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THE RELEVANCE OF THE JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT DISCOURSE

Ariel L. Bendor*

INTRODUCTION

One of the most common distinctions in both public and professional discourse in the field of law – in the United States, in Israel, and in many other countries – is between judicial activism and judicial restraint. This distinction is common mainly in constitutional law and in other fields of public law, such as administrative law. However, sometimes this distinction is also used in the context of private law. Despite the popularity of the distinction, which is mentioned in many thousands of books and law review articles, as well as in many court decisions, it is based on extremely vague terms and concepts, which lack clear definitions.¹ In the words of Keenan D. Kmiec:

[A]s the term [judicial activism] has become more commonplace, its meaning has become increasingly unclear. This is so because ‘judicial activism’ is defined in a number of disparate, even contradictory, ways; scholars and judges recognize this problem, yet persist in speaking about the concept without defining it. . . . [P]eople [are] . . . using the same language to convey very different concepts.²

Despite this difficulty, it seems that in general, speaking on judicial activism or restraint assumes that the judiciary has a key role in shaping legal policy. This assumption is implicit not only in approaches that favor judicial activism, but also in approaches that support judicial restraint. The question is whether it is desirable for the judiciary to be active in using its powers. The question arises in several aspects, including: striking down policies of other governmental branches; departure from a court’s own precedents; departure of the intent of the lawmakers; and judicial review, not only of procedural matters, but also of substantive issues.

In this context, former Israel Supreme Court Chief Justice Aharon Barak wrote:

Activism and self-restraint are relevant only when judicial discretion exists. A judge who declares what the law is, without creating new law, exercises neither activism nor self-restraint. . . . Activism or self-

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1. See Keenan D. Kmiec, Note, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1442-43 (2004) (seeking to clarify the meaning of judicial activism, especially “when it is used in different contexts, so that those who use the term can communicate their ideas more effectively.”).

2. *Id.* at 1443.

restraint exists only when judges make law.³

From this statement, it stems that the debate between judicial activism and restraint is not relevant in regards to judicial decisions — activist or restrained — that are not within the law. However, even though Chief Justice Barak argues that illegal judicial decisions arise out of disputes regarding judicial policy, in practice the meaning of his words is that one has to deny judicial activism or restraint resulting in violations of the law.

In this essay, my argument — which I believe Justice Barak would agree to partially — is that as a rule, courts have to distinguish between substantive law and judicial review matters, avoid as much as possible considerations relating to judicial review, and rely on the interpretation of substantive law. Although I will focus on demonstrating this argument by Israeli law, its jurisprudential nature is quite universal.

THE PURPOSES OF JUDICIAL REVIEW

The Israeli Supreme Court's decisions indicate that judicial review is not only an instrument for resolving disputes with regard to the question of whether an act of Parliament or a governmental decision is consistent with the provisions of the Basic Laws or other relevant laws.⁴ Rather, the settling of the differences is also justified on the basis of considerations, some of which are of an inter-institutional nature, that concern the relationship between the non-elected judicial branch and the elected legislative branch.⁵

The emphasis on the role of the judicial branch is not only in contexts of reservations against that role. At times, the role of the Supreme Court is also presented in positive contexts, of special contribution to the protection of human rights.⁶ In the words of then-Chief Justice Barak's words:

The degree of society's sensitivity to the preservation of individual liberty is reflected in the extent of judicial review of a decision by an administrative authority which [sic] violates a right. Indeed, the preservation of individual liberty is too dear for us to leave it explicitly in the hands of the administrative authorities. I know that judicial supervision does not always ensure the protection of human rights. Nonetheless, I am convinced that the absence of judicial supervision, in the end, leads to violation of human liberty.⁷

In many cases, the Court does not distinguish between the question of the interpretation of material constitutional law and its own considerations in exercising

3. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 264 (2006).

4. See Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 J. CONST. L. 581, 583 (2001).

5. See *id.* at 585-86.

6. See *id.* at 584, 586.

7. CA 2060/97 Vilenchik v. Tel-Aviv Dist. Psychiatrist 52(1) PD 697, 713 [1998] (Isr.).

judicial review.⁸ Thus, for example, then-Chief Justice Barak ruled as follows:

The Court will show judicial restraint, and will not replace the discretion of the legislators with the discretion of the judge. At the same time, judicial restraint is not equivalent to judicial stagnation. Judicial moderation must not give rise to judicial paralysis. When the legislators violate a human right which [sic] is anchored in the Basic Laws, and the violation exceeds the extent required, there is no other choice than to adopt a clear judicial position. Just as we are not free to repeal a statute, simply because we would not have enacted it, had we been members of the legislative branch, we are also not at liberty to refrain from repealing a statute, merely because the legislators saw fit to enact it. We, the judges, have been assigned the constitutional role of preserving the criteria for the constitutionality of the statute, which [sic] are set forth in the Basic Laws, and preventing any transgression beyond their boundaries.⁹

Indeed, the Court demonstrates theoretical ambivalence with regard to its role.¹⁰ If the tool is to preserve the criteria for the constitutionality of the statute, which are set forth in the Basic Laws, and to prevent any transgression beyond their boundaries, why does the Court sentence itself to restraint, deference, and moderation? What is the relationship between the policy of judicial moderation and the role of the Court, which requires it to hand down decisions according to the rules set forth in the Basic Laws? The answer to this question, as the Court sees it, may apparently be found in the following sentences by Chief Justice Dorit Beinisch:

[T]he Court should carry out the role given to it in our constitutional system and examine the constitutionality of the legislation enacted by the legislative branch. This examination should be made by striking a delicate balance between the principles of majority rule and the separation of powers, on the one hand, and the protection of human rights and the basic values underlying the system of government in Israel, on the other.¹¹

The meaning of this statement is that the Court takes no interest in the balance between human rights and the purposes of the violation thereto as is required by the Basic Laws on human rights, which state that “[t]here shall be no violation of rights . . . except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”¹² In addition, the Court also refers to the balance between the need to protect human rights and the remaining basic material values of Israeli society, on one hand, and, on the other, the principles that concern the

8. *See, e.g.*, HCJ 1715/97 Israel Inv. Managers Ass’n v. Minister of Fin. 51(5) PD 367, 389 [1997] (Isr.).

9. *Id.*

10. *Id.*

11. HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. para. 14 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm.

12. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.).

relationship between the non-elected judicial branch – that is, “the principles of majority rule and the separation of powers.”¹³

That is likely to imply that constitutional judicial review is operated according to principles that are not identical to those that apply to the Parliament, as the legislative branch. Whereas the Knesset, when operating as the legislative branch, is required to uphold the Basic Laws,¹⁴ and only those laws, the Court, while taking into account the material constitutional law set forth in the Basic Laws, also takes into consideration principles that are external to the material constitutional rules set forth in the Basic Laws.¹⁵

Nonetheless, in certain case law, there is a tendency to combine — at least rhetorically — considerations of material law with considerations of separation of powers and majority rule, which are external to them.¹⁶ Thus, for example, Justice Barak wrote:

In cases where a range of means exists, it is necessary to recognize the maneuvering power and the sphere of discretion of the legislators. . . . The determination of social policy belongs to the legislators, and they come punishment thereof belongs to the Government, to both of which room for legislative maneuvering has been given.¹⁷

However, these statements, which seem to reflect interpretation of the Basic Laws as providing the elected branches with room for legislative maneuvering, are justified by addressing the relationship between the roles of the legislative branch and those of the judicial branch, while ascertaining the need for special care and restraint on the part of the Court.

TO WHOM THE CONSTITUTION IS DIRECTED

Notwithstanding the importance of judicial review, a constitution and the Basic Laws, like most other legal rules, are not directed at the courts.¹⁸ Rather, they are primarily directed at the elected branches of government “and at individuals — the citizens and residents of the State.”¹⁹ The unique aspect of the Israeli Basic Laws as legal rules, which are superior to other laws, lies in the fact that they are also primarily directed at the legislature: “[t]hey prevent [the Knesset] from enacting certain statutes, or even require it to enact certain statutes.”²⁰ As in the United States, the power to engage in judicial review in Israel is derived from the very jurisdiction of the courts — which is

13. HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. para. 14 [2009] (Isr.).

14. *Powers and Functions of the Knesset*, KNESSET ENGLISH HOMEPAGE, http://www.knesset.gov.il/description/eng/eng_mimshal0.htm (last visited Feb. 17, 2012).

15. See HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. para. 14 [2009] (Isr.).

16. See *id.*

17. HCJ 1715/97 Israel Inv. Managers Ass’n v. Minister of Fin. 51(5) PD 367, 386 [1997] (Isr.).

18. Ariel L. Bendor, *Is it a Duck? On the Israeli Written Constitution*, YALE ISR. J. 53, 55 (2005); see also *The Existing Basic Laws: Summary*, KNESSET ENGLISH HOMEPAGE, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm (last visited Feb. 17, 2012).

19. Bendor, *supra* note 18, at 55-56; see also *The Existing Basic Laws: Summary*, *supra* note 18.

20. Bendor, *supra* note 18, at 56; see also *Powers and Functions of the Knesset*, *supra* note 14.

generally a mandatory jurisdiction – to decide legal disputes.²¹

One can argue that all these assertions “are formalistic and technical, and that in fact, Basic Laws and the theory of their superiority over ordinary statutes were only intended to allow for the judicial review of such statutes.”²² Thus, judicial review was not intended to give effect to the Basic Laws.²³ Rather, the Basic Laws were intended to enable judicial review.²⁴

Nonetheless, for the time being, the principal practical impact of the Basic Laws that embody the Israeli “Constitutional Revolution” — which are the two Basic Laws that relate to human rights — has been on Knesset legislation, and not on judgments that have exercised judicial review of the constitutionality of statutes.²⁵ Since the outbreak of the Constitutional Revolution, the Supreme Court has only invalidated six statutory provisions.²⁶ In contrast, the constitutionality of all legislative bills has been meticulously examined by legal advisors to the Knesset and government and by the members of Knesset themselves.²⁷ Bills that raise doubt as to their compliance with constitutional requirements are normally canceled, delayed, or redrafted.²⁸

Moreover, certainly because of the influence of the Basic Laws, the Knesset has enacted a series of new statutes, in relation to which an effort has been made to respect human rights.²⁹ These new laws replace previous laws that disproportionately violated human rights.³⁰ In cases where the Court invalidated Knesset statutes by virtue of the Basic Laws, the Knesset amended the statute in accordance with the guidance given in the judgment.³¹

21. Bendor, *supra* note 18, at 56; *see also* THE HIGH COURT OF JUSTICE, http://www.knesset.gov.il/lexicon/eng/bagatz_eng.htm (last visited Feb. 17, 2012).

22. Bendor, *supra* note 18, at 56.

23. *Id.*

24. *Id.*

25. *See id.*; Daphne Barak-Erez, *Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint*, 3 INDIAN J. CONST. L. 118, 121 (2009).

26. *See* Barak-Erez, *supra* note 25, at 129; HCJ 1715/97 Israel Inv. Managers Ass’n v. Minister of Fin. 51(5) PD 367 [1997] (Isr.); HCJ 6055/95 Tzemach v. Minister of Def. 53(5) PD 241 [1999] (Isr.); HCJ 1030/99 Oron v. Speaker of the Knesset 56(3) PD 640 [2002] (Isr.); HCJ 1661/05 Reg’l Council Gaza Coast v. Knesset of Isr. 49(2) PD 481 [2005] (Isr.); HCJ 8276/05 Adalah Leg. Ctr. For Arab Minority Rights in Isr. v. Minister of Def. (unpublished) para. 42 [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.htm; HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. para. 69 [2009] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm; CA 8823/07 John Doe v. State of Israel [2010] (Hebrew); *see also* HCJ 4124/00 Yekutieli v. Minister of Religious Affairs paras. 50-51 [2010] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/00/240/041/n43/00041240.n43.htm (invalidating a budget item included in the annual budget law that contradicted the Foundations of Budget Law).

27. Bendor, *supra* note 18, at 56; *see also* Barak-Erez, *supra* note 25, at 131-32.

28. Bendor, *supra* note 18, at 56.

29. *See id.*

30. *Id.*

31. *Id.*

THE IMPORTANCE OF THE DISTINCTION BETWEEN SUBSTANTIVE CONSTITUTIONAL RULES
AND JUDICIAL-REVIEW POLICIES

At the same time, it is preferable to focus on the substance of the constitutional constraints on the legislature and the executive, not only from a practical point of view, but also in terms of the strategy for determining the content and the interpretation of the Basic Laws and, in the future, of the Israeli Constitution.

Systematic discrepancies between judicial-review considerations and the principles set forth in the Basic Laws are likely to give rise to replacement of the constitutional rules by the rules of judicial review, or the obscuring of the distinction between the constitutional rules and the policy of judicial review.

Thus, the common approach is likely to lead to a lack of clarity with regard to the nature of the limitations and duties that are imposed upon the legislative and executive branches. As a matter of norm, the starting point should be that these branches, which operate according to legal advice, are interested in operating according to law in a manner reconcilable with the constitutional rules that apply to them. In any event, it is proper for the Court to exercise the power of judicial review by adopting an interpretation of the Basic Laws that focuses on the nature of the rules that apply to the elected branches, and not on the nature of the rules that apply to the Court itself.³² In this way, it will enable the other branches, provided they desire to do so, to operate according to law.

It is quite possible, for example, that the correct interpretation of the Israeli Basic Laws will allow the elected branches a broader range of discretion in matters that concern economic or security-related policy than in other matters. Accordingly, it is quite possible that the range of discretion that is given to the legislature and the executive in matters related to human rights is more restricted than the range of discretion given to them in other matters. At the same time, the interpretation of the Basic Laws should not be derived from considerations that concern the judiciary or its relationship with the other branches. Even if, in the opinion of the Court, there is justification in certain cases where its decision is not based exclusively on the interpretation of the Basic Laws and their application to the facts of the case before it, and even if it is appropriate for the Court to take constraints of the judicial branch into account, it must make a clear separation between the various aspects in order to enable the elected branches and their legal advisors to know which constitutional limitations and duties are incumbent upon those branches.

Mixing considerations of constitutional interpretation with considerations that concern the policy of judicial review is likely to give rise to errors in the Court's decisions. These errors in turn, are likely to have an undesirable impact on the method according to which the principle of binding precedent behaves. Thus, judges who hold before their eyes inter-institutional considerations which are likely to justify the restraint of judicial review in the context of a certain right, are likely to formulate their rulings in

32. *Id.* at 55-56.

such a way as to imply that the weight of that right is materially less. Moreover, the judges might not carry out their examinations with the requisite degree of stringency if there really is sufficient justification for the outcome of the decision not to comply with material constitutional law, but rather, to be biased by considerations or constraints of the judicial branch itself.

Ironically, it is precisely the stressing of considerations that concern judicial-review policies, without distinguishing between these considerations and material constitutional law — not to mention the replacement of material constitutional law by the policy of judicial review — which can prejudice the public status of the judicial branch. The public trust in the non-elected judicial branch and the public belief that the judiciary operates according to professional legal considerations and not according to the judges' own political agenda, may be prejudiced precisely by a declared practice of underestimating the weight, or even ignoring the existence, of material constitutional law.

CONCLUSION

As a rule, courts should make decisions based on substantive-law considerations, not on institutional considerations, relating to the judiciary itself and to its relations with other governmental branches. Judicial decisions should be evaluated according to their substantive-law correctness and not according to their activist or self-restrained nature.

If, by applying the correct interpretation of the law, a governmental branch acted unconstitutionally or illegally, the court should give the appropriate remedy. If the governmental branch acted in a constitutionally valid manner, the court should reject the petition against it. Judicial review is intended to interpret and enforce the substantive law. There should be no significant gap between the substantive law rules and the judicial-review policies.

This approach is not related to the disputes on judicial discretion.³³ Even if courts have wide discretion when they decide legal matters generally and constitutional questions in particular, they should use their discretion, as a rule, in light of substantive constitutional and legal considerations relating to the subject matter thereof, and not in light of institutional considerations of the judiciary and its relationship with the other branches of government.

Decisions of courts should therefore be written and in light of substantive principles. The question of whether they express judicial activism or restraint is not relevant.

33. For a comprehensive discussion of judicial discretion, see AHARON BARAK, *JUDICIAL DISCRETION*, 264-66 (Yadin Kaufmann trans., 1989).

