FOUR MYTHS OF JUDICIAL REVIEW: A RESPONSE TO RICHARD POSNER'S CRITICISM OF AHARON BARAK'S JUDICIAL ACTIVISM

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Richard Posner has recently reviewed, in *The New Republic*, Aharon Barak's book, *The Judge in a Democracy*. Posner criticizes Barak for both his theoretical argument and for what Posner portrays as Barak's legacy as the President of Israel's Supreme Court. Posner accuses Barak for acting as "a legal buccaneer," and describes his approach as "usurpative." Posner crowns Barak, in the very title of his review, as no less than an "Enlightened Despot." In this response I claim that Posner's critique lacks a proper understanding of the legal situation in Israel, it misrepresents Barak's activities as a judge, and fails to contend properly with Barak's doctrine which it purports to reject.

1. The Myth that Aharon Barak "Created" Israel's Constitution

A central portion of Posner's critique focuses on Barak's decisions as a judge. One claim revolves around Barak's role in Israel's "constitutional revolution"—the recognition of the Basic Laws as Israel's Constitution. According to Posner, "Israel does not have a constitution. It has 'Basic Laws' passed by the Knesset, Israel's parliament, which Barak has equated to a constitution by holding that the Knesset cannot repeal them. That is an amazing idea: could our Congress pass a law authorizing every American to carry a concealed weapon, and the Supreme Court declare that the law could never be repealed? And only one-quarter of the Knesset's members voted for those laws!"

These remarks are fraught with mistakes. For instance, it is simply not the case that the Knesset is unable to amend the Basic Laws. In fact, for the majority of the Basic Laws, such an amendment would not even require any special majority. It is also false that only a quarter

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of the Knesset Members supported the Basic Laws—the bulk of the Basic Laws were passed by a decisive majority. The granting of constitutional power—the authority to draft a constitution and amend it—to a body that also presides as the legislature is commonplace in a fair amount of democracies, and so the claim that the very fact that the Basic Laws were legislated by the Knesset negates, in and of itself, their status as a Constitution, is incorrect. Posner also ignores the special constitutional history of Israel, for the constitutional assembly chosen to draft a Constitution decided, soon after its election, to also serve as the legislature ("the First Knesset"), and it established explicitly that all future Knessets will have "all the powers" given to the First Knesset.

Additionally, Posner disregards the political and social reality in Israel when it implies that it is merely Barak's private opinion that the Knesset possesses the authority to draft a constitution, and that the Basic Laws are a constitution. There is virtually no debate in Israel that the Knesset is the Constituent Assembly, authorized to draft the constitution, as is evidenced in the prolonged discussions on the issue of the Constitution in the Knesset's "Constitution(!), Statute and Law Committee." The Knesset did not amend the Basic Laws in response to the Court's decision regarding the "constitutional revolution," and refrained from limiting the Court's power to practice judicial review over legislation. Moreover, in recent years, the Knesset usually examines proposed legislation to ensure its accordance with the Basic Laws, recognizing the supremacy of the provisions of the Basic Laws over "regular" legislation. The Knesset accepted, by a clear consensus, the Court's decisions in which it voided provisions in legislation which violated the Basic Laws.

Posner does not attribute the proper weight to the policy considerations that underlie the recognition of the Basic Laws as a Constitution. Posner agrees explicitly that a Constitution could be particularly beneficial for Israel ("[Israel] really could use a constitution"). While the recognition of the Basic Laws as a Constitution may not be the only possible logical outcome, it is the best choice given the relevant policy considerations. It is based upon the recognition of the importance of judicial review in ensuring respect for basic human rights, and protecting the fundamental principles of the State of Israel as a democratic and Jewish state; and upon the recognition that it is best to base judicial review upon explicit consent of the people, via its representatives in Knesset. The recognition of the Basic Laws as a Constitution constitutes an appropriate compromise in this regard. First, the Basic Laws were legislated by the Knesset, which is authorized to draft a constitution. Second, the Basic Laws possess clear constitutional characteristics (even if not unequivocal), particularly the fact that

they set forth the state's fundamental principles, they include language which emphasizes their supremacy over regular legislation, they are titled "Basic Laws," they omit the year they were legislated in the title, and the bulk of them were ratified by a decisive majority. Third, the Basic Laws are not irrevocable and even not entrenched, a fact entirely overlooked by Posner, as was previously noted. While Barak indeed noted a number of times that the Knesset's ability to amend the Basic Laws may be limited, in light of precedents drawn from comparative law, Barak nonetheless refrained from establishing such explicitly, and in any case, limited this option to particularly extreme cases, where a particular legislation "abolishes democracy and establishes a dictatorial regime."

Under such circumstances, the judicial recognition of the Basic Laws as a Constitution is a perfectly reasonable decision. As is well known, some disagree with this approach. However, the debate does not negate the legitimacy of President Barak's approach, and does not render his approach legally groundless. In contrast to Posner's arguments, the Court did not create a Constitution, but rather acknowledged the (continuing) power of the Knesset to draft a Constitution.

2. The Myth about the "Rule of the Judges" in Israel

Alexis de-Tocqueville characterized the American democracy, early in the nineteenth century, as a society in which all political questions are brought, sooner or later, for judicial decision. Posner seems to believe that this description is apt for Israel as well, and maintain that the fundamental social decisions are made, ultimately, by the Supreme Court. Posner describes Barak as the creator of judicial power which even the most radical of the American Supreme Court would not dare to dream of, and crowns him, as noted, a despot.

I wish to refute this argument. Consider the central decisions made in Israel from the 1980's until today, the era of Barak's "reign." These decision include the economic program of 1985, the expansion of the settlements in the Occupied Territories, the invasion into Lebanon and the withdrawal from Lebanon, the Oslo peace Accords, the policy of privatization, the increases and subsequent decreases in stipends for families with children, the disengagement from Gaza, Operation Desert Shield against Palestinian terror organizations, the construction of the Separation Wall, changes in Israel's immigration policy, the policy adopted in the Second Lebanon War, and more. All of these decisions, without exception, were taken by the government and the Knesset, without significant intervention by the Court. The Court did not

initiate any of these decisions, they were not made in the wake of its rulings, nor were they a result of petitions submitted to the Court. Some of the decisions were subject to deliberations in the Court, after the political echelon made its decision, but in all of the cases (except for certain aspects regarding the course of the Separation Fence and the War on Terror, as will be delineated below), the Court decided not to intervene.

The same is true as regards governmental inactions throughout the years. These include, for instance: the failure to take measures to close widening economic gaps in society and the deepening of poverty, discrimination by private agents against Arab citizens, delays in decisions to desalinate water and to recycle materials, and more. Here too, the Court's contribution (for good or bad) to social change was negligible. For instance, the Court did not instruct the Government to adopt a policy of affirmative action in order to contend with inequality (rather, it merely enforced affirmative action plans established by the Knesset and the Government); the Court did not instruct the State to set up soup kitchens or subsidize life-saving drugs; it did not prevent discriminatory security checks of Arab citizens in airports; and it did not even examine the constitutionality of the decision not to draft Arabs into the Israel Defense Forces.

A clear example of this trend is the construction of the settlements. Though there is wide consensus amongst jurists that the settlements in the territories are illegal, the Court refrained from so declaring. A second example, though less clear, is that of family law in Israel. The application of religious laws on marriage and divorce (Jewish "*Torah*" law for Jews), with their clear patriarchal tendency, leads to severe discrimination against women. Additionally, in the wake of the prohibitions within Jewish law against the marriage of certain individuals, many couples cannot get married in Israel. The Court did contribute greatly by creating mechanisms to circumvent this result (in particular, by recognizing marriages of Israelis conducted abroad, including same-sex marriages, by recognizing the rights of "common-law" couples, and by applying various restrictions upon the application of religious law). However, throughout the years, the Court shied away from declaring this system illegal, and preferred to leave it to the Knesset's decision.

The myth of judicial activism in Israel contains a kernel of truth. It includes, in the main, relatively great involvement in ensuring the proper functioning of politics (predominately restricting those who are suspected of breaking the law from serving in public office, barring someone from public office when there is a conflict of interest, and so forth); protecting fundamental rights of the individual (for instance, voiding the government's decision to

prevent the participation of certain parties and candidates in elections, enforcing the prohibition against discrimination against Arab citizens in the distribution of state land, enforcing the prohibition against discrimination against women in a variety of contexts, protecting freedom of speech, prohibiting the use of harmful means—including torture—in investigations of those suspected of terror activities, prohibiting the use of military methods that cause "disproportionate" harm to citizens, and more). The impact of the Court's rulings on these matters was relatively great, and it manifested itself by noticeable self-restraint on the part of the Government agencies, under the guidance of their legal advisors. But these decisions are a far cry from the hubris to "control both sword and purse." The Court refrains, almost entirely, from setting policy, such that the principle social decisions in Israel are made within the political framework, and not by the Court.

The Israeli Supreme Court, and Aharon Barak at its head, has a prominent role in cultivating the myth of judicial activism. The abolishment of the requirement for "standing," and the willingness to examine every governmental decision and determine whether it is "reasonable" and "proportional," creates the impression that the Court is a central actor in Israeli politics. But in practice, the clear trend in the Israeli Supreme Court is to refrain from interfering in governmental decisions. Posner criticizes Barak's willingness to examine every issue, based on the criteria of "reasonableness" and "proportionality"—for instance regarding the sum of government stipends given to residents, regarding the decision to release prisoners in exchange for captured soldiers, and even regarding the decision to initiate a war. However, he ignores the fact that in all these cases, Barak recognized a very broad range of "reasonableness," such that that the governmental agencies retained an almost unlimited amount of discretion.

An example of such is the judicial review over the IDF's activities in the Occupied Territories. The Court was willing to adjudicate almost all of the petitions submitted against activities of the army. However, the Court authorized almost every practice adopted by the IDF within the framework of its war on terror, by giving a very broad (and controversial) interpretation to the provisions of international law. Posner notes that the Court interfered in the path of the Separation Fence, but forgets to mention that it authorized the very creation of the fence in the territories, outside the boundaries of the state, in violation of the position of the International Court of Justice.

Israel's Supreme Court plays a particularly important role in shaping the character and image of Israeli society as a democratic society. The Court's interference in appointments to public

offices is great, relative to what is accepted in other democracies. Nonetheless, the Court's role in setting policy in central social decisions is very limited. It is certainly interesting to wonder whether the Court could have spearheaded social change if it chose to do so, for instance by establishing civil marriage in Israel, or declaring the settlements illegal, and whether it should do so. But in any case, the descriptions of the Israeli Court as one that purports to rule "by the sword and the purse," and of Barak as a despot, are unfounded.

3. The Myth about the Irrelevance of Moral Considerations in Judicial Rulings

Posner also criticizes Barak's willingness to acknowledge the existence of judicial discretion: Barak maintains that in "hard cases" the law does not provide one correct answer, and the judicial decision must be based upon the evaluation of what is the correct decision in the circumstances at hand, in light of the entirety of relevant considerations, and the fundamental principles of the system. Posner, on the other hand, maintains that the judge must distinguish clearly between considerations of justice, which can impact the desired outcome, and legal considerations, which dictate the correct outcome from a legal standpoint. Posner does not base his claim solely on the theoretical argument, but rather adds an empirical claim regarding behavior of American judges: "American judges distinguish between how they might vote on a statute if they were legislators and whether the statute is unconstitutional; they might think it a bad statute yet uphold its constitutionality. But in a Barak-dominated court, it would be very difficult to tell whether a judgment of unconstitutionality was anything more than the judges' opinion that it was a dumb statute, something they would not have voted for if they were legislators. And such an opinion would have no significance at all for the question of constitutionality."

This is a perplexing assertion. A long list of studies, and likewise unmediated impressions from the decisions of United States' courts, demonstrate a clear correspondence between the ideological positions of American judges and the way in which they implement legal doctrines, when those positions are not supposed to be taken into consideration. One of the most famous cases is, of course, the decision in *Bush v. Gore*. A number of studies found that the decisive factor in many American judges' decisions whether to interfere in the discretion of the government agencies is not their principled stance regarding the extent of judicial review in such cases, but rather the content of the governmental decision that is under review. Posner's claim is especially surprising in light of the fact that in his own academic writings

he has often expressed precisely the opposite position, advocating for an extreme "legal realism." For instance, in his 2005 Harvard Law Review article, Posner claimed that Constitutional decisions of the U.S. Supreme Court "are aptly regarded as 'political' because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms. Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. … [Judicial decisions] are inherently, and not merely accidentally, lawless." In that article, Posner claims that even decisions which seem indisputable, at least in hindsight—such as the case of *Brown v. Board of Education*—were the result of an ideological, rather than legal, decision.

Toward the end of his review of Barak's book, Posner hints at this position, by noting that even certain decisions of the American Supreme Court may be considered "lawless," in the sense that they are not sufficiently based upon formal sources of law, but he claims that Barak's approach is an extreme form of this way of thinking. Posner does not substantiate this claim at all. Barak does accord significant status to formal legal sources, such as the language of the law (or the Constitution), legislative history and relevant precedents. Barak acknowledges the existence of limitations upon the judge's power to achieve a just solution via interpretation. The place of considerations of justice in Barak's doctrine does not significantly differ from their place in American court decisions.

One could perhaps interpret Posner's critique of Barak as directed at judicial rhetoric. Posner's possible dislike of exposing the truth can, indeed, have certain rationales, such as preserving the public trust in judicial neutrality in light of possible disagreements regarding the correct moral theory and its implementation. However, I suspect that these considerations cannot justify such a "noble lie." Assuming that a legal decision is in fact based upon considerations of morality ("justice"), a doctrine that requires the judge to hide this fact would conceal from the public the thought process that guides the judge, and therefore is likely to violate the obligation to provide explanations for judicial decisions, and the goals behind that obligation.

4. The Myth that Judicial Review is "Anti-Democratic"

Barak's view on the role of the judiciary in a democratic society is the main concern in Posner's critique. In brief, Barak's position is that the Court is a partner in the "legislative project." According to this doctrine, the Court should "interpret," "adjust" and "complete" the norms set by the legislator when circumstances necessitate bridging the gaps between the needs of society and the law. The Court is supposed to legislate. The Court is empowered to apply judicial review over legislation, and to imbue the law with a meaning that will accord with the principles of justice. Barak indeed takes care to formulate this in terms of the "fundamental principles of the system," as manifested in the Constitution. However, Barak includes within these principles "manifested" in the Constitution also "implicit" provisions, such that in practice, this framework includes all the fundamental principles of the liberal democracy. As a result, according to Barak's doctrine, the role of the judge is to strive to match the existing legal norms with that which morality ("Justice" in Barak's terms) dictates.

Barak acknowledges the limitations placed upon the judge by virtue of the fundamental principles of the democratic system. These restrictions are visible in Barak's description of the Court as a "junior" partner in the legislative project, while the legislative (or constitutive) body is the "senior" partner: the Court's power of judicial review is limited by the (reasonable meaning of the) language of the Constitution, and its own powers of legislation are limited by the language of the law. Similarly, the Court's legislative power is subject to the power of the legislative body (or the constitutive body, in the case of judicial review over legislation) to react to the Court's decision and change it by legislating a new law (or by amending the Constitution).

Posner ignores these qualifications that Barak places upon the role of the judge, and rejects the legitimacy of judicial legislative activity across the board. For in his opinion, such activity does not conform to the essence of a democratic system: "Political democracy in the modern sense means a system of government in which the key officials stand for election at relatively short intervals and thus are accountable to the citizenry. A judiciary that is free to override the decisions of those officials curtails democracy. For Barak, however, democracy has a "substantive" component, namely a set of rights… enforced by the judiciary, that clips the wings of the elected officials. That is not a justification for a hyperactive judiciary, it is merely a redefinition of it." Posner asserts that under the guise of "interpretation," Barak seeks in essence to grant the judge legislative power, without being subject to any restrictions.

As a prefatory matter, one may again marvel at Posner's criticism, in light of the judicial philosophy which he himself embraces. In a string of books and articles, foremost amongst them in his 2003 book, *Law, Pragmatism and Democracy*, Posner heaps praises upon the approach that he calls "legal pragmatism." According to this philosophy, a judge should ignore deontological limitations, for instance the recognition of values such as the dignity of man or tolerance—a view which is in line with his critique of Barak. However, Posner does not maintain that morality is irrelevant for judicial decision. In fact, the opposite is true: Posner believes that the judicial decision should be based—entirely—upon a moral approach that he calls "legal pragmatism." A judge should render his decision by calculating the anticipated social ramifications of the application of each of the possible interpretations in the given case (though the nature of the calculation is unclear). Even if one were to ignore the difficulties in implementing such an eclectic approach, it is clear that this approach conforms with the position that a judge's decision should ensure the greatest harmony between the law and (a certain definition of) the social good. The fact that Posner believes that the correct moral approach is consequentialism (and not deontology) does not make his approach any more legitimate than that which Barak espouses; thus his harsh critique of Barak's approach is astounding.

The most important issue at hand, however, is the validity of Posner's criticisms of Barak's doctrine. Seemingly, the argument revolves around the definition of democracy—is it a procedure for decision-making in accordance with the rule of the majority ("formal" democracy), or is it about limiting the force of the majority's decisions, by virtue of certain fundamental principles ("substantive" democracy). Without agreement as to the criteria for determining the "correct" definition, it is clearly a futile debate. One possibility is to define democracy on the basis of a given social reality—the system of governance accepted in states commonly accepted as democracies. According to this standard, the correct definition of democracy is undoubtedly the substantive one, for all democratic systems around the world restrict the power of majority's decision, either by means of judicial review (in most cases) or by virtue of customary constitutional norms.

The second possibility is to define democracy on the basis of the desired system of government, given certain assumptions regarding the purpose of the state, and the conditions for the legitimacy of its existence (and therefore the existence of the moral duty to obey its laws). The academic discussion on these issues is of course immense, and it is not my intention (nor within my power) to exhaust the topic, or even to offer a significant

contribution to it. The following discussion is merely the tip of the iceberg, in order to refute Posner's arguments against Barak's doctrine.

The proponents of formal democracy argue as follows: whereas it is inevitable that judicial decisions will rely upon considerations of morality, there are differences of opinion regarding the correct moral judgment. Therefore, goes the claim, it is best to allow political bodies wide discretion, and to refrain from invalidating laws or other governmental decisions, and from "adjusting" their meaning in the process of interpretation. This position could be based on a number of rationales, but here I will suffice with enumerating the three that seem to me the strongest. I will attempt to demonstrate that they do not justify rejecting substantive democracy.

The *first* rationale, whose most prominent spokesman is Jeremy Waldron, is that the decision should be left to the public (or its representatives), by virtue of the basic right of every person to participate in the decision-making process. According to this approach, the advantage of a majority-based decision-making procedure lies precisely in that it does not purport to reach "correct" decisions by examining the content of the decision itself. The position of the majority—which does not need to be justified—does not pretend to be preferred over the position of the minority, and the minority is not requested to relinquish its belief in the justice of its own stance. The advantage of this method of decision-making is that it respects the right of every person to be a partner in an equal manner in the social decisions (the right to equal participation). A *second* rationale assumes that social decisions should (for various reasons) express the preferences of the public. As such, the claim is that the decisions of elected political bodies are expected to reflect in the best way the preferences of the public, unlike the decisions of the courts. Finally, a *third* claim is based upon an alternate assumption, according to which the proper view of justice is not necessarily identical to the public's preferences. Instead, formal democracy is preferable because the representatives of the public are up for reelection (they are "accountable"), and therefore they are expected to promote (what is in their opinion) the social "good," while judges, who are not up for reelection, constitute, in Robert Bork's words, "the branch most dangerous."

Each of these three claims has a great amount of truth. Indeed, nobody—Barak included—denies that majority rule, through its elected representatives, is the main process for social decisions. However, these claims do not negate the legitimacy of judicial review and the role of the judge in a democratic society according to Barak's doctrine.

The *first* claim, which argues that the majority's decision is just because it ensures the right of equal participation, does not contradict the legitimacy of judicial review, for three main reasons. First, this reason itself justifies limiting the power of the majority in order to protect the right of equal participation. So, for instance, it would be justified to have judicial review over the majority's decision to bar a party from participating in elections; so too over the majority's decision to restrict a future majority from changing certain decisions. Moreover, the right to equal participation can only be realized if it is accompanied by conditions that allow for significant participation. Posner is correct to acknowledge the importance of judicial protection of freedom of speech and other political rights, which he calls "democracy-supporting rights," but it is not clear what the basis would be for refusing to recognize other interests as "democracy-supporting," such as education, health, proper standards of living, and other aspects of human dignity.

Second, this argument does not pertain to a reality in which the disagreement generally reflects a structural division of majority and minority, in other words, a consistent majority, based upon a group interest, versus a "chronic minority" (for instance the Arab population in Israel). In these situations, the majority's decision grants absolute power to one group, simply by virtue of its being the larger group in society, and denies the minority group the right of equal participation in decision-making. Therefore, a belief in the right of equal participation does not oppose judicial activism, at least when that activism is employed to protect minorities. Moreover, when the majority directs its power against those who are unable to participate in the decision at all—for instance the residents of occupied territory—this argument is even more valid. Therefore, Posner's criticism of Barak's support of the decision to intervene when the State did not distribute gas masks to residents of the Occupied Territories during the 1991 Gulf War cannot rest on the right to equal participation, for the residents of the territories are denied access to the political system that decides their fate.

Third, the right to equal participation can indeed serve as a rationale for supporting a policy of judicial restraint, but it does not negate the validity of other rationales, consequentialist by their nature, supporting judicial activism. Absolute reliance on the majority's decision is dangerous, and is likely to result in noticeable restrictions upon basic human liberties, and the emergence of an immoral regime. Take Iran, for instance—where formal democracy is applied. The advantage of substantive democracy is that conditions for the legitimacy of the state's existence are an inherent part of its law.

The *second* claim against judicial activism assumes that the appropriate conception of justice is that social decisions should express the public's preferences, and that the decisions of political bodies, up for election, are expected to reflect the public's preferences in the best possible way. However, the findings of empirical and theoretical studies in the field of public choice theory undermine the very core of this claim. In many cases, public officials consider not only the public's preferences, but also (and at times, mainly) the preferences of organized interest groups, which succeed in applying significant political pressure on public representatives. This, clearly, does not automatically justify transferring decision-making powers to the Court, which is not susceptible to the same influence of interest groups, for the influence of interest groups over political decisions is not necessarily negative. Moreover, in certain situations the influence of interest groups on over political decisions is negligible. Thus the extent of judicial activism should be based upon the strength of the interest groups' influence on the political process, in general or in the specific case, and upon one's approach regarding the legitimacy of such influence. Yet this does not justify a blanket rejection of a position, such as Barak's, regarding the proper role of a judge in a democratic society.

The *third* claim against judicial review supposes that since public representatives are up for reelection, they are expected to act to promote (what they consider) the social "good" more so than judges, who are not up for election and are not accountable, in its usual political meaning. The members of the legislature are subject to new election, which indeed often leads them to make decisions based not only on their personal benefit but also on other interests. However, as noted, the theoretical and the empirical research do not necessarily prove that the politicians take into account the entirety of relevant public interests. Similarly, the fact that judges are not elected does not automatically lead the judges to ignore what they consider public interest. The institutional restrictions placed upon the judges, their obligation to explicate their decisions, their education, and more, bring about considerable restraint in their actions. Ultimately, the comparison between political office-holders and judges is circumstantial, and there is no reason to claim that the appropriate balancing point would grant full power to the former and deny it from the latter.

Concluding Remarks

This short note does not evaluate the entirety of Barak's theoretical doctrine on the role of a judge in a democracy, and certainly does not appraise the sum of his activities as a Supreme

Court Justice. The purpose of these remarks was to highlight what in my mind are the fundamental weaknesses inherent in Posner's critique against Barak.

I agree that Barak's theoretical argument does not demonstrate ample sensitivity to the prevalent political and social conditions in a given society, and the necessity for the judge's role to correspond with those circumstances. A judge in a society such as Israel's—a society with many rifts, where governmental powers are not sufficiently separated, whose political culture is not sufficiently developed, and which does not have an entrenched Constitution—should not have the same function as a judge in other societies. However, this criticism is equally valid for Posner's own critique leveled at Barak's judicial decisions. His critique does not adequately consider the relevant circumstances in the State of Israel. (At the end of his review Posner does note that in the special circumstances of the State of Israel, Barak's judicial activism could be justified, but Posner does not specify to what parts of his criticism this qualification applies). At the same time, the fact that the role of a judge in a democratic society should be suited to the specific conditions of the land does not invalidate the general principle that underlies Barak's approach. The inevitability of judicial discretion, the preferred method for employing such discretion, as well as an understanding of the democratic system as one which is not limited to the principle of majority rule, but also includes limitations upon the power of the majority and its representatives. These are general claims whose power is not conditional upon changing circumstances of time and place.

One can criticize Posner's approach as condescending. Posner asserts merely that Barak's position is "weird" and fundamentally different from that which is accepted in the United States; but he does not contend with Barak's doctrine itself. In truth, it is Barak's approach—and not Posner's—that dominates American judicial decisions and literature. Therefore, Posner's critique of Barak is largely a critique of the approach predominant within the U.S. Supreme Court, and in the legal and philosophical academic discourse, where Barak's doctrine has merited a central and important position.

It seems that Posner's critique derives from his fundamental opposition to the use of comparative law as a source of law. Posner presents to the reader what is in essence a caricature of Barak's approach, and attempts to portray it as fundamentally different from the norm in the United States. By doing so, he hopes to ridicule the proponents of the position that see the accepted doctrines in the democratic world—at least in as much as they express broad consensus—as a relevant legal source in judicial decisions. This position was recently espoused by the United States Supreme Court in *Roper v. Simmons*, where the majority

decided that the Eighth Amendment forbids the death penalty for minors, based in part on the consensus on the matter in the democratic world. Posner (following Justice Scalia) is a resolute critique of this approach. His decisive opposition to consider the consensus positions in the democratic world, for instance regarding the death penalty or criminal sanctions for homosexuality, testifies that this "weird" approach (at least in relation to the rest of world) is precisely that of those American judges and scholars who advocate for the preservation of unusual positions. Ultimately, Posner's battle with Barak is a battle against doctrines accepted in the entire democratic world, both regarding the role of a judge in a democracy and regarding the constraints placed upon the power of the majority. The overwhelming support in the Israeli society to Barak's rulings manifests that in Israel, just as in the U.S., the public prefers Barak's "substantive" form of democracy over Posner's "formal" one.