Watch v. Prime Minister of Israel 47(5) PD 441 (1993). *See also* GAVISON, KREMNITZER & DOTAN, *supra* note 136, at 42–43.

on major national security matters.<sup>139</sup> Logically speaking, this activist concept of reasonableness does not require open review. Review could proceed on the basis of the record, reasons, and arguments as developed at the agency level or in lower courts. From an ideological point of view, however, the broad and independent assessment of the merits connoted by judicial activism seems inconsistent with a strict, formalistic approach that would make the court dependent on the agency's record. For example, when the HCJ ordered the government to change the location of the security barrier between Israel and the West Bank, the principal determination of the facts (regarding the security implication of each alternative location for the Barrier) was made by the Court itself, and not by the government.<sup>140</sup>

#### 4. Selective Enforcement

Another doctrine of judicial review that seems inconsistent with closed review is selective enforcement. Since the early 1990s, the Israeli courts have developed an expansive doctrine of selective enforcement, for which there is no counterpart in the United States.<sup>141</sup> According to this doctrine, in Israel a person can challenge a decision to enforce the law against her (or to refrain from granting her a state benefit) without needing to demonstrate the existence of a legal duty owed to her. Instead, it is sufficient to demonstrate that an exemption from the law or a benefit was given to others, even if contrary to official policy.<sup>142</sup> Once again, the doctrine of selective enforcement, which focuses on what the agency did in cases other than the one at stake, seems incompatible with the concept of closed review.

### III. EXPLANATIONS FOR THE DIFFERENCE BETWEEN ISRAELI AND U.S. PRACTICE

The most likely explanation for the divergence between the United States and Israel with respect to closed and open judicial review lies in some fundamental differences between the two systems of administrative adjudication (in addition to the striking differences between the two systems discussed in Part II.D above). The administrative adjudication systems of different countries vary tremendously,

139. See, e.g., HCJ 8379/06 *Eduardo* (ordering government to build shelters at schools and kindergartens in southern Israel against rockets fired at these areas from the Gaza Strip); HCJ 2056/04 *Council of Beit Surik v. Gov't of Israel* 58(5) PD 897 (2004) (ordering the government to change the location of the security barrier between Israel and the West Bank); Ronen Shamir, *The Politics of Reasonableness: Discretion as Judicial Power*, 5 *THEORY & CRITICISM* 7 (1994).

140. HCJ 2056/04 *Council of Beit Surik*.

141. See *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that a defendant cannot argue selective enforcement on the basis of race without showing that the government declined to prosecute similarly situated suspects of other races).

142. HCJ 637/89 *Huka Le'Medinat Israel v. Treasury Minister* 46(1) PD 191 (1991); HCJ 6396/96 *Zakin v. Mayor of Beer Shiba* 53(3) PD 289 (1999).

but almost always include three phases—initial decision, administrative reconsideration, and judicial review. All countries want their administrative adjudication systems to operate efficiently and to generate accurate results through a process that is acceptable to the private parties enmeshed in disputes with government. However, each country tends to place its primary reliance on (and invest most of its resources in) only one of the three phases; the other two are less important.<sup>143</sup>

The U.S. system relies primarily on the *initial decision* to get things right.<sup>144</sup> As discussed earlier,<sup>145</sup> the initial agency decision normally consists of a trial-type adversarial proceeding. Adversarial initial decision proceedings are quite time consuming and costly for both the state (which has to pay its attorneys and the neutral arbiter) and private parties (who usually have to pay lawyers to represent them in the lengthy trial-type proceeding). Later phases in the process (administrative reconsideration and judicial review) are less significant than the initial decision and seldom overturn the fact-findings or the exercise of discretion that occurred as part of the initial decision.

The closed review rules in the United States flow logically from the decision to invest most resources in the initial decision. That decision generates a written record of all of the testimony and other evidence offered at the hearing; the parties were in control of the proceedings and had the ability to introduce all relevant evidence and make all relevant arguments. The decisionmaker can consider only that evidence and those arguments. The initial decision creates a crystallized set of fact-findings and reasons that a reviewing court should respect by precluding the introduction of new evidence, arguments, or reasons at the review stage.

Similarly, in the United States, the rulemaking process is highly structured.<sup>146</sup> There must be notice to the general public and broad opportunity for public comment. The agency must disclose its methodology and critical data, and it must respond to public comments by explaining why it did not follow the suggestions or alternative solutions contained in those comments. This process is very costly. As in the case of adjudication, the U.S. system of rulemaking places primary responsibility for finding legislative facts and stating reasons at the level of the rulemaking agency. Reviewing courts should respect that process through a system of closed record, closed reasons, and closed argument.<sup>147</sup>

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143. Asimow, *supra* note 11, at 30.

144. *Id.* at 19.

145. *See supra* text accompanying notes 3–5.

146. *See supra* text accompanying note 26.

147. The case for closed review of informal adjudication and policy-implementation decisions is much less persuasive. *See supra* text accompanying notes 22–24, 39.

Israel follows a quite different model of adjudicatory decision making. It places primary reliance on the judicial review phase of administrative adjudication, rather than the initial decision or agency reconsideration phases. The broad rules relating to standing, jurisdiction, reasonableness, and selective enforcement discussed in the previous section evidence Israel's commitment to judicial review and its willingness to rely on courts to produce a just and accurate decision. Similarly, Israel's striking and unusual rule designating the Supreme Court in its role as the HCJ as the first and only court of jurisdiction at the judicial review stage in more significant cases reflects its commitment to judicial review as the most important level of administrative decision making.

At the initial decision phase, Israel follows the rules of natural justice, but the proceeding is inquisitorial rather than adversarial. The initial decision is considered to be a part of the agency's investigation and the private party has the opportunity to correct what it considers mistaken findings or an abuse of discretion by the investigators.<sup>148</sup> Under natural justice principles, the private party has a chance to make its arguments orally or in writing before an unbiased decisionmaker. However, that decisionmaker is often involved as an investigator in the case and can rely on his or her prior knowledge in finding the facts and exercising discretion.<sup>149</sup> There is usually no opportunity to cross-examine adverse witnesses.<sup>150</sup> This inquisitorial proceeding is sharply different from the U.S. commitment to trial-type adversarial proceedings at the initial decision level with an exclusive record and an uninvolved decisionmaker.

As a result, in Israeli practice, the record is not crystallized at the initial decision level. There may be no written record at all of the testimony offered at the initial decision level, and the decisionmaker may rely on non-record evidence. In light of these procedures, it is not surprising that the courts permit parties to the initial decision (as well as non-parties who become involved at the judicial review stage) to supplement the record by introducing affidavits from additional witnesses or experts, allow either party to advance new arguments, and permit the agency to state new reasons to support its decision.

It might seem that in cases involving an appeal from an agency to a tribunal, the record for judicial review would have crystallized at the tribunal phase in a way that would constrict the openness of the review at the judicial review stage. In reality, however, the current status of tribunals in the Israeli system is not firm enough to substantiate the development of an exception to the judicial acceptance of open review principles.<sup>151</sup>

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148. See, e.g., HCJ 76-77/63, 79/63 Trudler v. Election Officer 17 PD 2503 (1963); HCJ 1661/05 Aza Regional Council v. Knesset 59(2) PD 481, 606-07 (2005). See also sources cited *supra* note 81; 1 DAPHNE BARAK-EREZ, ADMINISTRATIVE LAW 87-92 (2010).

149. See *supra* text accompanying note 81.

150. See, e.g., HCJ 78/71 Mizrachi v. Health Minister 25(2) PD 238, 244 (1971); HCJ 646/93 Bracha v. Minister of Commc'ns 48(3) PD 661 (1994).

151. See discussion *supra* text accompanying notes 84-87.



Similarly, Israel provides no structured process for making quasi-legislative policy decisions such as rules.<sup>152</sup> The agency no doubt consults with interested parties in the process of formulating the rules or other policies, but it is not required to inform the general public, solicit comments, conduct hearings, disclose its methodology, or respond to public comments if there are any. Judicial review offers the first structured opportunity for adversely affected parties to challenge the legality and reasonableness of quasi-legislative policy judgments. Consequently, it is unsurprising that courts are willing to entertain new evidence and arguments as well as new agency reasons at the judicial review stage.

### CONCLUSION

In this paper, we compared closed and open judicial review of agency action. The United States falls near the closed end of the spectrum while Israel falls closer to the open end. The question of the administrative record might seem like a procedural or technical issue. Our analysis demonstrates, however, that the concept of open or closed review is a central component of any system of judicial review. The decision about whether to employ closed or open review is crucial to the division of responsibilities between the administrative agencies and the courts.

In the United States, the policy of closed record means that the evidentiary record is set during the initial decision process in both adjudication and rulemaking as well as in policy-implementation decisions. In addition, the policies of closed reasons and arguments force private parties to make all their arguments and agencies to state all their reasons at that initial decision stage. In Israel, on the other hand, administrative procedures for making quasi-judicial and quasi-legislative determinations at the agency level are much less structured than in the United States, and the tribunal system of administrative appeals is undeveloped. The most crucial stage of decision making in Israel is the judicial review process, and the preference for open review reflects this.

Our analysis also demonstrates that the question of open or closed review is intertwined with various other doctrines of review on both the procedural level (such as standing) and the substantive level (including the standards of review such as reasonableness and the prohibition on selective enforcement). Accordingly, one cannot consider revisions to the policy regarding the administrative record, nor those relating to new arguments or reasons, without bringing into consideration the implications of such a move on many other doctrines of judicial review.

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152. See *supra* text accompanying notes 75–79.

