

The Israeli Constitutionalism: Between Legal Formalism and Judicial Activism

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The Israeli Supreme Court has an activist image, and even an image of extreme activism. This image is one that is held by the general public and academic law faculties both in Israel and abroad. Although the Supreme Court itself has no interest in declaring itself as activist, one may find hints of such self-awareness in its own verdicts. In this regard, the academic and public dispute is not about whether the Supreme Court is activist, but whether this activism is desirable.

Judicial “activism”, as most other “isms” in law theory, does not have any single, clear and consensual meaning. In this lecture, it implies the creativity of the court. It is an activist court when it creates new legal principles, either by development or changes in the common law, or by giving a new interpretation to an existing law. The court is perceived as activist when it makes a decisive ruling in disputes that lie at the very center of political or moral controversies. But, as I shall try to argue later on, this is a problematic issue. A significant number of legal principles, if not all of them, reflect political and moral preferences or judgments. The very application of legal principles does not in itself indicate the activism of the court *per se*.

The activist image of the Israeli Supreme Court is understandable. For example, nearly fifty years after the establishment of the State of Israel, the Supreme Court announced that the basic laws passed by the Knesset, the first of which was enacted forty years earlier, were not ordinary laws but comprised parts of a constitution. The Supreme Court further ruled – without this being written into any basic law – that it had the power to exercise judicial control over “ordinary” laws and to annul any that did not conform, in its opinion, to a basic law. In fact, Israeli courts deal regularly with claims against the constitutionality of laws, and in some cases have even disqualified laws that were found to contradict a basic law. Regarding this ruling, Moshe Landau, a former president of the Supreme Court, wrote ironically that the Supreme Court acted as a “Constitution-Maker for Israel”.

Another outstanding example for the judicial activism ascribed to the Israeli Supreme Court, and which is also taken from the field of constitutional law, concerns the development of human rights. Until the enactment in 1992 of the two basic laws dealing with the rights of man – which also, as they are worded, stipulate only some of the rights, and not all the important ones – there were hardly any laws that dealt with human rights. Nevertheless, the Supreme Court introduced a long series of basic rights into Israeli law, some of which have no grounding in law, nor even more so in any basic law until the present day. Among the rights adopted in this manner by Israeli law are: freedom of expression, journalism and demonstration, the right to equality and non-discrimination, freedom to associate, and the right to education. Besides the development of human rights, it is commonly claimed that the Supreme Court has shown activism also in the field of “quality of government”. In this context,

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it was decreed that the Prime Minister was obliged to dismiss any minister who had been presented with a bill of indictment for serious transgressions of the law. This is in spite of the fact that the Basic Law: The Government, which entitles the Prime Minister to dismiss ministers, does not prescribe any such obligation.

Other examples for what is perceived as the judicial activism – and sometimes even as the extreme judicial activism – of the Israeli Supreme Court, that have special relevance to this conference, is connected with the territories occupied by Israel. The very readiness of the Supreme Court to deliberate repeatedly with the appeals of residents of the territories, as well as with public appeals against the army and other Israeli authorities, is considered as clear-cut activism. A relatively large proportion of such appeals bear fruit directly or indirectly (such as compromises between the applicants and the army). In cases of national security, not specifically so in the territories, the Supreme Court also forbids the security services from exerting physical force, not to speak of torture, in interrogating terror suspects, and prohibited the administrative detention of Lebanese residents for bargaining purposes in negotiations for the release of Israeli captives.

The alleged judicial activism of the Israeli Supreme Court is not limited to constitutional law. Among other things, the court determined that in the field of administrative justice, a lack of plausibility was an independent reason for judicial control over individualistic administrative regulations and decisions; that the State in general is obliged to keep its promises, and that an administrative authority that causes damage to an individual through some illegal action would have to pay monetary reparations (not just according to the law of damages but by force of administrative law itself).

This judicial activism is seen as reflecting an anti-formalistic approach that indicates a preference by the court for a policy that appears to it as appropriate and in accordance with the basic values of the legal process as compared with the dry wordings of the law, especially the dry wordings of laws that seem to grant wide discretionary powers to other governmental authorities – the Knesset and the Government. In fact, judicial activism is considered to be incompatible with a legal formalistic approach. For this reason, the judicial activism of the Israeli Supreme Court is perceived as dependent upon a non-formalistic or even an anti-formalistic approach. Yet in my opinion, in many cases, the activism or what seems to be the activism of the Israeli Supreme Court is actually based on a legal formalistic approach.

One of the most frequent accusations against jurists is that of “formalism”. Formalist adjudicators are considered to be rigid, dogmatic, arbitrary and impractical, who uphold a mechanical and barren legal theory detached from values as well as from reality. On this basis, the Israeli Supreme Court sees the term “formalist” as a pejorative label, and frequently declares, at least in recent decades, its reservations against the formalist approach. In effect, the definition of an argument as being “formalistic” has in many cases been the reason for its rejection by the court.

Judicial “formalism”, as with the term “activism”, is not a concept that has a clear and consensual meaning. Nonetheless, it may be said that formalism is based on the perception of law as an autonomous branch of knowledge that can be distinguished from politics, and cannot in any way be transmuted into political terms. It is true that

law expresses political insights or ideologies, or makes use of them, but these can be distinguished from law and remain extra-judicial. This conclusion finds support in the perception of jurists engaged in legal practice. Judicial formalism expresses the theoretization of the jurists' sense of a coherent judicial order, and their resentment against any legal infringement of this order. Such "resentment" is sometimes implied even in the writings of realistic and critical pundits who censure legal politics not only for its deviation from acclaimed values but also for its deviation from the declared judicial order.

Formalism is based on intra-judicial rationality, that is, on the perception of law as a closed coherent system. Judicial formalism is centered upon making decisions according to principles, even to the degree of disregarding seemingly relevant considerations that are not determined by those principles applying to the matter under jurisdiction. The thinking that underlies judicial formalism is inductive and deductive – legal principles that rationally produce, or at least should produce, a solution to the legal question being presented for judgment. This implies that according to the formalist perception there should be no gap between the legal principle and the verdict of the court. The function of the court is to give a ruling according to the essential law, and not to deviate from this law for considerations of judicial policy that are external to it. This is, as I understand it, the meaning of judicial formalism as based on the rule of law, i.e. the rule of the legal principle, and not on the rule of judges or the court.

Here I come to my two central claims in this lecture. The first claim is that there is no necessary contradiction between judicial activism and judicial formalism. The second claim is that the judicial activism ascribed to the Israeli Supreme Court is based, in many cases, on a formalistic approach. I shall present the two claims briefly.

As I said earlier, judicial activism is expressed by a deviation from precedents and by changes in the law. Judicial formalism is expressed by loyalty to principles and the solution of legal questions inductively and deductively. From this we conclude that the court may be an activist one even when it adopts the legal formalistic approach, since formalism and activism function on different levels. For example, a new decision that deviates to a real extent from existing precedents may be based on inductive and deductive thinking – and not on intrinsically political or moral thinking – and therefore it can be formalistic and at the same time be an activist decision if the earlier precedents were not based on such inductive or deductive thinking.

It is indeed difficult to deny that at least some of the activist verdicts of the Israeli Supreme Court reflect considerations of judicial policy that are not derived from the purely legal principles that faced the court, and perhaps – in certain cases – that even contradicted these principles. Nevertheless, and this is my second claim today, in many cases judicial activism is expressed specifically through a clear-cut formalistic approach.

For instance, in dealing with matters of constitutional and administrative law, the Israeli Supreme Court has, for at least fifteen years, hardly ever applied barriers against standing rights and the non-justiciability of political questions. The Israeli Supreme Court is even prepared to discuss the appeals of public applicants whose rights or personal interests have not been damaged, but who claim that the governing

authorities have not acted lawfully. The court would reject such appeals only if there is someone who was directly harmed by the decision and who chose not to appeal against it, or if the claimed law-violation does not have any legal or public importance. As a general rule, the Supreme Court also does not place obstructions against deliberations over political questions. In this way, questions that have obvious security aspects have been discussed in the court and were essentially decided upon – questions that concerned political agreements between parties, and even recently the question regarding budgetary allocation for special education. The policy of the Supreme Court in the sphere of standing rights and justiciability based on giving preference to the rule of law, i.e. the need to ensure the existence of the law as opposed to the institutional interests of the court not to deal with questions in which a decision might harm its standing and expose it to the attacks of the criticized political authorities. This is because without judicial imposition of the law it is feared that the law would not be upheld. However, many see the approach that proposes to limit the range of legal control over the authorities as an expression of judicial formalism, as a means of limiting the political function of the court. But in actual fact, the very opposite is true. The avoidance by the court to deal directly with any appeal that is brought before it, however “political” it might be, is an expression of the justice of the judges and the courts and not of laws. The limitation of the standing rights and justiciability – which was practiced in Israel in the past, and is known to be the basic policy of the courts in the United States – is not directed towards legal interference in disputes that concern matters of security, state and religion, and other such sensitive political areas. It is intended to ensure that the position of political authorities – the parliament and the government – will have the upper hand, regardless of what is stated in actual law. It is just such an approach, despite its image, that is far from being formalistic.

Even the course taken by the Israeli Supreme Court called the “constitutional revolution” in which the court declared that the basic laws were parts of a constitution, and in spite of the lack of explicit instructions on this matter any court is allowed to give preference to the basic law above any other law, this course is clearly formalistic. Because of its complexity I shall not expand upon it in this brief lecture. It is nevertheless clear that the formalistic approach, which places at the center of discussion the essential law and not the judicial process, does not need the explicit authorization of the court to examine the validity of laws according to the constitution. This authority of the court is derived from the supremacy of the basic laws.

In a similar manner it is possible to explain the judicial authority of the Israeli Supreme Court over the occupied territories. If the State authorities, including the army, are subject to the law (whether it is international law or Israeli constitutional law), it is in any case required by the very principle of the rule of law that the courts should examine whether the authorities obeyed the limitations that the law imposed upon them.

One may bring many more examples of formalistic judicial activism by the Israeli Supreme Court in the constitutional and other spheres. The common denominator for all the examples is the preference for the supremacy of the law, as the court interprets it, over the precedents and political considerations that are external to the actual law and that are deterred by clashes between the court and other authorities that have both

power and money. This formalistic approach is not divorced from values. It expresses the values of equality, freedom, decency, efficiency, certainty, objectivity and democracy. In order to remove any doubts, I wish to make it clear that in my opinion the rulings of the Israeli Supreme Court on sensitive political issues are far from being perfect. But in many cases, a problematic ruling of the Israeli Supreme Court – as in other countries – occurred in just those cases when the court abandoned the law and legal inductive and deductive thinking, and gave way to what it saw as political or inter-institutional constraints. If we return to the epigram of Justice Holmes – following experience and not legal logic does not always improve the quality of legal life? In Israel, judicial activism, that has contributed to a society living under difficult security, economic and social pressures, has more than once based itself specifically on formalistic legal logic.