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## ON AHARON BARAK'S ACTIVIST IMAGE

Yigal Mersel\*

### A. OPENING REMARKS

I would like to begin by thanking the conference organizers for kindly inviting me to participate in this conference, in honor of Professor Aharon Barak, retired President of Israel's Supreme Court.

The topic addressed by this panel is “judicial activism or judicial restraint.” I will start by saying that it appears to me that Justice Barak, if he was asked, would react somewhat dismissively. His standard reply to questions about his own “activism” throughout the years was “tell me how you define activism and I’ll tell you if I’m activist.” With this in mind, it seems to me that Barak never admitted to considering himself an “activist” judge. Nor did he ever deny being one. What is more, addressing the subject of activism in his *Foreword* article published in the Harvard Law Review, he said explicitly: “In any event, I am not at all interested in whether my legal community thinks that I am an activist or that I show self-restraint.”<sup>1</sup>

This having been said, I do believe there is room for further discussion on the topic of “activism.” Indeed, few if any would challenge the degree of preoccupation with the question of whether or not Justice Barak was an activist judge and in what respect. Barak faced criticism for being “‘overly’ activist” in Israel and abroad; while these criticisms were met with replies in Israel and elsewhere, no definitive conclusion seems to have been reached (as evidenced also by our participation in this symposium) and the question of whether Aharon Barak was an activist judge remains.<sup>2</sup>

In this essay, I will address the issue by making four points:

First: Aharon Barak has an ‘activist’ image, even if he was not necessarily an activist. Second: it is not surprising that Barak has an activist image. Aharon Barak himself would probably define himself as activist. Third: it is not surprising that Barak has an activist image — his writings regarding judicial discretion and the surrounding rhetoric created such an image. Fourth: is it possible that Barak truly wasn’t activist, as

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1. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 127 (2002).

2. See, e.g., Richard Posner, *Enlightened Despot*, THE NEW REPUBLIC (Apr. 23, 2007, 12:00 AM), <http://www.tnr.com/article/enlightened-despot>; Abby Phillip, *Bork hits Kagan over Israeli Judge*, POLITICO, June 23, 2010, <http://www.politico.com/news/stories/0610/38920.html>.

his image would suggest, but that there were advantages to him being thought of as such?

#### B. AN ACTIVIST JUDGE OR MERELY THE IMAGE OF AN ACTIVIST JUDGE?

The difficulty in addressing the issue of whether Barak was activist or not is first the lack of a clear definition of “activist judge.” Even without such a definition, many scholars in Israel and beyond have come out against what they considered to be Justice Barak’s “excessive activism.” For example, Richard Posner and Robert Bork’s critiques are familiar to American readers.<sup>3</sup> In Israel too there are a good number of critics of Barak’s “judicial activism,” not only in the political arena but also in the legal community.<sup>4</sup> There are those who argue the Supreme Court is overly activist with regard to its review of the other branches. Still others argue against the broad use of the “reasonableness” doctrine. Then there are those who condemned the lack of certainty and stability, and others who complained about the death of formalism and the rise of uncertain value-laden elements. It is also important to remember, and point out to detractors, that there were also many who were convinced that Barak’s “activism” was well founded, appropriate, correct in degree and most legitimate, commensurate with the Israeli reality in the Israeli context.<sup>5</sup>

We may summarize this point by concluding that Barak has an activist image. But is it only an image?

It is worth emphasizing that when Justice Barak’s judgments are measured by their objective results, that is to say, to what extent he actually interfered with the other branches, using the judicial tools he created and developed, the result is not as activist as critics would have us think.

Let’s remember: Barak sat on the Court for twenty eight years and decided thousands of cases. The vast majority of these by no means interfered with the other branches.

Furthermore: A survey conducted in Israel in 2010, examining to what extent Supreme Court Justices’ decide in favor or against the state, produced surprising results.<sup>6</sup> The survey, touching on judicial years 1995-2004, found that when Justice Barak’s decisions are examined, his tend to be *most favorable towards the state*. In fact, only three judges’ decisions appeared more favorable towards the state than his. The survey further revealed that Barak ruled in favor of the state in seventy four per cent of the decisions published during that period. The real number is far higher, if we consider the number of cases settled in the courtroom in favor of the state and were never reported.

Hence Barak, it turns out, was not all that activist if we apply a results-oriented test. Moreover, alongside the activist argument directed at Barak, stands the “passivism” argument. There are certain specific areas in which he is said not to have been

3. Posner, *supra* note 2; Robert Bork, *Barak’s Rule*, 27 AZURE 125.

4. See, e.g., Alexander Traum, *Israeli Judge Complicates Kagan’s Image*, THE JEWISH STATE, July 2, 2010, available at <http://thejewishstate.net/july210kagan.html>.

5. Hanna Lerner, *Democracy, Constitutionalism, and Identity The Anomaly of the Israeli Case*, 11 CONSTELLATIONS 237.

6. Ido Baum, *Judges’ Rulings Favor the State*, THE MARKER (July 5, 2010, 8:34 AM), <http://www.themarker.com/law/1.556478> (Hebrew).

sufficiently activist — the High Court of Justice's review of the administrated territories, the realm of social and economic rights, and more.

Indeed, it is difficult to argue with the fact that Barak developed an activist image, without which neither he nor we would be addressing the topic of this symposium. What is far less clear is whether he was in fact an activist judge in reality, as his image would suggest. Perhaps his activism is simply a myth.

If we are in fact dealing essentially with myth, we can legitimately ask *why* such a myth was created and *who* created it. There were clearly those who disliked Barak's rulings for their results, and one might assume preferred to label him as activist in order to better attack his decisions. It also stands to reason that the source of the myth lies sometimes in a misunderstanding of the Israeli reality and of its legal circumstances. There are obviously further possible explanations.

I would like to point to two interesting arguments relating to the supposed myth of Barak's judicial activism and his activists Image: The first argument is that Barak brought the activist myth upon himself by developing his theory of judicial discretion. The second is that Barak himself — if asked — would define himself as “activist.” Let me explain.

#### C. BARAK AS AN ACTIVIST JUDGE: EXPOSING JUDICIAL DISCRETION AND THE JUDGE'S ROLE IN DEMOCRATIC SOCIETY

There are very few judges who dedicated so much thought and writing, both in case law and academia, to the topic of judicial discretion. Justice Barak dealt with the subject even prior to his appointment. He wrote in his 1987 book titled *Judicial Discretion* that the question haunted him even as a student.<sup>7</sup>

The book features a number of bold concepts: the idea that any text requires interpretation;<sup>8</sup> that the authorized interpreter is the judge;<sup>9</sup> that in his interpretative world the judge can and must examine the underlying purpose of the text and not only the simple words;<sup>10</sup> that in examining the purpose the judge is not confined to the framers' intent or to the framers' interpretation;<sup>11</sup> and that the judge can and is indeed authorized to turn to the legal system's basic values when determining the said purpose or deciding between various objectives.<sup>12</sup>

Barak explicitly admitted that there are “difficult cases” in which a choice involving some degree of subjectivity was inevitable, following an interpretative process; decisions that reflect the objective values as he identifies them.<sup>13</sup>

The ideas expressed in the book *Judicial Discretion* were rapidly implemented in Barak's rulings and rhetoric. A typical “Barakian” judgment would include chapters such as “the underlying values,” the “objective purpose,” the “principled balance,” the

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7. AHARON BARAK, *JUDICIAL DISCRETION*, at xi (Yadin Kaufman trans., 1987).

8. *Id.* at 55-62.

9. *Id.* at 7.

10. *Id.* at 55-56.

11. *See generally id.* at 9-12.

12. *See generally id.* at 152-54.

13. *Id.* at 129-35.

“margin of interpretation,” and so on. Hence, Barak not only developed a comprehensive — and sometimes disputable — theory of judicial discretion, he actually revealed his own decision making and judicial discretion in his judgments.

In doing so, Barak displayed exceptional intellectual and judicial honesty. He fully exposed the interests he was examining and his decision-making process; he systematically laid out the considerations at hand, the value he assigned each and every interest and right, the manner in which he interprets text, the exact weight he attributes to the Legislative intent (if at all), and the version according to which he arrives at the result. This honesty was expressed with exceptional transparency.

However, perhaps not surprisingly, this intellectual honesty exposed Barak to sharp criticism. The more transparently and systematically he presented his decision-making process, the more “activist” he came to be seen, and the more intellectually “exposed” he grew.

Regardless of Barak’s own activism, there is no doubt that his theory respecting judicial discretion is activist, if only in the sense that it recognizes a wide margin of judicial discretion. It is a most powerful approach in terms of the judicial tools that it grants the judge. *The question of whether he will use these tools and to what extent is secondary to the impression of activism that the doctrine creates.* Hence, Barak’s theory and practice of Judicial Discretion has significantly contributed to his activist image.

I truly doubt that Barak’s cases — decided exactly the same way — would have attracted an “activist” label absent this transparency and intellectual honesty. In truth, Barak’s honesty cost him, even if in part, the label or classification as “activist.” Even if this was not his intention, this was the end result.

But, Barak’s activist image does not rely only on his theory of judicial discretion and its implementation in his rulings. Another explanation I would like to suggest — and this is my second argument — is that Barak has contributed to that image himself by another way, by actually defining himself as an activist. Hence, if we would ask Barak himself if following his own definition on activism he is an activist — the answer would be — Yes.

#### D. WOULD AHARON BARAK SEE AHARON BARAK AS “ACTIVIST”?

Even though Barak did not particularly like the debate over his activist rulings, he did try to define for himself what an activist is. In *Judicial Discretion*, he turned his mind to the question of what constitutes judicial activism.<sup>14</sup> He began by noting that the very idea of judicial activism or judicial restraint is only relevant to the extent that a judge has judicial discretion — that is to say the ability “to choose between two or more alternatives.”<sup>15</sup> On this basis, *Barak determined that he defines an activist judge as one who understands the alternatives open to him and chooses that which advances the law; whereas a restrained counterpart will select that which preserves the current state of the law (the status quo).*<sup>16</sup>

Barak further added that a judge who wishes to adapt the law to the realities of life

14. See BARAK, *supra* note 7.

15. *Id.* at 7.

16. *Id.* at 119-20.

is not necessarily an activist judge. At times, an activist judge will not have that goal in mind, whereas the restrained judge, in certain instances, will preserve the status quo in light of such realities.

Barak also added that considerations relating to the separation of powers, judicial objectivity, and the like are equally as relevant to the activist as to the passive judge. *They are, however, more significant to the activist judge, who wishes to bring changes to the law.* That is why Barak warned that “the activist judge must be especially careful.”<sup>17</sup> Since Barak defined the activist judge as one who brings changes to the state of the law, he did not see a direct link between the end result and the question of whether or not a judge is activist. Hence, a liberal judge can display his liberalism by preserving the status quo, to the extent that he believes that the current state of the law is “liberal.”

Against this backdrop, Barak felt that most of the existing definitions of judicial activism focus on the end result and whether they are satisfied with it. Accordingly, Barak viewed the fixation with judicial activism as leading to unhelpful “double standards,” with respect to public confidence in the judiciary.<sup>18</sup> Whereas, to his mind, judicial activism or restraint flowed from the use of judicial discretion.

Twenty seven years later, Barak subsequently published a book titled *The Judge in a Democracy*, where he resumed his discussion of the issue of judicial activism at even greater length.<sup>19</sup> With the benefit of twenty seven years of reflection, Barak added that an activist judge is not only one who is undeterred by changing an existing policy or overturning case law, but “in order to achieve his goals, the activist judge is willing to develop new judicial measures and means (including systems of interpretation, ways of overruling precedent, rules that open the court’s doors to litigants) that will allow him to change the existing law or create new law.”<sup>20</sup> Barak repeats his position on activism as coming into play in the context of the “legitimate” exercise of judicial discretion, that is to say one that is based on objective judicial components rather than on the judge’s personal worldview. That being said, Barak himself admits that we are ultimately dealing with a subjective decision that has been objectively sorted.<sup>21</sup>

And what about methods of interpretation? Barak notes the absence of a direct link between the interpretive method of choice and whether or not a judge is activist. Seen from this angle, purposive interpretation is not necessarily activist and an “originalist” approach is not, by definition, restrained. This is not to say, as Barak admits, that we are more likely to find activism on the side of objective interpretation. That is because this form of interpretation gives the judge more room to maneuver, which serves the activist judge. And in the end, Barak observes, the activist judge will tend to broaden standing and narrow non-justiciability. He will develop new remedies, prefer principled balancing to ad hoc classifications.<sup>22</sup> So — is Barak activist according to the above-mentioned tests?

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17. *Id.* at 150.

18. *Id.* at 215-21.

19. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2004).

20. *Id.* at 271-72.

21. *Id.* at 273.

22. *Id.* at 273-79.

It is clear that the more we explore Barak's writings, the more we get the impression that if Barak were asked if he was activist, point blank, he would answer in the affirmative. Barak developed and fleshed out the theory of purposive interpretation. What is more, he developed an array of judicial remedies and tools, while expanding standing and narrowing non-justiciability. He expanded the grounds for reasonableness and proportionality. In truth, according to Barak's own definition, these are not only characteristics of an activist judge, *they are chiefly characteristic of an activist judge*. Were we to examine Barak's twenty eight years on the Supreme Court, his "activist" traits outweigh those Barak would deem "passive." In his book, Barak does not conclude whether according to his own definition, he is indeed activist. He leaves the answer somewhat open, essentially suggesting that he may have been activist at times but not always. He was prone to make activist changes only in the scope of fulfilling his judicial duties; in "bridging the gap between law and life"<sup>23</sup> and upholding the constitution.<sup>24</sup> Even then, he proceeded to do so using measured tools that reflect the delicate balance between change and stability.<sup>25</sup> That having been said, and as noted, if we are to examine all the criteria that Barak himself exposed, and even if we were to concede to his assessment that judges are only in part activist or restrained, it still appears that these tests reveal his own record as being more the former than the latter.

#### E. IS IT LIKELY THAT BARAK WISHED TO APPEAR ACTIVIST?

To summarize to this point, we can say that, at the very least, Barak has an "activist" image. It is not clear, however, that an in-depth examination of his rulings would comport with that image. Certainly that is true in respect of the broad scope of his decisions, which include areas in which his judgments could essentially be deemed "passive." And yet the idea of Barak's supposed activism has become almost undisputable where Barak's image is not only one of an activist judge but perhaps the most activist judge in Israeli history, and perhaps even beyond its very borders.

It bears repeating that even if this is only a myth, it is not surprising for two reasons. *First*, Barak's theory of judicial discretion and that dealing with the judge's role in democratic society is "activist in its substance."<sup>26</sup> It exposed Barak's decision-making process as a judge. It therefore effectively served to lay the groundwork for criticizing him as "activist." *Secondly*, and as previously noted, is Barak's own position. The more we read his definitions of the "activist" judge, the more we are inclined to see them as characteristic of his own record, that is to say we tend to conclude that Barak might have considered himself more activist than not.<sup>27</sup>

What conclusions can we therefore draw from all of the above? Is Barak's "judicial activism" in fact only a myth?

It is unlikely that Barak was not aware of his own "activist" image, but was the gap between the activist image and the reality entirely coincidental? It is truly hard to say.

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23. *Id.* at 18.

24. *Id.* at 20-23.

25. *Id.* at 106.

26. BARAK, *supra* note 7, at 192-97.

27. BARAK, *supra* note 19, at 271-72.

Barak himself was fond of saying that we should focus on analyzing the case law, not psychoanalyzing the judges that drafted them.

But we might still inquire into whether Barak's activist image was at least *beneficial*.

An intuitive answer — and perhaps one that Barak would give if asked — is that this image harms the Supreme Court and its status. It creates unnecessary strain between the Court and the other branches; it attracts excessive criticism of the Court and its work; it creates an inaccurate impression of its role among the public. In the long term, it can harm public confidence in the judiciary.

However, there is another possible explanation. This explanation would suggest that the activist image did not harm Barak or the Court but actually helped them to secure their status and role in the Israeli young democracy. Broadening the rules of standing, relaxing justiciability, and developing the doctrine of reasonableness are unprecedented tools that gave the Court a powerful image. They expanded the array of cases in which the Court *could* potentially intervene. Thus, even if the Court *did not actually intervene*, it came to be *perceived* as both powerful and influential.

Indeed, it is important to remember that the Israeli legal system is relatively new. Israel is a young democracy. It is a divided society that does not have an entrenched constitution even after sixty three years of independence. The relationship between the government branches is tense, as is the relationship between cultural and ethnic communities. There are security challenges and the threat of terror constantly looms.

Against this background, the Court's status and that of its judges depend not only on formal constitutional or statutory regulation but mainly on the judges themselves, on their rulings and on the public's confidence in them. Paradoxically, one can argue that in the above-described state of things, it is *better* to have judges perceived as activist, *even when they are not*. It is far better that the government branches know that they are subject to judicial review even if the Court ultimately does not intervene. In Barak's own words, "there is no law without judges."<sup>28</sup> Indeed, Montesquieu's theory of checks and balances might take into account an additional component — that of the judge's reputation as an "activist" judge. At times, that reputation is no less important than what the judge actually does. A judge's mere reputation as interventionist and activist, irrespective of whether she actually is, can in itself constitute a powerful tool.

#### F. WHAT HAPPENS WITH THE PASSAGE OF TIME?

Over the last years we have been witness to prolonged and increasing attacks on the Supreme Court of Israel. These attacks, significantly intensified after Barak's retirement, were accompanied by calls to reduce the Court's power and to change the judicial appointment process. What sparked this change?

There are many factors responsible for this change. One is that certain actors detected what they understood as a decline in the Court's manifest powers, as evidenced in its activist rhetoric. Thus, we seem to witness what might best be described as a "backlash" against the activist myth. It stands to reason that some of the reactions and

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28. Aharon Barak, *Judicial Philosophy and Judicial Activism*, 17 IYUNEI MISHPAT 497 (Hebrew).



critiques directed at the Court were prompted by a perception that it created this activist reputation, even though *in practice* its intervention is limited, and a realization that — in the absence of a stringent constitution and a longstanding democratic tradition — its actual power was limited relative to the other branches. The process we are perhaps witnessing over the last years, is one in which the court is losing its activist image.

It is perhaps in this context, related to the disparity between the Court's activist reputation and its actual record, that we can come to understand Barak's comments in an in-depth media interview that took place after his retirement from the bench and in the midst of bitter attacks on the Court.

When asked whether "if given the chance, [he] would do things differently?" If "[he] would have been a more cautious and reserved judge?"

Barak replied: "*I would have done a great deal more. A great deal more could have been achieved. A lot more should have been done.*"<sup>29</sup>

It might be that in retrospect Barak regrets the fact that he was only perceived as activist and was not truly activist in reality.

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29. Ari Shavit, *Aharon Barak, A Concerned Citizen*, HAARETZ (Apr. 9, 2008), <http://www.haaretz.co.il/misc/1.1317752> (Hebrew).