Center Court

Ruth Gavison, Mordechai Kremnitzer, and Yoav Dotan

Judicial Activism, For and Against: The Role of the High Court of Justice in Israeli Society

Magnes Press, 293 pages, Hebrew.

Reviewed by Evelyn Gordon

During the past decade and a half, a remarkable gap has opened up in Israel between the unprecedented activism of the country's Supreme Court, on the one hand, and the paucity of substantive intellectual debate about the court's practices, on the other. The Israeli High Court has been among the boldest anywhere in the democratic world, going well beyond the letter of the law in striking down the actions of the government and legislature in a range of areas including foreign and defense policy, religion and state, family law, education, and the appointments of high-ranking officials. Moreover, a substantial segment of the public has responded to many of the court's decisions with alarm, and has made judicial activism a subject of mass demonstrations as well as a central issue in national elections.

In such circumstances, one would have expected Israel's legal scholars to play a constructive role in shaping the public debate—by providing well-grounded arguments that could shed light on the pros and cons of judicial activism, by examining the jurisprudential philosophy of the court in its theoretical and comparative contexts, and by offering the public an example of reasoned debate in which adversaries are treated with respect. Unfortunately, the scholarly community in Israel has not risen to the occasion. With the notable exception of current Supreme Court President Aharon Barak—who, through his many books, articles, and extensive court decisions spanning two decades, has made himself not only the leading practitioner of an activist judicial philosophy but also its preeminent theoretician—Israeli scholars have produced hardly any written work on judicial activism

beyond a smattering of narrowly focused papers in law journals. And, since critiques of the trend towards activism have been especially sparse, what little discussion has taken place has been rather uninspired, a dialogue among scholars who largely agree with one another.

But if scholarly writings on judicial activism have been rare, comprehensive treatments aimed at the general reader have been even scarcer. Israelis seeking to learn about both sides of the issue without perusing back issues of law journals have had nowhere to turn for a serious discussion; they have been left with what can be gleaned from newspaper articles, radio interviews, and talk shows.

Against this background, the recent appearance of *Judicial Activism, For and Against*, the first book-length treatment of this subject in Israel, is a milestone in Israeli intellectual life. Indeed, it is no slight to the book to say that its greatest contribution may well be the fact that it exists at all, sending the clear signal that the issue of judicial activism is worthy not only of study, but of robust public debate among scholars who disagree with one another. The status of its two principal co-authors, Ruth Gavison and Mordechai Kremnitzer, coupled with the fact that it is geared for the intelligent layman as well as the scholar, is likely not only to make this book a standard reference on the subject, but also to raise the standards of both scholarly and public debate over the role of Israel's Supreme Court.

From this perspective, the authors' public stature is obviously an important part of the message. Gavison, in addition to her academic achievements as a law professor at the Hebrew University and a senior fellow at the Israel Democracy Institute, has a distinguished record of public service, including membership in public commissions dealing with topics ranging from privacy rights through media law to religious-secular relations. Her greatest involvement has been in promoting civil rights, and she has served stints as both president and chairwoman of the Association for Civil Rights in Israel (ACRI). Kremnitzer, a former dean of Hebrew University's law school, also has a lengthy record of public activity: He served as an adviser on draft legislation to several Knesset committees, co-authored the massive overhaul of the penal code enacted by the Knesset in 1994, and is currently part of a team of international experts drafting a model penal code for democratic societies; he has also chaired public commissions on a variety of subjects ranging from police brutality to civics education. At present, he is chairman of the National Press Council, the principal media organization

responsible for enforcement of journalistic ethics.

But it would do the book a grave injustice to suggest that its contribution to the debate begins and ends with the seal of legitimacy Gavison and Kremnitzer confer on it. *Judicial Activism* offers a wealth of material that is crucial for informed discussion. The introduction by Yoav Dotan, a senior lecturer in law at Hebrew University, is significant in this regard: It provides a readable and balanced background to the arguments over judicial activism, arming the unfamiliar reader with the technical terms and historical facts he needs to follow the debate while also providing material of interest to the more knowledgeable student of the courts.

The heart of the book, however, consists of a lengthy essay by Gavison making the case against judicial activism in Israel and an equally long essay by Kremnitzer defending it. There is an element of dialogue among the three parts, as the authors were given the chance to read one another's essays and to revise their own accordingly; at times, they even chose to respond directly to one another's arguments. But though the differences of opinion are often sharp, the tone is respectful. Kremnitzer and Gavison obviously hold one another in high regard, and make it clear that neither side in the debate possesses a monopoly on the right to be heard.

Judicial Activism, For and Against is hardly the last word on its subject, and it has its share of weak arguments. But for a work that is meant to spur debate rather than end it, this is certainly not a fatal flaw. Therefore, in the spirit that its authors are seeking to encourage, it is worth considering, in a critical vein, some of the principal arguments raised by Kremnitzer and Gavison.

In understanding the rise of judicial activism in Israel, it is essential to understand those flaws in Israel's political system and culture that have prompted the court's growing involvement in public life. It is therefore a shame that the reader must wait until Kremnitzer's essay, the last one in the book, to be treated to an in-depth analysis of these flaws. But despite its late arrival, Kremnitzer's analysis provides an important contribution to the debate—and indeed, it is the most compelling part of his essay. One can disagree that the court is the proper solution to the problems he highlights, but there is no question that they exist, undermine the country's ability to govern itself, and are in need of some solution.

The first of these flaws is that Israel has not developed a culture of "it's

just not done," of the kind that can deter politicians from engaging in legally or ethically questionable behavior, or compel them to leave public life in disgrace when caught. And when politicians behave in a way that most people would consider morally inappropriate, this gives the court an opening—Kremnitzer would say an obligation—to act. The dilemma was nicely summed up by a British jurist's comment after the Israeli High Court ruled in 1993 that Aryeh Der'i had to resign as interior minister because of an indictment against him on corruption charges, even though no explicit law required him to do so. In Britain, the jurist said, he could not imagine the high court making such a decision in the absence of a clear legal mandate—but on the other hand, he could not imagine any British minister refusing to resign after being indicted for corruption. To Kremnitzer's way of thinking, Israel would be largely devoid of basic elements of public morality had the court not begun imposing its own moral standards on the government.

The case of Yossi Ginosar, one of several examples that Kremnitzer cites, illustrates this problem in its starkest form. Ginosar, a one-time senior official in the General Security Service (GSS), was appointed director general of the Housing Ministry by then-Minister Binyamin Ben-Eliezer in 1992. The appointment was approved even though Ginosar was known to have been involved in two unsavory episodes during his time in the GSS: The extra-judicial killing of two captured terrorists who had hijacked Egged bus no. 300 in 1984; and the securing, by illegal means, of a false confession of espionage from Circassian IDF officer Izat Nafsu—who spent seven years in prison before the injustice came to light and the conviction was overturned. In the first case, Ginosar misled a state commission of inquiry about the GSS' role in the killings; in the second, he headed the team that extracted the confession, and then lied to the court regarding the means he had used. With considerable justice, Kremnitzer declares that "such an appointment would not have happened in any properly run country." The appointment was canceled only after a citizen petitioned the High Court against it, and the court ruled that the appointment violated fundamental standards of public morality and was therefore so unreasonable as to be illegal. This, Kremnitzer argues, is a classic case in which the alternative to judicial activism—letting a man who had engaged in flagrant misconduct assume a senior government post—was simply unacceptable.

Another problem Kremnitzer raises is the Knesset's sorry record of passing vaguely worded laws, which invite and sometimes even compel the court to fill in the gaps. He notes, for instance, that for years the legislature refrained from defining the circumstances under which it is legitimate to remand a suspect until the end of his trial, which left the court with little choice but to devise its own guidelines. Similarly, the Knesset failed to state clearly what extenuating circumstances can constitute a defense against certain criminal charges, thus forcing the court to do so in its stead. Indeed, this negligence on the Knesset's part has been a frequent target of Kremnitzer's own public activities: During the 1993 Knesset debates over a new penal code, for example, a Knesset subcommittee argued that there was no need to write explicitly that mild parental spanking does not constitute criminal assault, as the legislators could rely on the courts to uphold this defense even if it did not appear in the law. In vain Kremnitzer lobbied vigorously against this stance in the committee hearings, arguing that "The fact that the courts can continue… to create categories of legal exceptions is not a reason to invite the legislature to divest itself of its responsibility to impose legal order. If I ask myself which body ought to make the determination on this matter, a determination on a question of values of the first rank… it seems to me that it has to be the legislature."

Perhaps the most serious example of this problem, one which Kremnitzer does not cite, was the passage in 1992 of two seminal laws on human rights, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom. Both enumerate sweeping, absolute rights that, if not checked by a countervailing principle, would preclude the exercise of any governmental powers at all. Basic Law: Human Dignity and Freedom, for instance, states that "there shall be no violation of the property of a person," effectively ruling out taxation, and "there shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition, or otherwise," effectively ruling out police powers. Basic Law: Freedom of Occupation forbids any infringement on a person's right to engage in any type of work, thereby prohibiting, for instance, the licensing of medical practitioners. In order to permit the government to function, each basic law also includes a clause stating that these enumerated rights can be abrogated by legislation "befitting the values of the State of Israel" as a "Jewish and democratic state," which is "enacted for a proper purpose" and infringes on these rights "to an extent no greater than is required." However, neither law offers a hint as to

what purposes ought to be considered proper, nor does either one offer guidance on how to weigh the extent of infringement that can be considered legitimate.

Moreover, the laws make no effort to define Israel's Jewish and democratic values. The result is that innumerable government actions can be declared illegal unless they can be shown to meet these tests and to accord with Israel's "Jewish and democratic" character; but because the Knesset did not define these terms, the court has no way of adjudicating any challenge to these government actions without constructing its own definitions. And if the court has frequently advanced a different understanding of the "Jewish" side of the equation than the legislators intended, there is no doubt that at bottom, the Knesset itself is largely to blame.

Finally, Kremnitzer notes the undeniable fact that neither the legislature nor the voters in Israel provide effective supervision over government actions. This is partly a function of political culture, but it also stems from a number of institutional flaws. For instance, he notes, the Knesset has virtually no budget and no staff with which to conduct its own research, and is therefore largely dependent on the information it receives from the government—a situation that obviously makes for poor supervision. And though Kremnitzer does not dwell on this issue at length, it is not hard to think of other structural problems to add to his list. For instance, a very large portion of the Knesset consists of government ministers or deputy ministers—fully a third in the current Knesset—and they are unlikely to offer effective supervision of themselves. Given the combination of structural impediments and the lack of a tradition of oversight, Kremnitzer concludes, the choices essentially boil down to supervision by the courts or no supervision at all.

But if Kremnitzer deserves praise for his accurate analysis of the problems afflicting Israel's political system, the same cannot be said for his treatment of the court's role in solving them. There are a number of serious problems with his analysis, of which the most striking is his persistent assumption that the court is the *only* possible solution.

This is most obvious in his discussion of the Knesset's failure to serve as a check on the executive. Though Kremnitzer himself acknowledges that this is partly the result of institutional weaknesses, he never raises the possibility of structural reform as an alternative to judicial activism. For instance, if the Knesset were given an appropriate budget for the purpose, it would be able to conduct

independent research that could challenge the government's assertions, just as other Western legislatures do. Similarly, a number of proposals have been made in recent years for ameliorating the problems caused by the fact that such a large proportion of Knesset members serve as ministers or deputy ministers. These include adoption of what is known as the Norwegian Law, under which ministers and deputy ministers would have to resign from the Knesset and be replaced by other representatives from their party; and increasing the number of Knesset members from 120 to 180.

But even with respect to problems that are less amenable to solution by legislative or budgetary action, Kremnitzer is far too quick to conclude that the court is the only answer. Israel's lack of a culture of "it's just not done," for instance, can certainly not be solved by legislation alone. But as Gavison correctly points out in her essay, it is far from clear that it can be solved by court intervention either. Indeed, court intervention might even make the development of an appropriate political culture *less* likely.

One of the points Gavison comes back to repeatedly is that once the court asserts the right to declare actions it deems immoral to be illegal as well, the linkage also begins to run the other way. A verdict that a given action was legal becomes tantamount to a declaration that the justices believe it also meets basic standards of public morality. "The rejection of petitions against governmental authorities is often interpreted not only as a determination of the legality [of these actions]," she writes, "but also, by implication, as the granting of a seal of moral-public approval." And this, in turn, can dampen public outrage at an immoral action. To many people, a stamp of moral legitimacy from a body as august as the Supreme Court is a persuasive argument that what was done is acceptable.

One of her favorite examples is the policy of blowing up terrorists' houses—something the court has upheld as legal in numerous rulings throughout the years, since it was explicitly permitted by the Emergency Regulations which Israel inherited from the British Mandate. Gavison believes that public opposition to this policy, which she considers an immoral punishment of an innocent wife and children for the crimes of the guilty, has largely been muted precisely because many people see the court's rulings not as mere affirmations of legality, but also as affirmations of morality.

Another excellent example, though one that Gavison does not cite, can be seen in the 1997 Bar-On affair, in which it emerged that Justice Minister Tzahi Hanegbi had misled

cabinet members into believing that Supreme Court President Aharon Barak approved of his nominee for attorney general, Roni Bar-On, when in fact Barak opposed this choice. Initially, as one would expect, opposition MKs demanded Hanegbi's resignation. But then Bar-On's replacement, Attorney General Elyakim Rubinstein, announced that such behavior, though despicable, was not a criminal offense—and was backed in this view by the High Court, which was asked to rule on a petition to overturn Rubinstein's decision and force the prosecution to bring criminal charges. In the wake of the court's decision, calls for Hanegbi's resignation virtually disappeared overnight. A handful of opposition legislators, including Labor whip Ra'anan Cohen, continued their efforts to oust him, but were unable to muster support in the Knesset to do so. Senior Justice Ministry officials openly praised Hanegbi's performance as minister, describing him as "smart, hard-working, quick on the uptake, and pleasant to work with"; and even some opposition MKs chimed in: Amnon Rubinstein (Meretz), for instance, said that though he disapproved of Hanegbi's behavior in the Bar-On affair, the new minister had proven "hard-working and able despite his lack of experience." In the wake of the court's decision, such minor matters as lying to the cabinet could apparently be dismissed as unimportant.

Kremnitzer himself acknowledges that a culture of political morality, such as exists in many Western democracies, would be preferable to the court's intervention. "The more the political culture imposes unwritten restrictions and limits on political activity, the less place, and need, there is for judicial intervention," he writes. "Judicial activity… is no substitute for the public and educational efforts that must also be undertaken in order to craft an appropriate political culture." But in practice, judicial activity is likely to become just such a substitute whenever the court not only asserts itself to be the arbiter of such issues, but actively works to promote public acceptance of this view. Kremnitzer never acknowledges or addresses this danger, a fact that undermines his conclusion that the proper remedy for Israel's poor political culture is to be found in the courts.

Even more problematic, however, is Kremnitzer's assertion that the court has in fact made responsible use of its powers. Throughout his essay, he offers a number of reasonable tests for determining whether the court is justified in intervening in a given case: That the court review only the legal aspect of a decision and not interfere in questions of policy; that "the

vast majority of the public would adopt [the court's decision] as a general norm… if it were asked"; and that the court "derive norms from fundamental values… only if these fundamental values are values accepted by society." The problem arises, however, in Kremnitzer's evaluation of the court's performance, when he asserts that "the court in general makes appropriate use of this power [of judicial activism]." While there are certainly cases in which this is true (I suspect, for example, that "the vast majority of the public" supported the ruling in the Ginosar case), the claim that the court's activism has been appropriate *as a rule* is difficult to support. In order to realize just how weak the claim is, one need look no further than the examples Kremnitzer himself brings.

One case to which he returns over and over is the court's 1993 ruling, in the case of *The Movement for Quality Government in Israel v. the Government of Israel*, that Prime Minister Yitzhak Rabin was obligated to fire Aryeh Der'i as interior minister because of the draft indictment against the latter on corruption charges. Clearly, this case did not meet Kremnitzer's first test, that the court examine only the legal aspect of government decisions. Indeed, the petitioner's legal case was weak in the extreme: Not only did no law then on the books stipulate that a minister under indictment had to resign, but the new Basic Law: The Government, passed by the Knesset a year earlier and due to take effect in 1996, explicitly stated that only someone *convicted* of a crime involving a serious moral breach would be ineligible to serve as a government minister. Indeed, the court did not make any pretense that keeping Der'i in his post would violate an actual law. It merely stated, as it has in numerous similar rulings, that the decision was extremely unreasonable, and *ipso facto* was illegal. But the question of whether a given action is reasonable or not is by definition a value judgment—that is, a question of policy—rather than a question of law: It is a test applied only when the court is incapable of pointing to a specific law that the action in question violated, and it necessarily means that the court is substituting its own judgments on policy for those of the officials who were elected or appointed in order to make such decisions.

Kremnitzer deals with this problem by arguing, as the court itself does, that some decisions are so patently unreasonable that no reasonable person would make them, and that therefore they cannot be plausibly defended. In such a case, the court's intervention is justified by one of his other criteria: that "the vast majority of the public would adopt [the court's decision] as a general norm… if it were asked." And Kremnitzer considers

the Der'i case a self-evident example of such a decision. Yet there are numerous reasons why a reasonable person could have reached the opposite conclusion.

One is the time-honored principle that a man is considered innocent until proven guilty, and should therefore not be punished prematurely. Indeed, this was the consideration that motivated the authors of Basic Law: The Government in determining that only officials who were convicted should be compelled to resign. Another was the existence of weighty competing considerations of policy and politics, which played a major role in Rabin's decision. Rabin was willing to swallow Der'i in the cabinet for another few months—all that was actually at issue, since Rabin and Der'i had agreed that the latter would go if and when the draft indictment was actually filed in court—because the prime minister considered an Israeli-Palestinian peace accord to be of paramount importance to the country, and thought that without the support of Deri's Shas party, he would not be able to win Knesset approval of the treaty that was then being secretly negotiated, should it be concluded. And indeed, there were many Israelis, representing a wide range of views, who supported Rabin's decision, whether due to agreement with his policy priorities or because of the primacy they attached to the presumption of innocence. Thus the Der'i case is actually a classic example of one in which the court did *not* meet Kremnitzer's tests, because the public consensus it claimed to be representing was lacking.

But Kremnitzer's argumentation is even more problematic than this example suggests, because in many cases he openly abandons his own standards, without offering any explanation. This is particularly true of the court's activism on what he defines as human rights issues, such as the right of women to become fighter pilots, the rights of homosexuals, and certain issues of religion and state. Here, he freely admits that the court's rulings often not only lack a basis in written law, but are also not backed by societal consensus. Indeed, he writes, there is no consensus, either local or international, regarding the scope of human rights or what weight they should carry in the face of competing values. Though international law includes a generally accepted catalog of rights, "the scope, force, and weight of these rights when set against other rights and interests—which are the truly important questions—cannot in general be derived from an international consensus. They also cannot be derived from an Israeli consensus—all the more so given the genuine disagreement (primarily between part of the religious community and some of the

secular) over the very centrality and importance of individual rights." In cases such as these, Kremnitzer's own test of the legitimacy of the court's activism—that "the vast majority of the public" would support the court's conclusion—would appear to be unobtainable even in theory.

How, then, does Kremnitzer defend the court's activism on these issues? Too frequently, the answer seems to boil down to the fact that he personally agrees with the court's judgments. For example, when defending a ruling in which the court offered a sweeping rhetorical and legal defense of homosexual rights, in the case of *El Al v. Danilevich*, he writes simply: "Society reveals a demeaning attitude toward homosexuals, and they are clearly in need of legitimacy, both in the way society perceives them and in the way they perceive themselves. It is against this background that the court's expansion of the discussion must be understood." With that statement, and without any reference to his own tests for the appropriateness of judicial activism, Kremnitzer's defense of the court rests.

This approach is nowhere more evident than when, toward the end of the essay, Kremnitzer turns to the court's intervention in religious issues. A wide variety of religion-state issues have come before the court in recent years, including recognition of non-Orthodox conversions, civil burial, non-Orthodox and civil marriage, restrictions on certain occupations that are considered incompatible with Jewish tradition (such as belly dancing or importing non-kosher meat), government allocations for the Reform and Conservative movements, the status of non-Orthodox Jews in institutions such as municipal religious councils, the connection between an individual's status as a Jew and his right to Israeli citizenship, and the broader question of what it means for Israel to be a Jewish state. Regarding these last two issues—Israel's character as a Jewish state and the nature of Israeli citizenship—Kremnitzer reaches a conclusion with far-reaching implications for the nature of Israeli democracy. "It is not clear," he writes, "that the final decision on these questions, which are difficult and sensitive, should be left solely in the hands of the legislature."

The court's decisions in matters of religion and state are necessary, Kremnitzer explains, because "freedom from religion" is an essential component of a "liberal-democratic state." But while this assertion might arguably be true for some contemporary liberal-democratic states, such as the United States, it ignores the existence of a competing version of liberal

democracy that is in fact the norm in many, if not most, Western countries. Great Britain, for instance, is the birthplace of liberal democracy, yet it saw no contradiction in giving the Anglican Church special constitutional status. Similarly, the Catholic Church has special constitutional status in Ireland—and the list of similar examples could include literally dozens of countries. Both Kremnitzer and the court take it for granted, however, that Israel, despite its highly traditional society, should follow the American model with respect to the primacy granted to "freedom from religion." It is hard to fathom on what basis they reach this determination, given that Israel's Knesset has explicitly legislated on the basis of the opposite view: The nation's basic laws declare Israel to be a "Jewish and democratic" state, and the institutions that have characterized the country from its founding have assumed Israel's Jewish character to include some expressly religious component.

Given the tests Kremnitzer himself has posited for judicial activism, one might assume he is basing his argument on the belief that a broad societal consensus exists in favor of placing new limits on the state's Jewish character. But he is under no such illusion. "Lowered respect for the court within religious circles," he declares, is simply "the price we must be willing to pay" for the court's activism on such issues. For a man who claims that broad societal support is a necessary condition for judicial activism, this willingness to do without the backing of at least a fifth of the population—and probably a good deal more, when one considers that Israel's sizable "traditional" community tends to side with the Orthodox on such issues—is rather hard to grasp. But worse, writing off the support of a particular sector of society makes a mockery of the very idea of consensus, which by definition implies an arrangement that is accepted not only by the majority, but by minority groups as well.

Most disturbing, however, is Kremnitzer's apparent failure to recognize the contradiction between such statements and his own belief in the importance of "the public's faith in the regime," which he cites as a crucial reason for allowing judicial activism. Kremnitzer is, of course, correct that such faith is necessary for the survival of any democracy. It is precisely for this reason that he attributes such importance to decisions like the Der'i verdict: For someone under indictment to continue sitting in the government, he said, would badly undercut the public's faith in the system. Yet if maintaining the public's faith in

the system is paramount, how can Kremnitzer be so willing to sacrifice the faith of such a large portion of that public?

Indeed, nothing could better illustrate the dangers of Kremnitzer's approach than the results of the 1999 elections, in which Shas raised its Knesset representation from 10 to 17 seats following a campaign that made animosity towards the judiciary a central voting issue. When faith in the court system has eroded to such a degree that one out of every seven voters is prepared to cast his ballot in large part on this issue, then the threat to democracy is far greater than anything that might result from the unpleasant spectacle of a man who has been indicted continuing to serve as a minister. Kremnitzer believes that judicial activism is the key to preserving public faith in the courts and in the rule of law. But judicial activism can also pose a grave danger to public faith in the law and in the institutions of government, and Kremnitzer consistently fails to address this problem. In so doing, he reveals just how shaky are the empirical foundations upon which his theoretical argumentation rests.

It is this very issue—how the court, in the name of strengthening the rule of law, has actually undermined faith in the judiciary—that provides some of the most significant elements of Ruth Gavison's essay. Gavison attacks judicial activism from various angles. For example, she faults it for the damage it does to the principle of a separation of powers within the government. She also highlights the critical, but often overlooked, problem of the courts' limited resources: When judges devote too much of their time to the public arena, they inevitably neglect their traditional function, namely, adjudicating disputes between individuals. But because it is the desire to "preserve the rule of law" that has become the linchpin of most arguments in favor of judicial activism in Israel—among politicians, scholars, and justices alike—Gavison's critical treatment of this issue is a particularly important contribution to the debate.

"The rule of law" has become a catch phrase in Israel, so often repeated that most people who use it rarely think about what it means. As Gavison points out, however, the term traditionally has two meanings, neither of which fits its common usage in contemporary Israel. One is that government "is authorized to do only what the law permits it to do." The second definition is "in contradistinction to 'the rule of men.'" The "ideal of the rule of *law*," Gavison writes, "is that what determines the government's activity is the law, not the desires of the people [in power]." The rule of law

implies a system where what is legal and illegal is clearly set out in the law books and thus is known in advance; the rule of men is a system where those in power can make decisions arbitrarily, leaving the ordinary citizen with little way of knowing in advance what will be permitted and what forbidden.

But to state the case more bluntly than Gavison does, it is precisely this latter description that characterizes Israel's Supreme Court. When a panel of three or more justices routinely decides cases based not on the written law, but rather on what they deem "reasonable" or what they consider to accord with "basic values" of their own determination, it is often very difficult to know in advance whether a given action will be ruled legal or not. Rather than strengthening the rule of law in Israel, the Supreme Court has in a very real sense *replaced* the rule of law with the rule of men.

The consequence of this—and Gavison deems it a very serious consequence indeed—is a sharp increase in the amount of uncertainty in Israeli life. This is particularly true in public affairs, which have been the focus of the Supreme Court's activism. Gavison does not list examples, but they are not hard to come by. When the appointment of a government minister or ministry director general is challenged in court, for instance, decision-making on the most important issues faced by that ministry often grinds to a virtual standstill until the ruling is issued, sometimes months later. No one wants to commit the ministry to investing resources in a project likely to be halted should the court oust the man who commissioned it.

Another key element of the rule of law is an effective system of enforcement that enjoys the public's trust and respect. On the most basic level, this entails a belief on the public's part that decisions about whether to indict suspects are not influenced by extraneous considerations, such as political, ethnic, or religious bias. Yet here, too, Gavison points out, the court's efforts to shore up public faith in the state prosecution may have done more harm than good.

Over the past fifteen years, the court has asserted the right to overturn the attorney general's decision not to indict public figures suspected of wrongdoing. Thus, even when the state prosecution decided that there was little public interest in indicting a public figure, or that insufficient evidence existed, the court has often entertained petitions from ordinary citizens or public figures who disagreed, and has issued a handful of decisions requiring the prosecution to file an indictment. The goal of the court's forays into this area is laudable: To assure

the public that high-ranking officials who commit crimes will not go free due to their political clout. Yet the result, Gavison observes, has been increased pressure on the prosecution to indict in borderline cases, "even if it doubts the strength of the evidence, or the degree of public interest in prosecuting the case, since such a decision is easier to defend before the High Court of Justice." Thus government lawyers looking over their shoulders at a possible adverse response by the High Court have a clear inducement to press charges, and no inducement to refrain from doing so.

Though it is difficult to know to what extent this factor has affected the attorney general's actual decisions on indictments of public officials, it seems that in the years since the court began its practice, there has been a noticeable increase in indictments in borderline cases. The result has been a rash of high-profile acquittals in recent years. These have included three mayors—Ehud Olmert of Jerusalem, Eli Landau of Herzliya, and Rafi Hochman of Eilat—and two cabinet members: Former Agriculture Minister Rafael Eitan and former Justice Minister Ya'akov Ne'eman. And frequent acquittals inevitably lead concerned members of the public to one of two conclusions: Either the courts are acquitting people who should have been convicted, or the prosecution is indicting people who should never have been brought to trial. While either one of these options would be detrimental to faith in the justice system, Gavison evidently believes—correctly, in my opinion—that the latter is far more likely, and thus concentrates her fire on this point.

The problem with repeated acquittals of public figures, Gavison argues, is that they expose the state prosecution to charges that it is indicting public figures on the basis of political considerations rather than because of well-grounded suspicions of criminal wrongdoing. Indeed, such charges have been heard increasingly in the last several years. And as Gavison correctly notes, this problem is exacerbated by the Supreme Court's ruling in the Der'i case that ministers and other public figures must resign upon being indicted, because in such a case, an unwarranted indictment effectively nullifies the voter's choice by forcing the elected official out of office even before he has been tried.

The Eitan case provides a good example of this process. Eitan was indicted shortly after the 1996 elections for allegedly using confidential information from the Israeli army four years earlier to discredit a political opponent in his Tzomet party. Even before the indictment was filed, the attorney general, basing himself on the Der'i precedent, barred Eitan from

receiving the powerful Ministry of Public Security, on the grounds that if he were to be indicted, his credibility in handling sensitive security information would be compromised. His acquittal in February 1997 by the Haifa Magistrate's Court came too late to change Eitan's position within the government, where he had been forced to settle for the Agriculture Ministry. And this inevitably fed the grievances of Eitan's supporters, who saw their candidate deprived of an influential position by what later appeared to have been an unwarranted indictment.

An even more telling case is that of Ne'eman, which began with a petition to the High Court by journalist Yoav Yitzhak in 1996, shortly after Prime Minister Benjamin Netanyahu named Ne'eman as his justice minister. The petition accused Ne'eman of having suborned a witness in the criminal investigation of Interior Minister Aryeh Der'i. This allegation was based on a police memo whose existence the State Attorney's Office had been aware of for four years, but had never previously deemed worth investigating. Under pressure from the High Court petition, the office suddenly decided it had to investigate the case; and when it found no evidence to support the subornation charge, it decided to indict Ne'eman for perjury instead, due to alleged inaccuracies in his responses to the High Court and to the police investigation. When a trial court not only found him innocent, but said there were no grounds for having indicted him in the first place—long after it was too late for him to return to the ministerial post he had vacated upon being indicted—this naturally fueled public suspicions that the prosecution's motives in this case had been less than pure. But the entire sorry episode would probably never have occurred had the prosecution not felt pressured by a court petition to take action on a case it had previously considered unimportant.

When too many political figures are being acquitted, the public naturally begins to suspect the prosecution of political bias. The inevitable result, Gavison concludes, is that the prosecution's "legitimacy and the [public's] faith in its professionalism" are substantively undermined. And these are indispensable components of the public's faith in the legal system as a whole.

A third crucial aspect of the rule of law is the legitimacy that the law itself enjoys in the eyes of a country's citizens. In traditional democratic theory, the law obtains its legitimacy from the consent of the governed, by means of their chosen representatives. And it is here, perhaps, that the court's distortion of the meaning of "the rule of law" is most dangerous. For what arises from Gavison's essay is that the court

has been gradually promoting the theory that the law's legitimacy derives not from the decisions of legislators acting on behalf of their constituents, but rather from the court's own approval.

That so bizarre a view of democratic theory has been gaining currency, at least among certain politicians, journalists, and legal scholars, can be seen in those rare instances when the Knesset has acted to overturn the results of a particular court decision. When, for example, the High Court ruled in October 1993 that the government's policy of banning imports of non-kosher meat was a violation of Basic Law: Freedom of Occupation, the Rabin government overrode the court by passing legislation explicitly banning such imports. Though this law carried a clear majority in the Knesset, its passage triggered a wave of denunciations, in large part because the legislature was seen as going against the wishes of the Supreme Court.

There was an even greater outcry in October 1994 when the Labor Party and Shas reached a coalition agreement stipulating that Supreme Court decisions overturning long-established precedents on issues of religion and state would be met with legislation restoring the status quo ante. Justice Minister David Liba'i, himself of Labor, was quoted in the daily *Ha'aretz* as claiming that the agreement "would destroy basic values of democracy," and that it would "establish new norms that are opposed to the values of democracy and of the constitution-in-the-making in Israel." A number of public figures and groups opposed to this provision of the agreement then petitioned the High Court, asking that the coalition pact be ruled illegal. In the initial hearing, all three justices made it clear that they considered the agreement improper, as a result of which Labor and Shas watered down the language of the controversial clause. The court then ruled, 3 to 2, that the agreement was still improper, but no longer so improper as to be illegal; the dissenters, led by Aharon Barak, insisted that even the new, weaker version undermined the rule of law, and was therefore illegal. Thus, as Gavison correctly notes, the minority in this case—and the majority would almost certainly have done the same had the clause not been rewritten—was, in the name of "the rule of law," attempting to deprive the Knesset *in advance* of the right to legislate on various issues regarding the religious status quo.

Gavison justly ridicules the idea that the Knesset should be barred from overturning High Court decisions. Since the court's role is to interpret

the laws the Knesset passes, she writes, it is hardly illegitimate for the latter to amend and clarify legislation if it believes the court has misinterpreted its intent. "Does the High Court of Justice have a monopoly on [the right] to determine what the laws should say?" she asks incredulously. But that is precisely the assumption underlying the claim that laws to overturn a given ruling are illegitimate: That the court has the right not only to interpret, but also to *dictate* the content of legislation. In short, in the name of the rule of law, the court has begun usurping the Knesset's function and effectively seeking to dictate the contents of legislation.

It is precisely the broad range of disagreement between Kremnitzer and Gavison that makes the publication of *Judicial Activism, For and Against* such a refreshing addition to the generally tepid discourse over judicial theory and practice in Israel. Oddly enough, however, one of the few issues on which they are in agreement is one that seems to undercut the significance of the entire book: The claim that the phenomenon whose merits they are debating is becoming less pronounced. Indeed, all three authors appear to believe that the court's aggressiveness in overturning government decisions peaked more than a decade ago, and that it has been moving in recent years towards greater restraint. As Dotan writes in the introductory essay, "A series of verdicts issued in the 1990s express a different trend than the unhesitating activism described above [in the 1980s]."

This claim is certainly not entirely unfounded: It was in the 1980s that the court took the radical step of virtually eliminating procedural barriers to an increased judicial role, such as standing (the principle that only someone with a direct, personal interest in a particular government action is allowed to petition the court against that action) and justiciability (the principle that certain questions are inappropriate for the court to decide). It was also in that same decade that the court first asserted its right to intervene in a host of areas, from foreign affairs to the internal workings of the Knesset. Yet when one reviews the record of the 1990s, it is hard to fathom what grounds the authors of *Judicial Activism* could have for deeming this decade one of greater restraint.

To begin with, it was in the 1990s that the court first began using many of the powers it had asserted in the previous decade. To take but one example, the court first asserted its right to review coalition agreements in the 1980s. But it was only in 1990, in

Zherzhevsky v. the Prime Minister, that it first overturned a section of a coalition pact, nullifying an agreement between the Likud and a small faction named The Party for the Advancement of the Zionist Idea.

Even more important is the host of completely new areas in which the court has asserted or acted on its prerogative to review legislative and governmental activity during the past decade. First and foremost, of course, is its assumption of the right to overturn Knesset legislation, which it asserted in the case of *United Mizrahi Bank v. Migdal Cooperative Village* (1995). Another decision whose importance is hard to overestimate was its ruling, in *Amitai v. the Prime Minister* (1993), that the attorney general, rather than being the government's legal counsel, is in fact its legal arbiter, whose opinions are binding on the government. By giving an unelected official the power to overrule the elected government, the court has significantly curtailed the government's powers.

The last decade also saw an unprecedented incursion by the court into the sensitive issue of religion and state, where it overturned many long-established precedents: It overruled a ban on the import of non-kosher meat (*Meatreal v. the Prime Minister*, 1993), ordered the religious courts to use secular rather than religious law to divide property in divorce cases (*Bavli v. the Rabbinical Court of Appeals*, 1994), ruled the Orthodox rabbinate's monopoly on conversions illegal (*Pasaro v. the Minister of the Interior*, 1995), and overturned the system of draft deferrals for yeshiva students (*Rubinstein v. the Minister of Defense*, 1998).

But it is in the realm of foreign affairs that the authors' conclusion rings particularly hollow. In this area, Dotan offers two specific examples to back up his claim of increased judicial restraint: The court's refusal to intervene in the GSS' interrogation techniques; and its refusal to order the government to release several Hezbollah members jailed in Israel, whom the government was holding in order to exchange them for Israelis held by that organization. In both of these cases, however, the court reversed its previous nonintervention after *Judicial Activism* went to press: In September 1999, it ruled the GSS' interrogation techniques illegal; and in April 2000, it ordered the government to free the Hezbollah men.

But if the court's activism has shown no signs of abating, then scholarly and public debate on this issue becomes all the more significant—which in turn makes *Judicial Activism, For and Against* all the more essential. Indeed, as the authors state in

their preface, this was precisely their purpose in writing the book: "To provide a basis for public debate on the role of the High Court of Justice in Israeli society." One can only hope that this excellent book accomplishes its goal. And if a genuine public debate on this issue does emerge in Israel, then Gavison, Kremnitzer, and Dotan will deserve a healthy share of the credit.

Evelyn Gordon is a journalist, and a Contributing Editor of Azure.

War and Remembrance

Eugene L. Rogan and Avi Shlaim, eds.

The War for Palestine: Rewriting the History of 1948

Cambridge, 234 pages.

Reviewed by Yehoshua Porath

Over the past decade, Israel's self-styled "new historians" and their allies around the academic world have fiercely debated more traditional scholars over the nature of Israel's War of Independence. According to the revisionists, the classical historical research was little more than propaganda for the Zionist narrative, distorting the record by obscuring the "crimes" perpetrated by the Zionists against the Palestinian Arabs during fighting that lasted from late 1947 until early 1949. This war, known to Palestinians as "the Catastrophe," resulted in both the establishment of the State of Israel and the creation of the Palestinian refugee problem, and therefore both Israelis and Palestinians see it as the beginning of their respective national narratives.

Most of the research being done by the new historians tends to focus primarily on Jewish conduct during the war: How did the nascent State of Israel manage to defeat the Arab armies? Did the Zionists deliberately set