The Year of Ruling Dangerously

Israel's Supreme Court is not known for its reticence. In the half century since statehood, the court has gained a reputation for acting resolutely to protect what it has considered to be Israel's founding legal principles, even in the absence of explicit license from the legislature. For most of that time, the court's activism focused—and properly so—on protecting the rights and freedoms necessary for an open society and a responsive and representative government in a country not blessed with a strong democratic heritage. In recent years, however, the court has entered uncharted theoretical territory and claimed for itself wide new areas of authority. In the process, it has drawn heavy criticism from a growing number of scholars and commentators, some of whom have warned that the court's approach would lead to a judicial "revolution," in which the court would play a far greater role in defining the legal, social and political character of the Jewish state.

Over the past year, the worst of these fears have proved well founded. After a decade of preparing the theoretical ground for a quantum leap in its authority over the agencies of government, the court has begun issuing radical, landmark decisions at a pace previously unknown. One after another, areas which until now were understood to be outside the judiciary's discretion have become the object of precedent-setting rulings, which in

many cases overturned practices that were considered integral to Israeli public life since statehood.

To begin with what is perhaps the most striking example, the court has begun challenging long-standing policies in the area of defense. Israel has always been, and continues to be, a small country facing enemy armies as well as active guerrilla and terrorist organizations. As such, it has been an axiom of Israeli government, honored by lawmaker and judge alike, that the military must be allowed significant freedom of operation, so that it may develop responses adequate to the changing nature of its actual and potential enemies.

Now, however, the Supreme Court appears to have abandoned this policy, undertaking a sweeping review of the military's policies and operations. On September 6, 1999, in the case of *Committee against Torture v. Government of Israel*, the court ruled, in an 8-1 decision, that the interrogation methods employed by the General Security Service (GSS), the principal intelligence agency responsible for fighting terrorism, were illegal. GSS interrogations, which included sleep deprivation and other measures aimed at extracting information from terrorists, had been the subject of heated debate which in 1987 resulted in the creation of a national commission, headed by former Supreme Court President Moshe Landau, to reformulate the guidelines for the agency's operations. The Landau Commission determined that in cases in which lives are in clear and immediate danger ("ticking time-bomb" cases), the use of "moderate physical pressure" to extract information would be allowed; a committee of government ministers subsequently authorized this principle. Now, however, the court has concluded that investigations conducted by the GSS are no different from those of the police investigating ordinary crimes, and therefore may not employ methods more severe than those permitted the police. If they do, they violate the terrorists' "dignity and freedom," which are protected by the 1992 Basic Law: Human Dignity and Freedom, and are therefore illegal.

Another example of the court's new involvement in military affairs came in April of this year, when a 6-3 majority ruled, in *John Doe v. Minister of Defense*, that eight Lebanese prisoners, held by the IDF as "bargaining chips" to secure the release of Israeli POWs, were being held illegally and must be set free. The background here is important: Decades of fighting guerrilla forces had led the political and military establishments to devise a variety of methods, from commando operations to retaliatory attacks to negotiations and prisoner exchanges, for dealing with the problem of soldiers taken hostage. In the case at hand, the IDF sought to improve its bargaining position in securing the release of Israeli POWs, by refusing to release eight Lebanese prisoners who had been convicted of membership in the Hizballah guerrilla organization and awaited release after completing their prison sentences. President Aharon Barak, writing for the majority, ruled that although nothing in the law books expressly prevented the military from employing such a tactic, doing so nonetheless violated the guerrillas' "dignity and freedom," and therefore could not be permitted unless the prisoners could be shown to be posing an immediate threat. Moreover, the court ruled, the practice contravened the 1979 International Convention on Hostage Taking—an international treaty which Israel has signed, but which the Knesset never ratified or enacted into law—and as such Israeli law should be reinterpreted in a way that "fulfills the rules of international law rather than contradicting it."

Regardless of whether the court's position is correct, one cannot help but think that in the absence of explicit legislation, such questions fall squarely in the realm of political, rather than judicial, decisionmaking. Amnon Dankner, a respected journalist and commentator writing in *Ma'ariv*, assailed Barak's approach as "imperial," adding that the court "has become increasingly suspicious and hostile toward government, which it has come to see as increasingly illegitimate…. The indisputable fact is that it has damaged the government's ability and freedom to wage military and political war against irregular forces."

The court's new interventionism has not been limited to defense issues, however. The family, too, has become a subject for judicial review. On January 25 of this year, in *Jane Doe v. State of Israel*, a three-justice panel of the court ruled unanimously that all corporal punishment by parents is illegal. Even mild spanking, wrote Justice Dorit Beinisch, "infringes on [the child's] rights as a human being. It damages his body, his feelings, his dignity and his proper development," and is therefore "forbidden today in our society." From here on in, any parent who spanks his child is to be considered a criminal and, in theory at least, subject to imprisonment of up to two years for the crime of assault. (See Evelyn Gordon's essay on this ruling, p. 50.) The decision was met in some camps with incredulity, and in others with rejoicing about the victory of "enlightened" views over the barbarism of child-spankers. What few people mentioned, however, was that another region of previously sacrosanct autonomy, the sensitive question of how parents raise their children, had suddenly become "justiciable."

The court's intervention in family matters extended, as well, to basic questions of how the family unit is to be defined. This past May, the court issued a landmark ruling in the case of *Berner-Kadish v. Minister of the Interior*; in which a lesbian couple, Ruti and Nicole Berner-Kadish, had requested that the Interior Ministry list both of them as the "mother" of Matan, a boy whom one of them (Ruti) had borne and the other (Nicole) had adopted under California law. In a 2-1 decision jointly written by Justices Dalia Dorner and Dorit Beinisch, the Interior Ministry was ordered to list both women as the child's mother, even though Israeli law does not recognize homosexual marriages and stipulates that "adoption may only be carried out by a man and his wife together." Since the Interior Ministry was merely being asked to recognize a legal adoption which took place outside Israel, the court ruled, and since the ministry has no authority to investigate the truthfulness of documentation presented to it—two arguments which were pilloried in Justice Abed Al-Rahman Zu'abi's

dissent—the ministry had no right to contradict the legal documents establishing both women as the child's mother.

The implications of this seemingly technical verdict are far-reaching. From its logic, one can easily infer that *any* family structure legally recognized in any other country must also be recognized by Israel, if such a family should wish to register with Israeli authorities. The effect, of course, is to limit drastically the ability of Israeli society in general, and the Knesset in particular, to decide what constitutes a legal family, since any Israelis seeking official cognizance of "alternative" family structures of any kind have only to attain recognition in a foreign country.

In addition to its forays into defense and family issues, the court has broken new ground in matters of religion and state as well—including the supremely sensitive question of which religious practices may or may not be conducted at the country's most sacred sites. On May 22 of this year, in the case of *Hoffman v. Director-General of the Prime Minister's Office*, the court ruled that a women's prayer group, known as the Women of the Wall, must be allowed to hold prayer services at Jerusalem's Western Wall, including Tora readings and sounding the shofar, while wearing prayer shawls and phylacteries—which is in accordance with their beliefs but in contravention of the practice that has been customary at this site for many centuries, and which has been upheld by Israel's government since the unification of Jerusalem in 1967.

Now, it has been an important judicial tradition in Israel to rule consistently for the preservation of extant practices in the holy places of all faiths, even at the expense of allowing legitimate religious expression on the part of other groups. The reason is simple: Holy places are, by their nature, a tinderbox of sensibilities and passions, which people are often willing to go to extremes to protect. Any attempt by the authorities to alter centuries-old practices in the Jewish, Christian or Muslim shrines risks disrupting the delicate balance which prevails in Israel among competing religious interests, and between those interests and the state. For this reason, most holy

places have been governed not by explicit laws, but rather through informal arrangements, which reflect the sensitivity of the matter and discourage the use of force, including legal force, in resolving disputes. Yet here, Justice Eliahu Matza, writing for a unanimous three-justice panel, determined that the principle of equality mandates that the women's prayer group be allowed to pray its own way at the site, regardless of what consequences might follow.

Supporters of the Women of the Wall may well be right when they argue that no branch of Judaism should have a monopoly on access to the religion's holiest site. Yet as a legal precedent, the ruling is potentially catastrophic, signaling a removal of the protection which extant practices in holy places have enjoyed since Ottoman times. Even liberal-minded public figures, such as One Israel MK Uzi Baram, found the precedent reckless. Writing in *Yedi'ot Aharonot*, Baram predicted that it would "increase the lack of faith in the judicial system" and possibly even "complete the delegitimization of the judicial system among the religious community." Liberal commentator Yaron London was similarly incensed: "In an earlier day, and now and again in our own day, subtler changes [in religious norms] than those proposed by the Women of the Wall have created whole new religions and rivers of blood…," he wrote in *Yedi'ot Aharonot*. "There are times when judges dispense justice to the aggrieved without bothering to consider the different scenarios which may play out in reality. When these scenarios do play themselves out, it turns out that justice was but an illusion."

Of all the court's recent rulings, however, the most remarkable was issued in March of this year, in the case of *Kedan v. Israel Lands Administration*, known popularly as the *Katzir* decision. This verdict merits a close look, not only because it touches deeply on Israel's historical and national identity, but also because it contains within it an important

example of the Supreme Court's methods, as well as what might be an indication of its ultimate aims.

In this case, an Arab Israeli family petitioned the court to be allowed to move to Katzir, a Jewish community in the southern Galilee region (the "Little Triangle"). Here too, the background is important. The strategy for creating and securing a Jewish state undertaken by every Israeli government since the founding of the state has been predicated on the establishment of Jewish population centers on strategic terrain and in border areas. Until this year, an important focus of this policy of Jewish settlements centered upon the Galilee, large parts of which are predominantly Arab, including areas adjoining southern Lebanon (now under Hizballah influence) and the West Bank (now under PLO influence). The town of Katzir, too, was one of eight Jewish communities planned in the mid-1980s for the purpose of creating a Jewish buffer region separating the large Arab population of the Galilee from that of the West Bank. To this end, the Israel Lands Administration (ILA) allocated areas to the Jewish Agency, which set up the communities.

But now the court, in a 4-1 decision penned by President Aharon Barak, ruled that the Israeli government had acted unlawfully in establishing Katzir as a Jewish border community. After examining the circumstances which led to the town's establishment, the court ruled that the Israel Lands Administration "was not legally allowed to allocate state lands to the Jewish Agency for the purpose of setting up the town of Katzir on the basis of discrimination between Jews and Arabs." By setting up a community for Jews, the state had violated the principle of equality, according to which there could be no differentiation on the basis of nationality or religion, and its actions were therefore illegal.

On the surface at least, the *Katzir* ruling sounds entirely reasonable. After all, who wants to defend the idea that there should be communities in Israel that are closed to Arab citizens, even if only in the early going when the community is not yet established? Such distinctions are not made in "normal" democracies such as the United States, which serves as a reference

point for so much of today's thinking about democratic theory and practice. But Israel is not America. The United States has no hostile neighbors with a long-term interest in making irredentist claims and fomenting violence and even secessionist movements within its territory. Israel does—as the recent waves of rioting throughout the Galilee illustrate.

And while the ruling cautiously disclaims any intention to make all or most Jewish settlement in pre-1967 Israel illegal, this is merely window-dressing: The *Katzir* decision offers no principles or formulas which could distinguish future Jewish settlements in heavily Arab regions from Katzir, and therefore render them legal. On the contrary, the plain meaning of the decision is that every such Jewish settlement would, from the outset, have to accept an unlimited non-Jewish population—thereby making the establishment of Jewish population centers in strategically sensitive areas a legal impossibility. "The *Katzir* decision," wrote the widely respected journalist Nahum Barnea in *Yedi'ot Aharonot*, "is one of the most important ever undertaken by the Supreme Court. The judges will not admit it, but their decision is the first plank in the constitution of a different, post-Zionist Israel…." Nor was the verdict's meaning lost on Justice Minister Yossi Beilin, who immediately called for the closure of the Jewish Agency, calling it a "tool for discrimination" against Arabs. (*Ha'aretz*, March 14, 2000.)

The implications for Zionism, past and future, are significant enough. Yet the *Katzir* verdict is remarkable also for the legal doctrine on which it is based, whose implications reach far beyond the confines of the case.

In attempting to determine whether Israeli law ever meant to allow for distinguishing between Jews and Arabs on the issue of settlements, Barak draws a distinction between what he calls the "special purposes" and "general purposes" of a given law. The "special purposes," he writes, are those particular aims which that law is trying to achieve. The law's general purposes, on the other hand, are those greater goals which all laws in a democracy have in common, which seek to further the overriding aims of law as a whole, according to the "fundamental principles of the system."

These are rarely made explicit in a given law (and therefore, we are to infer, must be articulated by the judges). In the case at hand, the court ruled that the law governing the Israel Lands Administration is unclear as to its special purpose; nowhere does it stipulate that the Administration's aim is to foster *Jewish* settlement in Israel. In a three-page exposition, the court tries in vain to find any such content in the relevant statutes—an effort that seems more than a little disingenuous, since anyone slightly familiar with Zionist history understands that the aims of "immigrant absorption," "population dispersion" and "agricultural settlement," which Barak himself cites from the written laws and agreements covering the ILA, refer precisely to Jewish settlement, which was one of the state's chief domestic policy aims at the time these laws and agreements were adopted.

The law's general purposes, on the other hand, are clear. "The (general) purpose of all law," Barak writes, "is to protect equality among people, without discrimination on the basis of religion or nationality." Laws are never meant to be discriminatory, and, therefore, all laws must be interpreted in light of the fact that law in a democracy strives for equality. Now, Barak does grant that when a law's express purposes are clear, they can sometimes have the "upper hand" against its general ones (although even then the judge is still supposed to "strike a balance" between them). But in a case where the special purpose is unclear and the general purpose clear, Barak writes, the law must come down on the side of the latter. By this logic, Barak concludes that the Israel Lands Administration had no right to appropriate land to the Jewish Agency for the purpose of Jewish settlement—in Katzir or, by implication, elsewhere.

Needless to say, such a doctrine of implicit "general purposes" in the law grants vast powers of reinterpretation to a judge, who may potentially seize upon any ambiguity in a law's intention to impose a thorough rewriting of the values which underlie it. It is true, of course, that the laws in a democratic society are properly read based on certain inherent assumptions about the overall function of the system. But this is quite different

from asserting that there exist clear-cut, yet unstated, general purposes which are to be weighed *against* the manifest purposes of particular laws. As can be easily understood from the *Katzir* decision, such a doctrine provides a tempting opportunity for any judge, faced with a governmental practice that is not to his ideological liking, to find ambiguity in the law's special purposes, delineate general ones in line with his conscience, and declare the latter winner by default.

Indeed, just five weeks after the *Katzir* verdict, the court employed similar reasoning in ruling that the eight Lebanese prisoners had to be freed. In that case, the court built its verdict on the fact that Israeli law does not explicitly permit the taking of prisoners for use as bargaining chips—even though it does, explicitly, give the defense minister the right to order the imprisonment of anyone "whose detention is required by the needs of national security or public safety." From this the court concluded that as regards the "specific purpose" of the law, the law had been "unclear" as to the legality of holding prisoners for longer than their sentences in order to recover captured Israeli soldiers. The law's "general purpose," however, is clearly to protect the dignity and freedom of all people, since that is the mandate of democratic lawmaking—and this latter is clearly violated when someone is imprisoned for longer than his sentence dictates. Again, the specific purpose was unclear, and the general purpose clear: Therefore, the latter wins, and the prisoners must be set free. (In that ruling the terminology was changed, as special purposes became "subjective purposes," and general purposes became "objective purposes," but the meaning was essentially the same.)

The idea that the law contains within it aims that extend beyond the specifics of a given statute is not new. What is new, rather, is the employment of such a potent legal construct in the service of what appears to be a thorough recasting of the judiciary's role in Israeli public life, undertaken at the court's own initiative.

Where is it all going? The court's defenders depict the revolution as a widespread victory for the rule of law in areas crippled until now by lawlessness. There is some truth in this. Many areas of Israeli life suffer from the inequitable or inconsistent application of the law, and the Supreme Court should be lauded for the stand it has taken in this regard. Yet one cannot escape the remarkable ideological consistency which characterizes the court's recent decisions. While the rulings employ a diverse range of seemingly neutral legal reasoning, from the technical to the philosophical, time after time the gavel ends up falling the same way: Against the particular cultural traditions and unique needs of the Jewish state, and in favor of a universalist vision, built upon a conception of unbridled tolerance and equality. Thus, the two defense-related rulings downplay the circumstance of a people under siege contending with a complex enemy, in favor of a view that ensures "dignity and freedom" for all, even one's enemies; the *Jane Doe* and *Berner-Kadish* rulings dismiss as legally irrelevant the most abiding social norms concerning the family unit, in favor of abstract individual liberties most broadly understood; the ruling concerning the Women of the Wall comes down for equality in religious expression, at the expense of long-standing traditions that reflected the realities of a country filled with sensitive religious sites; and the *Katzir* verdict similarly gives priority to individual equality between Jewish and Arab citizens, at the expense of the unique needs of a state whose purpose was to secure one place in the world that would be a homeland for the Jewish people.

So what may otherwise look like a significant but ideologically neutral upswing in court interventionism, as part of an effort to impose the rule of law in those areas of public life where lawlessness presumably prevailed until now, may actually signify a concerted effort to lead the country in a particular direction. That this is the case can be seen also from the fact that the law's "general purposes" invariably turn out to be universalist in nature,

never including even those particularist principles which have always enjoyed, and continue to enjoy, a broad consensus in Israel—such as traditional conceptions of the family, or the defense of Jewish sovereignty and security through settlement.

Aharon Barak himself provides a hint of this direction, in the brief, unexpected detour he takes toward the end of the *Katzir* verdict. Having completed the operative section of his decision, he adds the following:

> Today we are taking the first step on a difficult and sensitive journey. On this path we should tread heel to toe, so that we neither trip nor stumble, but instead move forward with care, from case to case, according to the circumstances of every case. But even if the journey is a long one, it is important that we always understand not only from where we have come, but also where we are going.

What is the nature of this journey, and where does it lead? Barak does not say. But, given the methods and direction of the court's most important decisions of the past year, it is not too difficult to guess.

David Hazony, for the Editors
November 1, 2000