

The Role of the Judge: Theory, Practice, and the Future

THEORY

The Role of the Judge

At the opening of this book, I asked what the role of the judge in a democracy is.¹ I also asked whether there are criteria for evaluating how the judicial role is realized. I wanted to know which tests determine whether a judge is a good judge. In this book, I have tried to give an answer to these questions. My answer concerning the role of the judge is this: the role of the judge is to adjudicate the dispute brought before him. In order to do so, the judge must decide the law according to which the dispute will be decided. In making this determination, the judge often acts as the “mouth of the legislature.” The judge repeats the language of the statute, as opposed to creating a new norm (“easy case”). That is generally but not always the case. In some cases (“hard cases”), determining the law requires creating the law. That is certainly the case of the development of the common law. It can also be true of interpreting a text created by others (the founding fathers of the constitution, the legislatures, the parties to a contract, a testator). In each of these cases, there is no prior law, or the prior law contains uncertainty. In these cases the judge makes new law.

In creating new law, the judge should aspire to realize two central goals. The first is to bridge the gap between social reality and law. The judge should adapt the law to life’s changing needs.

¹ *Supra* p. ix.

The second is to protect the constitution and its values. In working toward both goals, the judge should behave objectively, remaining sensitive to social consensus, to the extent that it exists. The judge should maintain public confidence in his fairness.

To realize these two roles, the judge should use the tools that the law provides (such as interpretation, developing the common law, balancing, the use of comparative law). The judge may not use means that are not legitimate. It is not enough for judges to know where they are going; they must use legitimate tools to achieve their goals. Without a legitimate ladder, one cannot reach the desired rooftop. In the absence of existing tools, one should consider creating new tools. Such creation is appropriate if the judge is authorized to do so.

Realizing the judicial role using these available means will create tension between the judge and the legislative and executive branches. Such tension is natural, even desirable. The judge should respect the special status of the legislature and recognize that there is a dialogue between him and the legislature. The judge is not accountable to the legislature or the nation in the way that a member of the legislature is. A judge is not a politician. A judge is accountable to the constitution and its values. That is the (personal and institutional) independence of the judge. Within the principle of separation of powers, the judge should make sure that each of the other branches operates within the boundaries of the law. Judicial review of the constitutionality of legislation and of administrative actions realizes democracy. It protects the constitution and its values.

A Good Judge

Who is a good judge? My answer is that a good judge is a judge who, within the bounds of the legitimate possibilities at his disposal, makes the law that, more than other law he is authorized to make, best bridges the gap between law and society and best protects the constitution and its values. A good judge is aware of his role and makes use of the means at his disposal in order to achieve it. In the absence of means, he examines whether it is possible to

create new means to help realize the judicial role. Regarding some issues, he will be active. On others, he exercises self-restraint. The judge never assumes that it is always worthy to be either activist or self-restrained. The good judge is always limited by the text according to which he adjudicates the dispute. The judge may not give the text a meaning that its language cannot bear. However, the text is not the end-all. Every text operates in a context, which must be understood in order to understand the text. The good judge recognizes the text and sees it as a starting point, but not an ending point. Good judges lift their eyes and see the legal system in all its nuances, values, and foundations. The good judge locates the meaning of the text within this general context. Indeed, the good judge does not make do with knowing the law. He should know society, its problems, and its aspirations. The good judge does not just look at the language of the single clause of the constitution, statute, contract, or will which he must interpret. The judge looks at the text in its entirety. One who interprets a single clause of the constitution interprets the entire constitution. One who interprets a single clause of a statute interprets all the statutes in their entirety.

The quality of a judge is determined by examining his rulings. Each case is examined on the merits. All the cases are given a comprehensive evaluation. The good or worthy judge is the judge who, in this comprehensive evaluation, used the available tools to achieve the role of the judge optimally. Indeed, the quality of a judge does not depend on a single decision given. We all make mistakes, including the judges among us. A mistaken ruling does not tip the scales any more than a good ruling does. Examining the quality of a judge depends on evaluating the entirety of the judge's work. Of course, one should also consider the judge's development over the years.

Some judges fulfill their roles properly without giving thought to their roles. They act intuitively. The criteria for their actions are internalized, without them having articulated them. In my opinion, judges should try to develop their judicial philosophy. This philosophy is the most practical tool that judges have. It guarantees that the intuition undergoes a process of rationalization. Without intuition, it is difficult for a judge to act. But judges should not act on intuition alone.

Good judges therefore lay the basis for a judicial philosophy that allows them, using the tools at their disposal within their legal systems, to decide according to the law that best realizes their roles. They will therefore develop a theory of interpretation that will help them fulfill their roles. In my opinion, that theory is purposive interpretation. Good judges will develop the common law in their system in order to realize their roles. When necessary, they will deviate from precedent, providing that the considerations supporting the new rule outweigh those supporting the old rule when taken together with the harm caused by the very act of change.

There are degrees in the quality of judging. There are better and worse judges. All judges should aspire to attaining the highest level, without ever attaining it. To my mind, the good judge is not a person of extremes. His world is not divided into black and white. Good judges know to balance between the extremes. Good judges understand that even if law is everywhere, law is not everything; they are aware that law is not a closed framework that lives inside itself. Without society, law has no value, and social values nourish the law. Indeed, law is inseparably connected to society's values and principles. True, judges do not create these values and principles, but they help introduce them into the law and remove them from law. In the field of law, conflicting values must be balanced.

The law deals with people. Human complexity influences the complexity of law. There is no single, unique solution to the problems of the individual and of society; there is no one theory that explains law and its development. There is always a need for balance and awareness of the limitations of judges and their role in within the three branches of government.

In this book, I discussed the normative aspect of judicial work. This is not the forum to discuss additional aspects of judicial work and the qualities needed to actualize them. It suffices to note that at the core of judging is judicial temperament. That is the quality that allows the judge to listen to the parties' arguments with an open mind, without interrupting and without constantly seeking to educate them; that is the quality that allows the judge to restrain his power and to understand its limits; it is a quality of humility and the lack of

arrogance that educates the judge to understand that he does not have a monopoly on wisdom; it is recognition of his capability of erring and the need to admit mistakes. In addition to judicial temperament, of course, other qualities such as personal and professional integrity are necessary, without which a person cannot be a judge.

REALITY

It is hard to be a judge. It is even harder to be a good and worthy judge. It is sevenfold harder to be a good and worthy judge in a democracy under terror. It is hard to be a judge because the judge is a loner. It is hard to be a good or worthy judge, because doing so requires the power to abstract, recognition of law in its entirety and the relationship between it and society's values and principles, the ability to balance conflicting demands and to give expression to what is fundamental and basic, disqualifying what is temporary and passing—and to do all that with maximal objectivity. It is hard to be a good and worthy judge in a democracy under terror, because when terror strikes a democracy, the tension between the needs of the community and the liberty of the individual reaches its peak.

THE FUTURE

Understanding the Judicial Role

What does the future hold for the role of the judge in a democracy? It is, of course, impossible to foretell the future. But we can make several suppositions. I believe that the view of the judicial role as I have described it will take root and deepen. The need to bridge law and society will become more pressing. Social changes are becoming more and more intensive. Changes that in the past took place over generations today take place in a matter of years. In the future, those periods of time will become even shorter. The legislature

cannot always keep pace with these changes. Society will need courts more than ever to bridge the gaps between law and life. This is the case for gaps created by technological changes, such as the computer and Internet; it is the case for gaps created by social changes, such as attitudes toward religion, the institution of marriage, social rights, and other changes related to the ways in which people relate to their surroundings.

The role of the court in protecting the constitution and its values will certainly become strengthened as the essence of the constitution as a supreme norm and the judicial review that accompanies it become more deeply understood. Changes in the view of constitutional democracy—the daily bread of the world’s important democracies (such as those of the United States, Canada, and Germany)—will become internalized. The man in the street will understand, better than he does today, that democracy is not just majority rule but also the rule of values, including human rights. Trends toward “popular constitutionalism”² will be, I believe, short-lived. They reflect a dissatisfaction with a specific court. They do not pose a satisfactory intellectual alternative to the role of the judge in a democracy, as provided in this book. Thus, the judicialization of politics will continue.³ The non-justiciability of legal aspects of politics will decrease.

As in the past, so too in the future, the court will protect the state’s democratic values. Judges come and go, but democracy and the need to protect it remain. I am convinced that in the future, too, judges in general, and Supreme Court judges in particular, will place the protection of the state’s democratic values at the top of their agenda. They will protect both formal and substantive democracy. I do not expect that to change. The precedential foundation laid by generations of judges will serve them. They will construct their own buildings on that foundation.

² See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

³ See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (2002); Alec Stone Sweet, *The Judicial Construction of Europe* (2000); Herbert Jacob et al., *Courts, Law and Politics in Comparative Perspective* (1996).

Developing Judicial Means

Judges have few tools at their disposal. I hope that the tools presently available will be developed. I am certain that new tools will be created. Indeed, interpretive theory should be developed. Modern purposive interpretation is at the start of its journey. The common law has developed nicely in the past; I am convinced that it will develop nicely in the future. The theory of balancing will continue to be the central means at judges' disposal. I also hope that jurisprudence will provide us with a better understanding of the tool of balancing and aid us in determining the weight of competing values. In the future, will the approach to judging and its role be as it is today? I do not know. The present situation may continue; there may be further liberalization or restriction of access to the court. I hope that the latter development does not take place. In modern democracies, claims of non-justiciability are becoming fewer; standing rules are becoming more and more liberal. The role of comparative law will expand. As the trend toward globalization continues, comparative law will become a natural means of interpreting and developing the law.

The Relationship with the Other Branches

What does the future hold for the relationship among the branches of the state? It is clear that the existing tension between the judicial and other branches will continue. Such tension is positive. I do hope that in the future, it will be based on a better understanding of the other branches and their functions.⁴ The question is whether it will break the rules of the game. I hope that the answer is no. There is a myth that strong courts are needed when the other branches of the state are weak. The truth is, democracy needs strong courts *especially* when it has a strong legislature and a strong executive.

⁴ See *Judges and Legislators: Toward Institutional Comity* (Robert A. Katzmann ed., 1988).

Further, it is a myth that courts become stronger because of weak governments and legislative bodies. The strength of the judicial branch and the judicialization of politics are not dependent on the weakness of the political branches. They are based on democracy itself. They assume strong and effective political branches.

Public Confidence in the Judiciary

Will public confidence in the court system be maintained or even grow? I am convinced that judges will do all they can to maintain this confidence. They will be guided by neither activism nor self-restraint, but rather will weigh claims on the merits. Sometimes that will mean activism; sometimes the result will be self-restraint. Whatever the result, judges will be subject to criticism. Such criticism is appropriate and desirable. Will it also be fair? I have no clear answer to that. Increasingly, people criticize court decisions without reading them; too many people criticize decisions they don't understand. I fear that the future does not hold positive developments in this area.

Judicial Independence

In the future, the independence of the court system will be put to the test. I hope this independence will be maintained; I hope that institutional independence—which is missing today in many democracies—will be established and preserved. I do hope that the judicialization of politics will not increase the politicization of judicial appointments. On the contrary: it should reduce such attempts. If politics is judicialized, what is needed is objective, professional, and independent judges. That calls for less politics in the appointment of judges. It seems to me that the trend is toward more professionalism and less politics.⁵

⁵ See the powers and composition of the Judicial Service Commission in the appointment of judges in South Africa: Articles 174 and 178 of the Constitution of the Republic of South Africa. See also the United Kingdom proposals for the

A Role That Is a Mission

I regard myself as a judge who is sensitive to his role in a democracy. I take seriously the tasks imposed upon me; to bridge the gap between law and society and to protect the constitution and democracy. Despite frequent criticism—and it frequently descends to the level of personal attacks and threats of violence—I have continued on this path for the last twenty-six years. I hope that by doing so, I am serving my legal system properly. Indeed, as judges in our countries' highest courts, we must continue on our paths according to our consciences. We, as judges, have a North Star that guides us: the fundamental values and principles of constitutional democracy. A heavy responsibility rests on our shoulders. But even in hard times, we must remain true to ourselves. I discussed this duty in an opinion considering whether extraordinary methods of interrogation may be used on a terrorist in a “ticking bomb” situation:

Deciding these applications has been difficult for us. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems and we live its history. We are not in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The fear that our ruling will prevent us from properly dealing with terrorists troubles us. But we are judges. We demand that others act according to the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial. In deciding the law, we must act according to our purest conscience.⁶

That is my approach to my role as a judge. I have taken this approach with me daily into the courtroom. It is my approach to writing decisions. It is an approach central to which are the values

creation of an independent statutory Judicial Appointment Commission to recommend judicial appointments: see The Constitutional Reform Bill: A Supreme Court for the United Kingdom and Judicial Appointments (Bill No. 18 of 2004–05).

⁶ H.C. 4054/95, *Pub. Committee Against Torture in Isr. v. Gov't of Israel*, 43(4) P.D. 817, 845; [1998–9] IsrLR 567, 606.

of a democracy; it is an approach central to which is the human being, created in the image of God; it is the approach that views the judicial role as service and not as power.

As a judge, I do not have a political platform. I am not a political person. Right and left, religious and secular, rich and poor, man and woman, disabled and nondisabled—all are equal in my eyes. All are human beings, created in the image of the Creator. I will protect the human dignity of each. I do not aspire to power. I do not seek to rule. I am aware of the chains that bind me as a judge and as the president of the Supreme Court. I have repeatedly emphasized the rule of law and not of the judge. I am aware of the importance of the other branches of government—the legislative and executive—which give expression to democracy. Between those branches are connecting bridges and checks and balances.

I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial.