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Judicial Activism Vis-a-Vis Judicial Restraint: An Israeli Viewpoint

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JUDICIAL ACTIVISM *VIS-À-VIS* JUDICIAL RESTRAINT: AN ISRAELI VIEWPOINT

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INTRODUCTION

A court that frequently intervenes in determining the content of the policy to be exercised by various government entities (federal legislators, legislators in the states, and administrative authorities) is referred to as a judicial imperialist because it exceeds its mandate and enters into fields that properly belong to other branches.[1] Critics of judicial activism in the United States claim that the courts must not assume the power to intervene in subjects that involve political and ethical decisions, thereby ignoring the basic principles of democracy.[2] On the other hand, a court is, at times, considered overly restrained and passive when it refrains from protecting the rule of law in general and individual liberties especially.[3]

In this article, I shall discuss the various definitions of judicial activism and passivism, present various arguments raised for and against each approach, describe the approach of the former Israeli Chief Justice, Aharon Barak, and finally, briefly present my own views on the subject matter.

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* Zeev Segal (1947-2011) completed writing this article, which he planned to present at the symposium in honor of Chief Justice Aharon Barak, on January 9, 2011 – four days before he passed away. Zeev Segal was an Associate Professor of Law at Tel-Aviv University, where he taught in the Department of Public Policy, the School of Government and Policy, and was a faculty member of the Social Sciences Department. Lilach Littor, doctoral candidate at Tel-Aviv University, provided Professor Segal with comprehensive research assistance. Ariel Bendor completed the footnotes. This article – the last article which Professor Segal wrote – is in his memory.

1. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227 (2004). Kramer argues that the Court, in its case law, expanded the areas that it governs in an attempt to control political subjects. *Id.* at 227, 250-51. *See also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 31-32, 154 (1999) (arguing that citizens are not capable of rejecting the decisions of the Court or strenuously opposing the control of the Court, and that imposing limitations on judicial criticism will lead to the return of control of constitutional subjects to the people). Along with the term "judicial imperialism," "government by injunction" is commonly spoken of in the United States.

2. *See* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 79-81 (rev. ed. 2003); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 15-17 (1990). Bork argues that judges in the United States seek to impose their personal values and world outlook, while attempting to present them as ostensibly relying on the Constitution. *See also* Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *in* MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 181 (Mark A. Graber & Michael Perhac eds., 2002); Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335, 338 (1998).

3. *See* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 8, 10 (Kenneth M. Holland ed., 1991).

I. JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT – WHAT IS IT ALL ABOUT?

The difficulty in defining the term "judicial activism" resembles, to a great degree, the difficulty in defining the term "pornography." And indeed, an American judge remarked that the only way to know what pornography is, is to see it.[4] The expression "judicial activism" is, in fact, vague and equivocal. Scholars and judges attribute different meanings to it, and no universally accepted definition for it has yet been found.

There are those who emphasize that the concept of judicial activism refers to cases in which the court creates a new legal rule that had not previously existed.[5] This is a rule that is not explicitly anchored in legislation and does not constitute a continuation of previous doctrine or of a ruling by another entity. The court may create such a new rule while setting aside legal policy that had formerly been established by another governmental branch or a previous court ruling. Others note that the court is considered activistic insofar as it takes upon itself a broader role, relative to that of other governmental branches, in determining the values that will prevail within the society and in setting forth the way in which the resources available for distribution by the society are to be allocated.[6]

The concept of judicial activism in public law primarily concerns the court's involvement in areas that are classically allocated to the other branches of government and the court's intervention in the decisions and actions of those branches. This may be done by setting aside a decision or by sending it back to the deciding entity for further study. Judicial activism, in practical terms, is exercised when the judicial branch sets aside a decision by another branch of government or by a previous judicial instance, irrespective of the question of whether it was fitting and proper for the Court to do so. Thus, for example, a ruling may be referred to as activistic when the Supreme Court sets aside its own precedent, especially if it was handed down only a short time before. A decision to refrain from setting aside a decision by another branch, by its very nature, means that the judicial branch has decided to be passive and to stand on the sidelines, irrespective of the question of whether it was appropriate to act that way.

In private law, judicial activism revolves around innovation and creativity in court-rulings and the court's willingness o intervene in the autonomy of individual will and to govern various subjects by means of judicial rules. At times, this willingness contravenes the policy set by the individuals themselves. One expression of judicial activism in private law is the willingness of a court to interpret contracts in a purposive manner, in order to implement basic concepts and values of society. This interpretation contrasts what is set forth in the express language of the contract itself and contravenes the clear, subjective desires of the parties.[7]

By contrast to judicial activism, the concept of self-restraint – judicial passivism – is expressed as the court's tendency to allow the existing legal rule to stand and to

4. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

5. *See* TOM CAMPBELL, PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS AND DEMOCRACY 279 (2004).

6. *See* MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 54 (2011).

7. *See generally* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005).

hesitate to set aside legal policy, which was previously instituted by another entity, or a decision by any governmental branch within the framework of public law.

The activism-passivism dispute results from the fact that the subject in question is extremely important – indeed, fundamental – and impacts the face of society itself. The degree of judicial intervention exerts considerable influence on the assimilation of cultural values, as well as on the shaping and the strength of social interests. Thereby, the judicial branch becomes part of the factors that shape society and its values.

It is not possible to discuss the subject of activism in general without commenting on the court's approach to the specific type of subject in question. In the United States, for example, it is well established that the role of shaping economic and social policy should be left with the Legislature. Thus, in the *Rodriguez* case,[8] the Supreme Court addressed a claim that Texas' system for financing public education violated the Equal Protection Clause. The Court held the Constitution only required the legislature's choices satisfy the minimal standard of rationality.

In South Africa, the *Grootboom* case[9] provides an example of a weak judicially enforceable social welfare right. The Constitutional Court of South Africa dealt with the constitutional right to adequate housing as part of the rights of social welfare. The court gave the applicants a broad declaration regarding the right to adequate housing, and ordered the government to take "reasonable" steps towards the realization of its social welfare right.[10]

Accordingly, it seems that the burden of shaping a public policy, which will grant citizens the rights of social welfare, rests with the legislative and the executive branches. Courts refused to grant themselves powers in this area which might increase government spending.

II. JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT – PROS AND CONS

The extent of judicial involvement in decisions by other branches is derived, to a great extent, from the policy of the Court and principally from the ideological views and perspectives of the judges. The question of judicial involvement is hotly disputed by the supporters and opponents of activism.

In analyzing judicial activism, we must recall the traditional starting point for the role of the court is the deference policy,[11] pursuant to which the Court is not supposed to make decisions which belong to another governmental branch. The principle of restraint is based on the traditional concept of separation of powers, which was formulated by Baron de Montesquieu in the first half of the 18th century.[12] Montesquieu viewed the role of the courts as a mechanical function and considered the judiciary as no more than the mouth of the Legislature. This concept favors judicial passivism. The reasons behind the deference principle are several.

8. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

9. *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

10. *Id.* at 1209. For a general discussion of judicial review relating to oversight of social welfare rights, see TUSHNET, *supra* note 1.

11. *See* Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

12. *See* 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 149-62 (Thomas Nugent trans., Colonial Press rev. ed., 1900) (1748).

First of all, the making of executive decisions comes under the responsibility of the executive branch, and the determination of the law comes under the responsibility of the legislative branch. Accordingly, intervention by the courts in a field which does not properly belong to them runs counter to the principle of separation of powers.

Secondly, the courts, by contrast to the Executive and Legislature, are in most cases not an elected branch. Therefore, trespass by the courts into the domains of the other branches stimulates a problem of legitimacy. The legislative and executive branches are elected by the people on the basis of certain policies, which those branches are supposed to implement. This means that there is no *prima facie* justification for judicial decisions in areas which are assigned to the other branches, as the views of the courts may be different from those of the elected branches, which represent the will of the majority.

Thirdly, judges do not have the professional knowledge, the expertise, and the appropriate tools for making political decisions. Moreover, they are not in possession of a mechanism which enables them to obtain proper information and professional evaluations. The judicial procedure is limited and, by its very nature, is not appropriate to the making of executive decisions or the establishment of proper legal standards. Furthermore, it is not possible, within the framework of judicial proceedings, to collect data or to monitor the impact of previous decisions in the field in question over time.

Over the course of years, the courts have distanced themselves from the traditional concept of judicial deference and have begun to develop judicial activism in a variety of areas. The exercise of judicial activism is multifaceted. One facet is the judicial review of administrative actions. A second facet is review of the constitutionality of statutes, and a third is the involvement of the courts in the shaping of public policy.

With regard to the facet of judicial activism which concerns the shaping of public policy, the model of separation of powers in a democratic regime holds that public policy on subjects which concern the individual, as well as the various rights of individuals and society, are established by the legislature and the executive.

Judicial activism in the shaping of public policy is also exercised by the courts in cases where certain rights are not expressly set forth in the Constitution.[13]

The debate on judicial activism encompasses the question of whether it may be said that there is one correct legal solution to a legal problem and to predict the ruling according to an "objective" analysis of the legal rule. In the United States, a realistic approach has developed, which examines judicial decisions with the tools of the social sciences. This approach holds that it is not correct to examine Supreme Court decisions according to the question of whether the decision is correct and legally established or incorrect and founded on an error of law. The view dictates that it is necessary to examine why the Court ruled as it did. The ideology and the approach adopted by the judges as an underlying basis for the decision should be analyzed. One has to examine the external constraints acting on the judges, such as the relationship with Congress and other governmental authorities.

It has been argued that the constitutional case-law handed down by the U.S.

13. *See* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004) (discussing the relationship between rights set forth in the Constitution and judicial criticism).

Supreme Court represents political decisions, and that, in fact, the Court is nothing other than a political entity. The decisions made by the Supreme Court as a political entity are, in fact, based on "political judgment."[14] Indeed, one may argue that for every constitutional ruling handed down by the Supreme Court, it would have been possible to issue the opposite ruling as well, and that all such rulings are derived from the composition of the bench, the ideological views of the justices, and the external pressures imposed upon the Court; and that, in fact, the Supreme Court does not consider itself to be bound by the literal interpretation of the Constitution, nor even by Court precedents. The very decision by the justices as to whether to continue to uphold the line of previous doctrine or to overturn it, in fact, is a decision which involves political discussion. This argument sets judicial activism or passivism on a foundation composed of the value concepts of judges concerning the proper degree of involvement and intervention in decisions by other governmental branches.

The opponents of the activistist approach hold that the courts cannot legitimately invalidate decisions which were made by the elected branches. As they say it, any judge who does so is ruling in accordance with his or her subjective personal views on the matter in question, which is not necessarily preferable to the views of the elected branch, whose concepts reflect the will of the people.

In contrast, the proponents of the activistist approach hold that the role of the courts is to examine the constitutionalism of decisions of the other branches, including laws enacted by the legislature and policy decisions formulated by the executive. All such decisions must be subject to objective legal criteria, such as compliance with the requirements of the rule of law, and must be compatible with human rights.

Those who favor this approach believe that the separation of powers should not be viewed as a sacred value by itself. When a governmental authority acts unlawfully, it constitutes a risk to democracy, and accordingly, judicial intervention is justified.

III. COEXISTENCE OF JUDICIAL ACTIVISM AND PASSIVISM IN AHARON BARAK'S JURISPRUDENCE

The Israeli Supreme Court is a policy player, which shapes policy in the matters decided by it. It is involved in designing the rules of the political game, defining the power relationships between the various branches of government, shaping the duties of public administration, and determining the protection to be given to individual rights.

Since the 1980s, the Supreme Court has restricted the use of procedural obstacles which prevent the discussion of delicate matters.[15] Such obstacles included, but were not limited to, the long-standing former requirement for proof of a special personal interest in order for a petition to be heard and the issue of non-justiciability (the "political question" doctrine). Thus, governmental authorities were stripped of their judicial review immunity, and their actions were subjected to judicial scrutiny. Through this activism,

14. *See* Richard A. Posner, *The Supreme Court, 2004 Term- Foreword: A Political Court*, 119 HARV. L. REV. 31, 32-54 (2005); *see also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1021-22 (1998).

15. *See* SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 151-52 (2007).

the Supreme Court has become an institution which charts public policy for government authorities.

The Israeli Supreme Court is considered a court whose rulings are characterized by judicial activism and readiness to overrule decisions taken by other branches of government. This trend was developed and guided under the inspiration of Justice Barak, as a Supreme Court Justice since 1978, as the Chief Justice from 1995 until his retirement from the bench in 2006,[16] and as a leading legal scholar.[17] His judicial activism inspired Israel's judicial system as a whole. "In 2006, while dean of Harvard Law School, Ms. [Elena] Kagan introduced Judge Barak during an award ceremony as 'my judicial hero.'"[18] She further stated: "He is the judge or justice in my lifetime whom, I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice."[19]

This statement became a point of harsh discussion in Kagan's Supreme Court confirmation hearings in the summer of 2010. "Senator Jeff Sessions of Alabama, the top Republican on the Senate Judiciary Committee . . . called Ms. Kagan's introduction 'very troubling' and suggested it 'might provide real insight into her approach to the law.'"[20]

The Israeli Supreme Court throughout the years created basic individual rights before such rights were anchored in basic laws, or even in ordinary statutes. Thus, in the first years of Israel, the Supreme Court recognized the right to freedom of occupation[21] and the right to freedom of expression.[22] Over the years, the Israeli Supreme Court has expanded the right of gender equality,[23] the equality of gays and lesbians,[24] and more. The Supreme Court also outlined general norms for the rule of law, which impose a duty upon the other branches, even where no such unity is set for the legislation. The advocates of judicial activism point to the case law handed down by the Israeli Supreme Court, which shaped important norms of the rule of law and transformed ethical rules into legal prohibitions.

In principle, according to Barak's view, "there is law in everything" and everything can be decided upon in accordance with legal criteria, even if the subject in question is sensitive from a political, diplomatic, or public point of view.[25] This was the viewpoint which guided the Supreme Court, chaired by Barak, to rule that the courts are

16. Owen Fiss, *Tribute: Law is Everywhere*, 117 YALE L.J. 256, 257 (2007).

17. Barak's English books are: JUDICIAL DISCRETION (Yadin Kaufmann trans., 1989); PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005); THE JUDGE IN A DEMOCRACY (2006); PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

18. Sheryl Gay Stolberg, *Praise for an Israeli Judge Drives Criticism of Kagan*, N.Y. TIMES, June 24, 2010, www.nytimes.com/2010/06/25/us/politics/25kagan.html?scp=1&sq=praise%20for%20an%20israeli%20judge%20drives%20criticism%20of%20kagan&st=cse.

19. *Id.*

20. *Id.*

21. *See* HCJ 1/49 Bejerano v. Minister of Police 2 PD 80 [1949] (Isr.).

22. *See* HCJ 73/53 "Kol Ha'am" Co. v. Minister of Interior 7(1) PD 871 [1953] (Isr.).

23. *See* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN (2004); Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM. J. COMP. L. 293, 311-16 (2005).

24. *See generally* Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 COLUM. HUM. RTS. L. REV. 443 (2000).

25. *See* BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 17, at 179-82.

competent to set aside a statute enacted by the Knesset (Israel's Parliament) if the statute is contrary to basic rights which are encored in the Basic Laws.[26] This was possible regardless of the absence in the Basic Laws of any specific provision regarding constitutional judicial review of statutes enacted by the Knesset.

Due to Barak, the courts are competent to interpret laws on the basis of "objective purposive interpretation," in accordance with the basic values of society as reflected, for example, in the Declaration of Independence, which is deemed to be the "credo" of Israel's Founding Fathers.[27] Chief Justice Barak emphasizes that in interpreting the Constitution, as well as statutes, it is necessary to attribute considerable weight to their objective purpose, as represented by the objectives and values the Constitution and statutes intend to achieve in a democratic society. Objective purpose includes various presumptions which reflect human rights, the rule of law, values of justice and ethics, international law, the aspiration of fulfilling the democratic nature of the State, and the like.[28]

The objective purpose is "determined by objective criteria."[29] It does not result from either the subjective purpose or the real desires of the legislators; it is to be upheld even in situations where it is actually clear the objective purpose could not have been the subjective purpose intended by the legislators at the time of the enactment.[30]

In this regard, there is also a position, which favors judicial restraint, and does not accept Barak's concept according to "there is law in everything."[31]According to that position, it is necessary to readopt the doctrine of political questions (customarily accepted in Israel in the past), which according to certain governmental decisions, should be excluded from judicial review. This, for example, applied to decisions, which due to their political nature, were not suitable for settlement by the courts. not suitable to be resolved in light of legal principles, and, by their very nature, not suitable to be settled by a court of law. According to that approach, there are issues which are not subject to judicial resolution. It is not appropriate for the Court to resolve controversial public and political issues according to its own views. Judicial review of administrative actions should be restricted, and the authority and autonomy of the elected political institutions should be honored. Such an attitude reflects the deference doctrine.

Judicial activism in private law in Israel is basically founded on the doctrine of purposive interpretation propounded by Chief Justice Barak in the field of contracts, which was adopted by the Israeli Supreme Court. The Court emphasizes that, at times, preponderant weight should be attributed to the objective purpose of the contract, which

26. *See, e.g.*, CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill. 49(4) PD 221 [1995] (Isr.) (holding that the Court is entitled to invalidate a statute as prejudicial to human rights which are protected by Basic Law: Human Dignity and Liberty or Basic Law: Freedom of Occupation, notwithstanding that set forth in the "Limitation Clause" of the Basic Laws. According to that clause, a statute which is prejudicial to basic rights is required to correspond to the values of the State of Israel, to be intended for a proper purpose, and not to prejudice human rights to a greater degree than required).

27. For an extensive review of the nature of the theory of objective purposive interpretation, see BARAK, *supra* note 7.

28. *Id.* at 170-81, 358-63.

29. *Id.* at 148.

30. *Id.* at 350.

31. BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 17, at 179.

reflects principles of fairness and common sense and the basic values of the legal system, rather than the explicit language of the contract, which reflects the subjective purpose of the contract which bears out the intentions of the parties or the language of the law.[32] The trend of activism in private law, similarly to that of activism in public law, gives rise to considerable controversy.

On one side of that controversy stands the perspective of Justice Barak, which holds that public policy considerations and the duty of good faith, within the framework of purposive interpretation, serve as a channel for the imposition of the principles of public law (principles such as the right of equality, the right of dignity and the freedom of occupation) upon private law, through intervention in the content of the contract. In his view, public policy considerations require a balance between conflicting values. One of these conflicting values is the value of freedom of contracts. Nonetheless, in his opinion, even though the upholding of contracts is also a matter of public good, it is not the sole component, nor even the most important component, of public good. At times, there are other more important values which give rise to intervention in the content of the contract.

On the other side of the controversy is a position which expresses profound criticism of Justice Barak's approach and of the trend toward judicial activism in private law. According to that position, the use of purposive interpretation for the purpose of imposing external values upon a contract — *inter alia*, by invoking public good and the duty of good faith — detracts from the freedom of contracts and the autonomy of the parties to a contract.

The judicial activism displayed by Barak was especially noteworthy in the field of security considerations, which have traditionally been regarded in Israeli jurisprudence as immune from judicial intervention. The Israeli Supreme Court has positioned itself as a central player in these sensitive issues, especially since 2004, the year in which the Court ordered the military commander to reroute the security separation fence in the occupied territories.[33] The Supreme Court's ruling was drafted by Chief Justice Barak and was followed by the Court in numerous equivalent cases after Barak's retirement.

Barak's role in the Israeli judicial activism is exemplified, *inter alia*, in decisions that forbid the Government from appointing an official who has admitted the commission of a severe crime, even though he has been pardoned.[34] Another example is the decision that the Prime Minister must remove a Cabinet minister from office because the minister was brought to trial — despite the absence of any constitutional or statutory provisions in this regard.[35]

Barak's activistist attitude was described by Judge Richard A. Posner as a "hyperactive"[36] attitude, which renders the judicial branch independent of the other

32. BARAK, *supra* note 7, at 187-88.

33. *See* HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807 [2004] (Isr.) [hereinafter *Beit Sourik*].

34. *See* HCJ 4668/01 Sarid v. Prime Minister 56(2) PD 265 [2001] (Isr.); HCJ 6163/92 Eisenberg v. Minister of Bldg. & Hous., 47(2) PD 229 [1993] (Isr.).

35. *See* HCJ 3094/93 Movement for Quality Gov't v. State of Israel 47(5) PD 404 [1993] (Isr.).

36. RICHARD A. POSNER, HOW JUDGES THINK 364 (2008). For a critique on Posner's views, see Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1 (2007), http://www.harvardilj.org/2007/08/online_49_medina/.

branches.[37] At the same time, Posner observed that Barak may well have been "what Israel needed, and perhaps still needs."[38]

Yet, the Israeli Supreme Court, including Barak, displays caution and restraint on subjects, such as religion and state, and judicial passivism reaches its peak in the social sphere.[39] When claims to housing or to minimum subsistence were raised before the Israeli Supreme Court, the Court explained that in the absence of a specific Basic Law, it cannot interpret the right of human dignity so broadly as to include the right to a proper and dignified existence.[40] At the same time, the Court issued a lyric statement that every person is entitled to minimum means of shelter, food, and health.[41] In this context, the Supreme Court stands on the sidelines, seldom intervening in the actions of the authorities.[42] This applies to the rights to education, health, social security and housing, freedom of association, freedom to strike, and the right to employment.[43]

The Israeli Supreme Court's general passive approach in social and economic issues is based on an outlook according to which the power to regulate social rights in these areas is entirely the prerogative of the Knesset's legislation and the government's decisions.

IV. JUDICIAL ACTIVISM AND PASSIVISM IN ISRAEL – A SUBMISSION

In the debate between activism and passivism, it is not possible to adopt a sleeping, unequivocal position. A proper judicial decision should be made on the basis of a large number of considerations: the nature and circumstances of the decision to be made, the nature of the subject in question (prejudice to individual rights or the proper conduct of public administration) and the degree of need for intervention by the Court, the costs and benefits involved in judicial intervention, the extent of the damage expected for the branch which issued the original decision and for the judicial branch as a result of its intervention or non-intervention, and so forth.

At the same time, along with the specific balance of interests in the case in question, it is also necessary to take into account the fundamental balance and the basic concept which concerns the manner in which the judiciary views its position within the system of branches. My approach considers the judiciary, and especially the Supreme Court especially, as a social engineer and a central partner in the formulation of public policy. I favor judicial activism and oppose restraint by the courts in the absence of any serious justification for refraining from intervention. This approach departs from the deference rule, which favors non-intervention by the courts in decisions issued by other authorities, other than in exceptional cases.

It seems to me that the judicial intervention policy of the Israeli Supreme Court

37. POSNER, *supra* note 36, at 365.

38. *Id.* at 368.

39. *See* Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 95-96 (2004).

40. *See id.*

41. *See* HCJ 366/03 Commitment to Peace & Soc. Justice Soc'y v. Minister of Fin. [2005] (2) IsrLR 335 (Isr.).

42. *See* Gross, *supra* note 39, at 95.

43. *See id.*

contributed to the promotion of the rule of law. Judicial intervention by the Supreme Court, in light of the reality prevailing in Israel, is essential, not only for the protection of individual rights, but also for the upholding of public ethics in the Government. Supervision of public administration and preserving the public faith therein are not much less important than the preservation of human rights. The right of good and fair governance is one to which all citizens and residents are entitled.

In regard to social rights, the Israeli judicial-passive approach in regard to social rights is based on a classic argument, well-known in the legal literature, which advocates the Supreme Court's non-intervention in bolstering social rights characterized by an economic-budgetary aspect.[44] Under this argument, the positive nature of social rights, the high cost of implementing them, and the fact that they entail the setting of budget priorities, makes them non-justiciable from an institutional perspective.[45] The argument is based, *inter alia*, on the distinction between social rights (sometimes categorized as "positive" rights), which obligate the State to allocate resources for their realization, and the liberal political rights categorized as "negative," toward which the state must remain passive and merely refrain from infringement thereof. In other words, while the state must not violate these negative rights, it is not obligated to take action to fulfill them, thereby imposing an additional financial burden on the State.

This argument cannot hold water. One can find both positive and negative elements in human rights which apply to the relationship between the individual and the government. Nor can this argument be allowed to stand in light of the fundamental distortions in safeguarding human dignity. Thus, the Supreme Court's activist ruling on the separation fence,[46] which was based on humanitarian concerns and intended to make life easier for Palestinian residents, imposed heavy expenses on the State, assessed in hundreds of millions of dollars. Similarly, intervention by the Court on a social issue which entails a monetary imposition on the State cannot be rejected out of hand. In light of the Supreme Court's far-reaching intervention in recent years on sensitive security issues, which has placed a heavy financial burden on the public, it is difficult to accept the Supreme Court's judicial passivism in the social arena.

CONCLUSION

In this article, I have submitted that judicial activism or judicial self-restraint cannot be dealt with in a vacuum. Rather, they should be discussed in light of a particular society. Each society faces unique problems, and its judiciary is part and a parcel of the baggage of democracy in the country in question. Israeli society is an over praised society, a melting pot which faces special security problems and the danger of discrimination between different groups. The question regarding judicial activism and passivism should be answered within the framework of the society. Israeli democracy would not have been the same without strong judicial activism, which interpreted laws on the assumption that the legislators did not intend to infringe on civil rights, such as the equality of women and minorities, even when the subjective intent of the legislators

44. *See* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).
45. *See id.* at 788-92.
46. *See Beit Sourik*, *supra* note 33.

was not to secure those rights. The same line should also have been adopted in the sphere of social rights, as has been advocated in this article.

In interpreting the laws in the light of civil liberties, even in the absence of a written constitution, the Israeli Supreme Court narrowed the gap between law and society. In his jurisprudence, Barak interpreted statutes to "ensure that the law in fact bridges the gap between law and society."[47] Even if the price of judicial activism is sometimes high, it is worthwhile to ensure democracy in a diverse society.

47. BARAK, THE JUDGE IN A DEMOCRACY, *supra* note 17, at 17.