The Israeli Supreme Court - Between Law and Politics, reviewing Assaf Meydani, The Israeli Supreme Court and the Human Rights Revolution: Courts as Agenda Setters

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THE ISRAELI SUPREME COURT — BETWEEN LAW AND POLITICS

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Assaf Meydani’s book is part of the growing literature analyzing/critiquing the role of courts in democratic societies.¹ It deals with the Israeli Supreme Court, which is one of the courts that has been frequently accused of illegitimate judicial activism. The book sets out to explain the Israeli Supreme Court’s gradually increasing involvement in public and political issues and its increasing judicial activism during the 1990s.² Meydani does not define judicial activism but instead loosely identifies it as one of the following three practices: the annulment of parliamentary laws by a court which according to him “does not have constitutional authority of any kind;” a “flexible attitude toward the question of standing;” and a “willingness to hear appeals in areas that had been left to social bargaining in the past.”³ Thus, Meydani explains, the central questions that the book sets out to answer are: “Why has the Supreme Court felt obliged to engage in such activism? Why has the Court changed its policy of self-restraint toward activism? Finally, why has the political system permitted such activism and political intervention by the Court?”⁴

Before expounding on his explanation for the Israeli Supreme Court’s judicial activism, Meydani first critically discusses and rejects other explanations for the Israeli Supreme Court’s behavior.⁵ Thus, he rejects the claim that a legal analysis of court practice will show that it is in fact not activist,⁶ the sociological claim that the court’s activism manifests an attempt by individual judges to use the court to carry out their own

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2. Id., at 33.
3. Id., at 33–34.
4. Id., at 33–34.
5. See id. at 34–42.
6. Id., at 34.
ideologies, and the claim that activism reflects the court's complicity with the ruling elite. In this context, he discusses and rejects Mautner's influential explanation for the court's increased judicial activism, according to which this activism is a result of the Israeli liberal elite's loss of control over political power centers and its use of a like-minded Supreme Court as a willing agent entrusted with the implementation of its liberal agenda. Meydani challenges this explanation on two grounds. First, he argues that the data shows that not only liberal elites, but other groups as well, such as right-wing political parties, have "turned to the court to advance their interests." Second, he suggests that all those who turn to the court, including elite group representatives, do so in order to advance their own interests and not to strengthen liberal values. Thus, for example, Meydani argues that even when human rights organizations turn to the court they do not do so merely in order to advance liberal values, but also to advance their own social status. Similarly, members of the Israeli parliament (the Knesset), from the right and left alike, use the court to advance their political interests. While these are credible claims, it should be noted that they do not necessarily refute the claim that the court decides the varied cases brought before it in a manner that promotes the liberal elites' agenda. Nevertheless, Meydani's suggested explanation for the court's judicial activism, to which I now turn, does refute this claim.

Meydani's approach "attempts to combine political strategies and social-structural patterns in order to explain institutional changes." The essential premise of his model, which is certainly plausible, is that Israel suffers from an acute problem of non-governability. According to Meydani, the inefficiency of the Israeli political system is the result of the deep divisions in Israeli society which create a political system that is highly fragmented and generate "conflicts that cannot be solved through the political system. Under such conditions, politicians who make choices based only on short-term considerations often prefer the no-decision solution, thus exacerbating the inefficiency of the political system." In addition to non-governability, another important characteristic of Israeli political culture, which is a legacy of the pre state era and, according to Meydani, facilitated the emergence of judicial activism, is the tradition of activity through semi-legal channels as a means of achieving political change. During the period of the British mandate, the Jewish community in Palestine, whose activities were restricted by mandatory laws, found illegal and semi-legal ways to expand the

7. Id. at 37.
8. Id. at 37-39.
10. MEYDANI, supra note 1, at 38.
11. Id. at 39.
12. Id.
13. Id.
14. Id. at 45.
15. Id. at 61.
16. Id. at 58.
17. Id. at 58–61.
community and develop its institutions and thus created new facts and realities that were later accepted by the British authorities.\textsuperscript{18} Similarly, after the 1973 war Jewish settlers illegally settled in the occupied territories, creating a reality which the government was then forced to accept.\textsuperscript{19} These and other examples lead Meydani to argue that Israeli society is characterized by what he terms a “quasi-exit behavior.”\textsuperscript{20}

Quasi-exit behavior occurs when people are dissatisfied with governmental services and “try to find alternative channels, often illegal, to obtain the types of services that the government is supposed to supply.”\textsuperscript{21} “By doing so,” Meydani explains, “the public threatens the governmental monopoly, thus forcing policy changes in the direction required by society. In other words, politicians often respond to such pressures by legalizing some of the semi-legal or illegal institutions created by society.”\textsuperscript{22} In turning to the Supreme Court, continues Meydani, “Israeli society has adopted a quasi-exit behavior of intensive litigation in order to produce policy decisions, while also pressuring politicians to make fundamental institutional reforms.”\textsuperscript{23} Hence, to summarize the core of Meydani’s argument, the deepening divisions in Israeli society and the worsening non-governability during the 1980s and 1990s caused the Israeli public to adopt a quasi-exit behavior of turning to the Supreme Court, whose constitutional powers were not clearly defined, in order to create policy changes they could not create through the regular political process.\textsuperscript{24} Utilizing notions of public choice theory, Meydani further argues that when responding to petitions put before it, the Supreme Court operates as a political entrepreneur that makes use of the structural conditions of governance in Israel in order to advance its own interests.\textsuperscript{25} In making its legal decisions, both substantive and procedural, the court takes into account the interests of four groups: politicians, interest groups, the public, and the bureaucrats — itself included\textsuperscript{26} — and the court’s decisions reflect the balance that it strikes between those groups’ interests in an attempt to maximize its own power and legitimacy.\textsuperscript{27}

Meydani’s analysis is interesting, innovative, and many of its general insights will resonate with people who are familiar with Israel and its political and legal systems. Despite the fact that, as I will explain in detail below, I found the legal analysis in Meydani’s book wanting, I believe that the book is a worthwhile read for anyone interested in Israeli politics and in the place of the Supreme Court in politics. Furthermore, Meydani’s general explanation of the reasons for the development of judicial activism in Israel strikes me as more convincing than other influential explanations such as Mautner’s.\textsuperscript{28} Unfortunately, I found Meydani’s treatment of law in

\begin{itemize}
  \item \textsuperscript{18} Id. at 60.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 60–61.
  \item \textsuperscript{22} Id. at 61–62.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} See id. at 83–84.
  \item \textsuperscript{25} Id. at 138–42.
  \item \textsuperscript{26} Id. at 142–43.
  \item \textsuperscript{27} See Mautner, infra note 9, at 193–94.
\end{itemize}
general and of Israeli law in particular to be deficient, and in the remainder of this review I will explain in what ways.

While the third chapter of the book contains a background discussion of theories of law and politics, including legal positivism, legal realism, and post realism, and while other chapters include legal analyses of cases, Meydani fails, in my view, to properly analyze the law and to duly incorporate the analysis of law into his explanatory framework. This failure mars his otherwise thought provoking analysis. Presumably, law is absent from Meydani’s explanatory framework because he believes that the content of the law is irrelevant to the decisions of judges or of government which are determined by the political, social, and cultural factors delineated above. However, though the cliché “we are all legal realists now” rightly points to the dominance of legal realism in legal philosophy, most legal realists would reject the view that the content of law is of no relevance to judges’ decisions. While judges strive to achieve legal results that are compatible with their own ideological stances, they do not operate in a constraint-free environment. As Duncan Kennedy explains, the medium of the law is “at once plastic and resistant.” Thus, judges are constrained in their judgments by a given legal structure, by the need to apply particular modes of reasoning, and by the content of the laws, regulations and precedential decisions within which they operate. Whereas in some cases judges can work within these constraints to achieve their desired results, at other times they cannot. In both cases these constraints may go a long way in explaining court decisions, and at times they may explain them better than social, cultural, or political factors can.

The lack of attention to law and to legal analysis seems surprising even from the perspective of institutional theory, which is the approach that Meydani uses in developing his explanations for judicial activism. In his survey of institutional theory scholarship in chapter four, Meydani refers to a definition of institutions as “limitations enforced on human interactions” and explains that legal institutions “include formal rules (constitutions, laws, accepted court rulings, regulations) and informal ones (conventions, norms, codes of behavior).” Nevertheless, his analysis does not sufficiently take into account these legal institutions and the limitations that they place on the Supreme Court or the government.

The insufficient attention to the law is detrimental to Meydani’s analysis on several levels, from the almost trivial to the more profound. In what follows, I will point to some

30. Id. at 27–28.
31. Id. at 28–31.
32. Id. at 87–105, 119–20, 121–46.
33. Id. at 27–28.
34. DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 4 (Gianni Vattimo & Santiago Zabala eds., 2008).
35. See id.
36. See id.
37. MEYADNI, supra note 1, at 45–51.
38. Id. at 45.
of the problematic manifestations and consequences of the inadequate attention to law in the book.

One of the more trivial manifestations of Meydani's insufficient attention to law is his inaccurate use of legal definitions. To offer several examples: instead of the term "distributional justice," Meydani uses "The Distribution of Justice;" 39 instead of the term "targeted killings" he uses "focused liquidations;" 40 instead of "judicial criticism" Meydani talks of "overcoming paragraph;" 41 instead of "overriding clause," and "restriction paragraph" 42 instead of "limitation clause." On a slightly higher level of importance, another legal oversight is the lack of mention in his list of Israeli human rights laws 44 of the most important and comprehensive Israeli human rights laws to date: the Women's Equal Rights Law of 1951, the Employment (Equal Opportunities) Law of 1988, and the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law of 2000. 45 While all these are by no means crucial errors, a jurist reading the book may find that they indicate a disturbing lack of attention to the law, especially in combination with the more substantive legal errors to which I now turn.

The most extensive legal analysis that Meydani undertakes in the book is of the two Supreme Court decisions he uses as case studies with which to test his suggested framework of analysis against the Supreme Court's actual decision making process. These two decisions are the Supreme Court's 1999 decision regarding the use of torture in the interrogation of suspects in security offences 46 (hence — the Torture Case), and the court's 2002 decision regarding the compensation of agricultural settlements (kibbutzim and moshavim) for changes in the zoning of agricultural lands previously used by them (hence — the Land Decision Case). 47 While Meydani's socio-political analysis of the cases is interesting, his legal analysis is flawed and the legal flaws adversely affect the socio-political analysis as well. For example, a major flaw in the legal analysis of the Torture Case is Meydani's almost complete lack of reference to the fact that the prohibition on torture is an absolute prohibition in international law 48 and a lack of appreciation of the legal significance of this fact. Thus, from the legal perspective, and consequently from the socio-political perspective, it is almost unthinkable that the Israeli Supreme Court could have reached any other decision except the prohibition of torture. Furthermore, Meydani mentions that following the Torture Case, the Israeli Parliament passed the General Security Service Law but did not include

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39. Id. at 137.
40. Id. at 130.
41. Id. at 149.
42. Id. at 158.
43. Id. at 157.
44. Id. at 63.
47. MEYDANI, supra note 1, at 128-44. In the book, Meydani refers to the first case as the Interrogation Case. However, since this case is widely known as the Torture Case I will use the conventional terminology.
in it any reference to the use of torture during interrogations. In line with his general framework of analysis, he attributes this fact to the legislature's "inability . . . to govern in crucial [issues and] its willingness to hand over power . . . to the Supreme Court." However, Meydani again fails to understand the legal significance of the absolute prohibition on torture in international law. Just as it is unthinkable for the Israeli Supreme Court to approve the use of torture, it is also unthinkable that the Israeli Legislature would enact a law contradicting the absolute prohibition on torture in international law and explicitly allow interrogators to torture suspects. Unfortunately, this does not mean that the Israeli security service does not continue to torture suspects in security offences during interrogation; it only means that it does so covertly, outside the law.

Furthermore, Meydani's legal analysis of the Torture Case fails to capture the legal complexity of the Supreme Court decision, which was a direct result of its attempt to reconcile the difficulty of having to abide by an absolute prohibition against torture on the one hand, with its desire to leave an opening for the use of the interrogation methods at issue in instances of what is commonly referred to as the ticking bomb scenario, on the other hand. In order to do this, the court rejected the government's claim that the necessity defense — which Meydani mistakenly refers to as "need" — can justify, ex ante, the use of the interrogation methods at issue in the interrogation of suspects in security offences and held that there is no legal authority for the use of physical force against a suspect is subject to criminal liability. However, the court went on to hold that its ruling does not preclude the possibility that the necessity defense could be used post factum to clear particular investigators from criminal liability if their actions are proven to be justified under the circumstances of a particular case. Hence, the court justified a retroactive authorization for the use of torture in ticking bomb scenarios.

Meydani's legal analysis of the Land Decision Case is similarly lacking. The case revolves around administrative decisions taken by the Israel Land Council according to its authority under the Israel Land Administration Law, which gives the council extensive authority to determine fundamental aspects of Israeli land policy. In his analysis of the case, Meydani chides the court for what he perceives as the court's

49. MEYDANI, supra note 1, at 132-33.
50. Id. at 144.
51. Convention Against Torture, supra note 48.
52. For a detailed analysis of the case and of Israel's practices, see Itamar Mann & Omer Shatz, The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987 – 2009, 6 UNBOUND HARV. J. LEGAL LEFT 59 (2010).
54. MEYDANI, supra note 1, at 129.
56. Id. at para. 23.
57. Id. at paras. 34-36.
58. Id.
59. See MEYDANI, supra note 1, at 136-37.
60. Id.
political choice not to annul the Land Administration Law despite the court’s view that the authority granted to the council by the law is overbroad.61 Meydani wonders why in the past the court chose to annul laws, but it refrained from doing so this time.62 However, a correct legal analysis of the case exposes Meydani’s criticism as entirely misplaced. The case was never a case about the validity of the Land Administration Law. From the onset petitioners in the case attacked only the council’s administrative decisions and did not bring before the court any challenge to the validity of the law. Furthermore, neither the court nor the petitioners suggested at any stage that the flaws in the law were of the type that could serve as a legal basis for the law’s invalidation. Under such circumstances, the suggestion that not invalidating the law is a political move is a deep misunderstanding of the law and of the process of adjudication, which adversely affects the socio-political analysis as well.

Finally, Meydani’s choice of case studies and especially his choice of the Torture Case expose another serious weakness in his analysis, which is also tied to his lack of sufficient attention to law. In his analytical framework, Meydani analyzes both petitioners’ turn to the court, as well as the court’s judicial activism as “quasi-exit.”63 As already mentioned, according to Meydani, an active quasi-exit is an attempt “to find alternative channels, often illegal, to obtain the types of services that the government is supposed to supply.”64 However, since Meydani fails to give an accurate definition of judicial activism, his book leaves the distinct impression that almost any petition to the court and almost any decision by the court is an illegitimate attempt, by both petitioners and the court, to subvert the legitimate authority of the government. This impression is even strengthened by the analogy that Meydani draws between the power of the Supreme Court and the power of an authoritarian military regime, which although qualified, is still disturbing due to the deep illegitimacy it seems to assign to an unspecified and overbroad spectrum of court actions.65

The over broadness of Meydani’s critique of the court is strikingly demonstrated by his choice of the Torture Case as one of his two detailed case studies. In Meydani’s analytical framework, petitioners’ turn to the Supreme Court in the Torture Case was a quasi-exit behavior — using illegitimate channels in order to circumvent a legitimate government action — while the court, by deciding the case against the government, was engaging in illegitimate judicial activism — itself a quasi-exit behavior — which prevented the government from pursuing its lawful and legitimate actions.66 However, even the most cursory legal analysis shows that Meydani’s critique is entirely misplaced in this case. First, in terms of the legitimacy of the petition, in addition to the human rights organizations that petitioned in this case, additional petitioners were people who claimed to have been held and exposed to unwarranted physical pressure at the hands of

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61. Id. at 137.
62. Id.
63. Id. at 162.
64. Id. at 60.
65. Id. at 162–63.
66. Id. at 129–30.
the Israeli security service. Thus, in terms of standing, one can hardly think of a more solid basis for standing and, consequently, of a more legitimate reason to turn to the court, than to ask it to instruct the government to cease from unlawfully violating people’s physical integrity. Second, in terms of the legitimacy of the court’s decision, the court’s decision to instruct the government to cease the unauthorized administrative practice of applying physical pressure that amounts to torture to detainees is firmly rooted within the core powers of the court even under the most restrictive theory of judicial review. If, in Meydani’s view, instructing an administrative agency to cease performing acts which it has no legal authority to perform amounts to illegitimate judicial activism, then under this view there is no legitimate room for any judicial review in a democracy. Lastly, in terms of the government actions in this case, Meydani’s choice of the Torture Case as a case study is particularly vexing since the Torture Case is the paradigmatic case in which the government is the one engaging in an illegitimate quasi-exit behavior, outside the purview of the law, and not the petitioners or the court. In fact, because the government was perfectly aware of the extremely shaky legal grounds on which its interrogation methods stood and the numerous petitions against these methods which were filed on behalf of suspects against which they were used prior to the Torture Case, the government would consistently inform the court that it ceased to use these methods against the particular petitioner in an attempt to prevent the court from reviewing their legality. Thus, Meydani’s use of the Torture Case as a central case study to demonstrate the court’s illegitimate judicial activism seems to reflect a deep misunderstanding of the rule of law in democratic societies.

To conclude, despite the fact that Meydani’s insufficient attention to law and his deficient legal analyses mar his general thesis, the socio-political explanations that he offers for the role of the Israeli Supreme Court in the Israeli political system are interesting and thought provoking. Taken with a grain of salt, Meydani’s book is a worthwhile read and his general thesis provides a useful contribution to the socio-political analysis of the role of the Israeli Supreme Court in Israeli society.

67. See Mann & Shatz, supra note 52, at 67.
68. See MEYDANI, supra note 1, at 137.
69. See Mana & Shatz, supra note 52, at 77.