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Formalism, Positivism, and Activism in Israeli Laws

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Abstract

The article explores two philosophical approaches and how they are reflected in Israeli Supreme Court rulings. The first approach that I will explore addresses the rise or rather not necessarily the rise of legal formalism in Israeli law and its connection to legal positivism and legal activism. Ultimately, the issue has not yet been decided by our scholars as to whether the decline of formalism has indeed occurred according to Prof. Mautner (who bases his arguments on dominating legal issues from the broad spectrum), or not necessarily its rise according to Prof. Bendor (who focuses on public law). We can only discern the rise of judicial activism in Israeli law as evolving since the Bergman case until today, with the publication of the historical precedent regarding the annulment of the cause of reasonableness.

Keywords: Israel studies, Israeli laws, Israeli Supreme Court, legal formalism.

1. Introduction – Legal formalism

Prof. Mautner defined the main principles of the concept of legal formalism through three main areas that were distinct in the literature that developed already in the last century (Mautner, 1993). The first area is the sociology of law, the literature dealing with this bears an extensive discussion around formalism that rules as a key concept in Max Weber's doctrine. The second area is "science and law," as formalism is its main concept and it dominated Germany's jurisprudence starting in the nineteenth century, and especially from the second half. The third area is the extensive use of the concept of formalism in the United States by theorists, sociologists, and historians to describe developments in American law from the late 19th century to the present day.

The concept of "legal formalism" in the theory of legal science and Max Weber's doctrine, refers to content and structural characteristics that exist in legislation and to the division of labor between the legislative authority and judicial authority derived from these characteristics.

In American law, Prof. Mautner explains that the concept of "formalism" is used mainly to characterize the reasoning given by certain judges in their rulings to justify their decisions. However, since these reasonings reflect a broad worldview regarding the place of law in society and a worldview regarding the role of the judicial authority in the operation and creation of law, the formalism concept serves to characterize a specific, complete, and comprehensive legal worldview (Paine, 1978; Lyons, 1981; Quevedo, 1985).

The scholars of "legal science" in Germany and Weber lean on basic assumptions that differ from those of American legal scholars, in that respect that the concept of formalism of Weber and those of scholars of Science and Law are based on structural and content characteristics of

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legislation. But at the basis of the concept of formalism, which developed in American law, are the methods of reasoning accepted rather in the ruling. However, the content of the concept of formalism is common to a considerable extent to all three of them, and is based on four main points:

1.1 *Organization of legal norms in a system with internal logic*

Owing to the influence of the methodology of the natural sciences in the second half of the nineteenth century, Germany's science and law scholars and the formalist approach to American law sought to organize law as if it were a "scientific" system, striving for the norms of law to be organized in a system built according to internal logic, both horizontal and vertical (Reimann, 1990; Grey, 1983).

Horizontally, legal norms should be arranged according to defined and distinct legal categories (e.g., contracts, distinct from torts, private law distinct from public law, substantive law distinct from procedural law, etc.). Each such legal category, as explained by Prof. Mautner, is supposed to be based on one dominant element in the factual interaction observed by it, to enable the jurist to trace the entire factual story presented before him, its relevant legal characteristics, and then sort the case into the appropriate legal category and apply to it the solution inherent in that category. This is also the cause of devoting a great deal of intellectual energy on the part of jurists who operate according to the formalist worldview, to prevent overlap between the various legal categories. In their eyes, the jurist's greatest virtue is the "analytical power" to correctly classify factual cases into the legal categories that are supposed to regulate them.

Horizontally, at the foundation of any legal field, there should be several general basic principles, from which should arise, in descending hierarchical order, more detailed sub-rules, deriving from the principles and rules above them (Horwitz, 1992; Weber, 1987; Braithwaite, 1953).

1.2 *Detachment of law from its value dimension*

According to the concept of legal formalism, the academic discussion of legal questions, and the legal process, do not focus on reality directly. Rather, the basis of legal practice should be the existing legal norms in the legal system. Therefore, the question that is asked in the framework of the judicial process will be, what norm should exist in the world by the internal logic of the existing normative system, considering its conceptual and linguistic components? Therefore, the legal decision must be scientific and be completely free from dealing with questions of value

At the basis of the system, additional norms in the legal system are supposed to be present, and not the existence of moral reasons that may justify the existence of norms. Therefore, Prof. Mautner concludes that, according to the concept of legal formalism, existing legal norms are supposed to separate the legal decision-maker from the substantive reasons that can justify his decision (Horwitz, 1975; Goetsch, 1980; Kennedy, 1973).

1.3 *Limited creativity within the judicial process*

An ideal model of legal formalism assumes that the system will usually find an appropriate, ready-prepared norm for application by the judiciary. But in the absence of a norm that provides a direct solution to a legal problem that arises, this norm is considered to exist by implication, and the role of the judge or scholar dealing with the issue, according to the formalist method, is to create it by way of exposing it to full view. This, explains Prof. Mautner, is a process

of legal reasoning, a process that is inductive and deductive, and whose raw materials are the legal norms that already exist in the method. Within the framework of inductive reasoning, the legal norm, which provides the required solution, should be shaped according to the contents of legal norms that can be considered to have some relevance to the issue that arises. Within the framework of deductive reasoning, in his understanding, the legal norm providing the solution should be derived from the broad principles and rules that are supposed to be considered those that apply to the issue. The law should, therefore, develop the framework of the judicial process, but not by weighing the moral desirability of possible alternatives, but from within. Furthermore, the process must be technical-mechanistic, when it is required to always give rise to one agreed-upon norm, and hence all its operators are supposed to reach, necessarily, the same result itself, if it is implemented correctly.

1.4 *Certainty and planning ability as central objectives of the legal system*

Having observed, that according to legal formalism, legal norms must pre-exist in the method, explicitly or implicitly, as the product of a technical-mechanistic disclosure process, they can be considered by decision-makers to be part of the existing factual situation in the world, which they can rely on when planning to achieve goals. It follows that legal norms allow legal consumers to operate with a high degree of certainty and immunity from unexpected external interference that will disrupt their actions to achieve legal objectives.

2. Legal positivism and judicial activism

The concept of positivism (deriving from the term "position" to place things) consists of three ideas:

> The first is the idea of separation. The question of whether a law exists what the content of the law is or what is the validity of the law is a different question from the question of whether the law is good or not. On the part of natural law, they were Communicating vessels – law is neither good nor just – invalid. The requirement of the law was a prerequisite for things that were not written or interpreted or that were not created by human beings (even if there was an attempt to change them through the Senate). The idea of separation is the separation of questions of two types – one from the world of values, which asks whether the law is a good law or not and whether it is moral or not. The second question comes from the world that describes the difference between normative and descriptive (here everything is normative because we are talking about binding tools, but the idea which we address here about value evaluation separately and the factual question: Does a particular society produce laws? Is a society organized in such a way that it can produce laws? Did it create this law? If it does not exist – is it not a law?). It seems that the question of validity is different from the question of evaluating a particular legal arrangement (natural law does not separate these questions because all laws are good, and if not, they are not laws), and thus, according to positivist law, they must be separated.
>
> The second idea is the idea of social fact, according to which we provide the existence of a legal system "objectively", scientifically – the intention is that we first check whether there is a law or not (and this, after we have separated law from values), and now we will examine whether it exists or not – whether the law is a good idea or not – this is another question.
>
> The third idea is the idea of social convention, which mainly characterizes H.L.A. Hart's doctrine, according to which the validity of the law rests on social convention.

The bottom line, if the law is not legislated, it is not a law. Unlike natural law, where it is necessary to legislate to realize the ideals of natural law, here the approach advocates that if it

is not enacted legally, there is no legal validity. Another thing that distinguishes natural law from positivism is that law in natural law is divine and eternal, and the law according to positivism is a human product like sociology, if we want to examine it, it has a strong affinity with the idea of social convention.

Prof. Adi Parush, in his book (Parush, 1993), found that the expression "legal positivism" is not as unambiguous as the expression "natural law," which is why different researchers use it in different ways. It is indisputable that the main theorists in the current legal positivism are Austin and Bentham (nineteenth century) and Hart and Kelsen (twentieth century). Each theory differs from the other in important matters, but they all share two arguments: The first argument is, the negative argument, by which it is not true that the legal validity of any norm depends on some moral test (as the natural law thesis states). The second argument is the positive argument, according to which the legal validity of any norm always depends on social facts, related to the sources of law.

The sources, the connection to which may lend to a given norm a legal validity, can vary from one legal system to another (although, not coincidentally, the main sources of developed legal systems lie in acts of legislation or judicial decisions). Among the four researchers mentioned above, there are differences of opinion regarding the nature of these sources and the nature of their connection to various legal norms; But each of the four assumes that these sources can be identified on a foundation of clarification of facts, without resorting to moral arguments. Some justified the positivist thesis by stating that it conforms to the common use of the term "law." Some argued that it befits the nature of the law as an institutionalized social instrument. Some even justified the positivist thesis on the moral-educational grounds that its acceptance might lead to people not obeying the law in blind obedience. The author did not focus here on evaluating the theoretical constructions woven around the positivist thesis, nor did he focus on evaluating the various attempts to justify this thesis, but the author understands that the distinction between moral and legal questions is a very important distinction, essential for understanding the nature of the law, and does not see the need to dispense with this distinction or blur it, as some theorists do.

Prof. Parush concludes that the positivist thesis refutes the existence of a necessary connection between law and morality, but it refutes its existence only in the sense that, according to this thesis, there is no contradiction in talking about a grossly immoral law. Denying the existence of a necessary connection between law and morality in this sense does not mean that when the legislature considers whether to enact a particular law, it must ignore moral considerations. Likewise, denying a necessary connection between law and morality in this sense does not mean that when the judge decides on disputes before him, he must ignore moral considerations. In many legal systems, the law itself gives the judge the authority to decide certain disputes based on moral considerations. These methods do not contradict the positivist thesis.

But doesn't the positivist thesis require the conclusion that, from a legal point of view, the power of the legislature in any legal system is unlimited? That he may, from a legal point of view, legislate any law he sees fit, regardless of its content? There have been theorists in the history of positivist thought, such as J. Austin, who have accepted this conclusion. However this conclusion is unjustified, and it does not stem from the positivist thesis. It is possible to imagine legal methods, whose basic norm (in Kelsen's words) or their basic identification rule (in Hart's words), the will of the legislature is not a supreme, unlimited source of law.

According to the positivist thesis, the sources whose connection constitutes a condition for legal validity, are sources that can be identified based on fact-finding, without the need for moral arguments. But as noted, the nature of these sources can vary from one legal system to another, and there is no reason to assume that they always depend on the will of the legislature. Even without dealing here with the question of whether the legislature can limit itself, it is clear

that there are legal systems in which a rigid constitution, not established by the legislature, but by another recognized body (the "founding fathers"), can set legal limits to the power of that legislature.

One might think that even if the positivist thesis does not require the conclusion that the power of the legislature is unlimited in any legal system, it requires the conclusion that in those legal systems that do not include a rigid constitution or entrenched basic laws, its power is unlimited. But even this conclusion does not stem from the positivist thesis. Undoubtedly, in underdeveloped legal systems, in which custom served as a major legal source, an ancient custom could serve as a source of legal norms limiting the power of the legislature, and since the identification of the custom can be made based on clarification of facts, without resorting to moral arguments, this possibility is easily consistent with the positivist thesis. But even in developed legal systems, it is possible to imagine situations in which the power of the legislature would be legally limited, without a rigid constitution or entrenched basic laws. Effective court rulings can also give rise to legal limitations on the power of the legislature. Let us take, for example, the principle of the unlimited power of Parliament in the British legal system. This principle was formulated by the British court in the second half of the nineteenth century. But what would have occurred if the court at this time rejected this principle and ruled that Parliament had no power to give legal effect to norms incompatible with certain principles? Prof. Parush finds, therefore, that if this ruling were effective, if it were accepted and rooted in British law, the power of the British Parliament today would be legally limited even in the absence of a rigid formal constitution.

Certainly, it is no coincidence that the British legal system did not develop in this way. For various reasons, the British Court preferred to adopt the doctrine of the Almighty Parliament, and needless to say, even if it had decided to reject it, it is not clear whether this decision would have been effective. However, the author did not intend to describe or evaluate the historical sequence that gave rise to the current situation in British law, but merely to clarify, by a hypothetical example, why the positivist thesis, as a general jurisprudence thesis, does not require the conclusion that only legal systems that include a rigid constitution or entrenched basic laws can create legal limitations on the power of the legislature. Of course, a similar imaginary exercise can also be conducted when it comes to the Israeli legal system. What would have happened, one might ask, if the Supreme Court had employed, after the establishment of the State, when it became clear that the Knesset was not going to fulfill the role of establishing a constitution, more judicial activism than the one employed, and ruled that the Knesset has no power to give legal force to laws that violate basic human rights (the rights mentioned in the Declaration of Independence or the UN Bill of Human Rights, for instance)? The author also finds that if such an activist ruling were effective, the Knesset's power today would be limited, from a legal point of view, even in the absence of a rigid constitution or an entrenched basic law.

In conclusion, Prof. Parush finds that the thesis of natural law requires the conclusion that the power of the legislature is limited in any legal system: it has no power to give legal validity to norms that do not meet the moral test of natural law. Whoever accepts the positivist thesis will reject this argument, but it is a mistake to think that they must consequently accept the argument that the power of the legislature is unlimited in any legal system. The positivist thesis, as a general jurisprudence thesis, which deals with the nature of law in any legal system, does not provide an answer to questions whose decision depends on the particular legal arrangements used by different legal systems. It is conceivable that legal systems, according to their basic norm or basic identification rule, have the power of the legislature to be truly unlimited, but it is also conceivable that legal systems, according to their basic norm or basic identification rule, have no unlimited power. The positivist would not argue that certain moral principles legally limit every legislator in any legal system. But it does not have to rule out the possibility that certain moral principles will become, in a particular legal system, legal principles that limit the power of the legislature, and there is no reason why it should condition this possibility on the existence of a rigid constitution

or an entrenched basic law since moral principles can become legal principles that limit the power of the legislature even following effective court rulings.

3. Legal formalism and legal positivism

As a theory of the origins of law applicable in the country, Prof. Mautner finds that there is no connection between legal positivism and the legal formalism approach (and thus finds that there is no necessary connection between natural jurisprudence – positivism's great competitor – and formalism approach). In other words, he explains that about the question of what can be considered within the scope of the law applicable to the system, a person can advocate either of the two legal approaches and at the same time, advocate or not advocate legal formalism as to the question of how the courts will exercise law (Radin, 1989).

However, the author also finds it common to think that there is a connection between some of the main tenets of the legal formalism approach and some of the arguments of positivism's jurisprudence. According to one of the positivist's arguments, there is no necessary connection between law and morality or between law as it is and law as it should or appropriate to be. Therefore, dealing with legal questions requires a distinction between the question of the status of norms as legal norms and the question of the value content of legal norms (Boodenheimer, 1964). This argument is close in spirit to one of the main tenets of the legal formalism approach, according to which it is not the business of judicial decision to deal directly with questions of value.

Another argument identified with the approach of legal positivism is that the practice of law requires tracing the meaning of the main concepts of law. The proponents of this argument, known as analytical positivists, dealt with clarifying the content of the basic concepts of law (right, obligation, damage, possession, contract, simple explanation/literal meaning, etc.), to create a science of the various legal terms. This argument is also close to one of the main tenets of the legal formalism approach, according to which the main point of judicial decision is not a creation of or embodied in value decisions, but nothing more than a logical derivation of the binding solution according to the conceptual content of the existing normative system.

4. Legal formalism and the rule of law

In Israel, the concept of the rule of law has two senses (Rubinstein, 1991; Zamir, 1987; Barak, 1977; Shelef, 1992; Barzilay Case, 1986), the first is formal and the second is substantive. In its formal sense, the concept of rule-law is quite close to the concept of legal formalism, formal rule of law refers to the existence of a situation in which the legal arrangement in the country is carried out by predetermined norms, the content of which is provided with a high degree of specificity and clarity so that their application does not involve the exercise of discretion for the sake of applying them. This sense is a formality in the sense that the existence of the rule of law according to it is not contingent on the content of the legal norms in the system. At the same time, the concept of the rule of law is also given substantive content, referring to a situation in which legal norms guarantee citizens basic freedoms that are identified and accepted in liberal democratic regimes.

5. Conclusion – The rise of formalism or not necessarily its decline in Israeli law

Mautner argues for the decline of formalism in Israeli law and explains it due to the rise of the non-formalist worldview in Supreme Court rulings. According to him, from the 1950s onwards, ruling was not completely formalistic, and case law in the 1990s was not completely

devoid of formalism. In both of these periods, the methods of reasoning in the Court's rulings were not uniform, some were formalistic, and some were methods of reasoning that emphasized the value dimension of the decision.

The decline of formalism was reflected in the decline in the perception of law as a means of deciding disputes and as a planning tool, and in the rise of the perception of law as an educational tool. Thus, the target audience of the ruling was expanded to society, which was reflected in the fact that the judges' reasons for decisions did not only address the parties to the dispute (and to those whose situation is like that of the parties to the conflict) but also the legal community and the public. In the first decades, the court presented itself as operating in the bosom of an autonomous subculture, which maintains a rigid barrier between it and the general culture and speaks to the public through professional language and the world of images unique to it (Al-Kuri Case, 1949; Lahav, 1992). This increased the relative weight of the formalist approach. In the decade-long rulings of the nineties, the court speaks more to the society in which it operates, more and more relying on the values recognized in the general culture of society, using language and the images world that are understandable and meaningful according to the general culture, and lowering the barrier between the legal subculture and the general culture. This interprets the argument for increasing the relative weight of the non-formalist approach (Fogel Case, 1977; Azoulay, 1981).

Likewise, the transition from proof to persuasion, within the framework of legal formalism, in situations where there is no clear legal solution that can be applied to the facts of the case at hand. Reasoning by way of proof, using the rules of legal reasoning, and not reasoning by way of persuasion, is what is supposed to justify the legal conclusion. The decline of formalism and the rise of values mean that the relative status of proof arguments in Israeli law has weakened and the status of persuasion arguments has been strengthened.

Similarly, the ratio between specific rights and general rights indicates the decline of formalism. The explanation for this is that legal formalism is associated with a rigid set of ways of creating specific rights and with strict protection of specific rights. Formalism strives to maintain a set of clear and detailed rules, according to which individuals can manage their actions with a high degree of certainty, to acquire or avoid acquiring specific rights. The decline of formalism in Israeli law means that the rules regarding the creation of specific rights in Israeli law have become less clear and that the power of courts to determine the circumstances under which these rights arise has prevailed at the expense of the power of the parties themselves to create or refrain from creating their rights. Conversely, explains Mounter, the rise of values in Israeli law means that the status of civil rights, which are general, has been strengthened in Israeli law.

Some argued (Bendor, 2003) that the basis of formalism lies in intra-legal rationality, that is, in the perception of law as a closed coherent system (Stewart, 1995; Unger, 1983).

Similarly, the focus of legal formalism is making decisions according to rules, even while ignoring seemingly relevant considerations that are not prescribed in the rules applicable to the matter at hand (Schouer, 1991). Prof. Bendor finds that the fact that any system based on the principle of the rule of law uses mainly rules and does not suffice with referring legal disputes to decisions at the discretion of the judges (as opposed to how political decisions are accepted by the Knesset or the government) is not an exigency dictated by the reality, rather, it reflects a value-formalist decision. He argues that the very need for the interpretation of authoritarian texts (such as laws) in law – whatever the method of interpretation may be – reflects legal formalism. The view that a legal norm, as a rule, is not determined by the judges, but is only interpreted by them, reflects a clear formalist insight. After all, deriving the decision of the dispute directly from the value considerations perceived by the justices as relevant to the matter at hand, which is required by concepts that reject legal formalism, does not involve the interpretation of authoritative legal texts.

Relying on legal rules, as distinguished from relying on judges' discretion – whether expressed in common law or interpreted "from a broad perspective" – promotes a series of values. The application of predetermined abstract laws – even if they embody policies, decisions, and political preferences – is more egalitarian, consistent coherent, and less accidental than individual political decisions made after the fact, not based on coherent policies, and not set behind a veil of ignorance. Subjugation to abstract laws may safeguard people's liberty more and is even fairer than subjugation to individual human decisions. A decision according to laws is certainly more effective and certain than a discretionary decision. This, and only this, allows the law to fulfill its primary function, to establish rules of conduct, rights, and obligations, as opposed to its secondary function, which is the resolution of disputes that arise in connection with the content and application of the primary rules. Predetermined rules are more objective than individual decisions after the fact. And of course, key aspects of democracy are better promoted by laws made by elected representatives than by judges, precisely because of the political decisions inherent in law.

However, the existence of certain values may sometimes involve impairing the realization of others, especially the individual justice of deciding coherent disputes.

Although it is common to see an approach that advocates reducing the scope of judicial review of the government as expressing legal formalism by reducing the political role of the court and judges (Sandberg, 2002), it seems to Prof. Bendor that the opposite is true: the court's abstention to discuss any petition brought before it – no matter how "political" the petition may be – expresses a judgment of judges and not of laws. Such avoidance is undesirable, in his opinion, and harms the set of values embodied by legal formalism. Thus, paving a wonderful way of using the term "judicial activism" as legal formalism, thus "everything is justiciable."

According to Prof. Bendor, the meaning of "everything is justiciable" in the normative sense is that the law takes, or is supposed to take, a position regarding any action or decision of a person or corporation (including a governmental body), that is: any human act is prohibited or legally permissible, so that the state allows the act or prohibits its doing. Moreover, certain actions or decisions have a legal significance that goes beyond permission or prohibition. And in his opinion, the common, political arguments that broad justiciability is undesirable, do not deal with the logical, formalistic necessity of absolute justiciability in this sense.

"Everything is justiciable" is, therefore, a conclusion of formalist legal thought, in Prof. Bendor's opinion, and it illustrates the affinity between legal formalism and the rule of law, and the essential moral importance that may exist between legal formalism and the rule of law, and the intrinsic moral importance that a maximum progression, development can have to create a buffer between law and politics. Legal norms embody politics, but they are not politics, in his opinion. Legal life should be based, in his view, on logic, that is: on induction and deduction stemming from rules. In this way, legal life differs and is distinguished from the political spheres of life, where intuition and experience predominate.

Prof. Bendor construes the rise of formalism while describing it as judicial activism. If so, we have seen the rise of judicial activism, especially in public law, which spruced buds in the Bergman case (1969), in which the Supreme Court faced the question of whether the court could invalidate the law in question because it did not meet its formal conditions.

By the very decision of the court in this case, it determined that it had the power to order the authorities not to act according to a law of the Knesset that was found to be constitutionally flawed, without providing a theoretical basis for its decision. Indeed, over the years, the court has recognized the principled authority granted to it to invalidate legislation according to the Bergman ruling (Rubinstein Case, 1983; Mi'ari Case, 1986).

The Bergman ruling is considered the first stage of the "constitutional revolution" and the first time that formal judicial criticism was also seen in the petitions that followed the Bergman

case (Kaniel Case, 1973; Ressler Case, 1977). Subsequently, the implementation of the Bergman case appeared in additional rulings (Derech Eretz Case, 1981) and the beginning of the constitutional revolution in 1995 (Mizrahi Bank Case, 1995), which led to the introduction of the concept of constituent authority and the normative supremacy of all basic laws into the judicial method in Israel. Therefore, the Supreme Court today treats the governmental system in Israel as if it were based on the principle of constitutive authority, which assumes that all basic laws, entrenched and un-entrenched, benefit from normative superiority in practice – even though there is not even the slightest basis for this in the basic laws or the famous Harari Decision. To this day, the publication of the historical precedent: the decision to cancel the cause of reasonableness by the Knesset (Movement for Quality Government in Israel Case, 2024), in which, for the first time, the Supreme Court intervenes in fundamental legislation and hence it assumed the authority to annul a fundamental law.

Ultimately, the issue has not yet been decided by our scholars as to whether the decline of formalism has indeed occurred according to Prof. Mautner (who bases his arguments on dominating legal issues from the broad spectrum) or not necessarily its rise according to Prof. Bendor (who focuses on public law). We can only discern the rise of judicial activism in Israeli law as evolving since the Bergman case until today, with the publication of the historical precedent regarding the annulment of the cause of reasonableness.

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