AHARON BARAK

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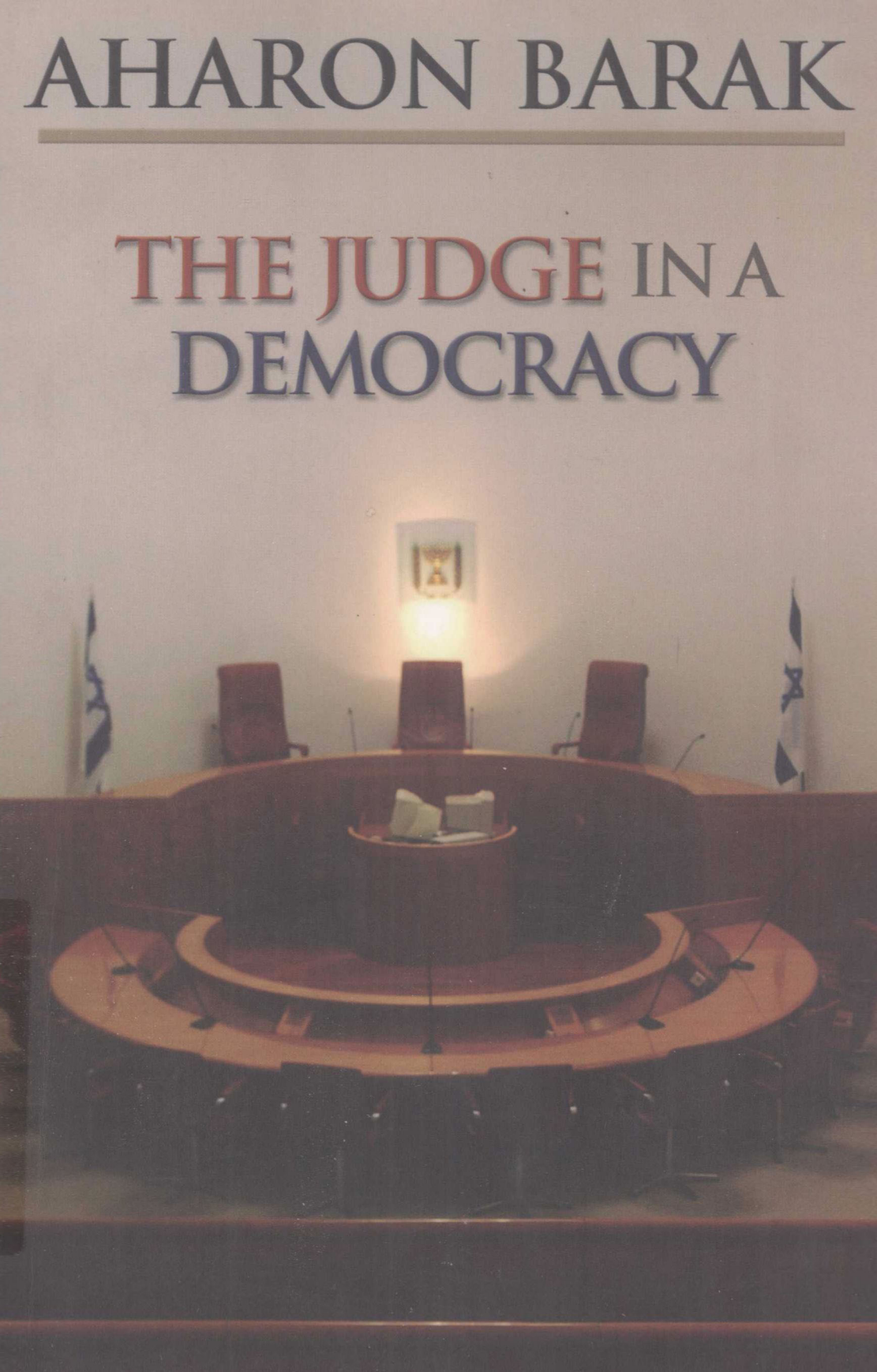

THE JUDGE IN A DEMOCRACY

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THE JUDGE IN A DEMOCRACY

Introduction

I am not a philosopher. I am not a political scientist. I am a judge—a judge in the highest court of my country's legal system. So I ask myself a question that many supreme court judges—and, in fact, all judges on all courts in modern democracies[1]—ask themselves: What is my role as a judge? Certainly it is my role, and the role of every judge, to decide the dispute before me. Certainly it is my role, as a member of my nation's highest court, to determine the law by which the dispute before me should be decided. Certainly it is my role to decide cases according to the law of my legal system. But is that all that can be said about my role? Are there criteria for assessing the quality of my work as a judge? Certainly no such assessment should be based on the aesthetic quality of my writing.[2] Nor should the criterion be the number of sources I cite in my decisions. But then what would be a meaningful criterion? What is my role, and do I even have a role beyond merely deciding the dispute before me according to the law? These questions occupy me daily as I enter the courtroom and take my seat on the bench. In my twenty-six years of service on the Supreme Court of Israel, I have written thousands of opinions. But am I a "good" judge?

[1] *See generally* Michael Kirby, "Judging: Reflections on the Moment of Decision," 18 *Austl. B. Rev.* 4 (1999); Beverley M. McLachlin, "The Charter: A New Role for the Judiciary?" 29 *Alta. L. Rev.* 540 (1991); Beverley M. McLachlin, "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?" 39 *U. N.B. L.J.* 43 (1990); Georghios M. Pikis, "The Constitutional Position and Role of the Judge in a Civil Society," *Commonwealth Jud. J.*, Dec. 2000, at 7.

[2] Although aesthetics are important, as Richard Posner's discussion of Justice Cardozo indicates. *See* Richard A. Posner, *Cardozo: A Study in Reputation* 10, 42, 143 (1990).

This question is important not merely to judges who want to assess their performance, but to the system as a whole. The answer determines the criteria for developing the law and provides a basis for formulating a system of interpretation of all legal texts. Establishing criteria for judging judges is particularly important in view of the frequent attempts to dress up political problems in legal garb and place them before the court. De Tocqueville 170 years ago characterized this tendency to legalize political questions as a quirk of the United States.[3] Today, however, this phenomenon is common in modern democracies.[4] How are we judges to deal with political problems that have taken on a legal character?

The questions I wish to consider are not new. They are as old as judging itself, and they have accompanied various legal systems in their progressions throughout history. Sometimes they can be found at the center of public debate. Sometimes they are marginalized. The time has come to reconsider these questions. There are four main reasons for their timeliness.

First, democracy is celebrating its victories over Nazism and Fascism in World War II and over communism at the end of the twentieth century. Our age is the age of democracy.[5] New countries have joined the community of democracies. Many of them wish to reexamine the nature of modern democracy,[6] which is not based solely on the rule of people through their representatives (formal democracy) but also on the separation of powers, the independence of the judiciary, the rule of law, and human rights (substantive democracy). A key historical lesson of the Holocaust is that the people, through their representatives, can destroy democracy and

[3] Alexis de Tocqueville, *Democracy in America* 97 (Harvey C. Mansfield and Delba Winthrop eds.-trans., 2000) (1835).

[4] *See, e.g.*, McLachlin, "The Role of the Court," *supra* p. ix, note 1 at 49–50.

[5] See Richard H. Pildes, "The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics," 118 *Harv. L. Rev.* 28, 29 (2004) ("This Is the Age of Democracy"). *See also* Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* 13 (2003).

[6] *See generally* Bruce Ackerman, *The Future of Liberal Revolution* (1992); Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (2000); Ruti G. Teitel, *Transitional Justice* (2000); *Transition to Democracy in Latin America: The Role of the Judiciary* (Irwin P. Totsky ed., 1993).

human rights. Since the Holocaust, all of us have learned that human rights are the core of substantive democracy. The last few decades have been revolutionary, as we have learned the hard way that without protection for human rights, there can be no democracy and no justification for democracy. The protection of human rights—the rights of every individual and every minority group—cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion. Consequently, the question of the role of the judicial branch in a democracy arises.

Second, democracy today faces the emerging threat of terrorism. Passive democracy has been transformed into defensive democracy. All of us are concerned that it not become democracy run rampant. As judges, we are aware of the tension between the need to protect the state and the rights of the individual. This ever-present tension intensifies and becomes more pronounced in times of national emergency. What is the role of the judge in these special situations?[7]

Third, since World War II there has been a better understanding of the nature of judging.[8] Legal realism, positivism, the natural law movement, the legal process movement, critical legal studies, and the movements to integrate other intellectual disciplines into law have provided new tools for understanding the complexity of the judicial role. I find much truth in all of these approaches. Nonetheless, like the human condition, legal reality is too complex to be adequately captured by any one of these schools of thought. In my opinion, it is time for what I call an eclectic reexamination of the various theories about the judicial role. This reexamination is timely now, as globalization exposes us to ideals and thoughts that transcend national boundaries and legal systems.[9]

Finally, a survey of the de facto status of the judicial branches in the various democracies shows that since the end of World War II, the importance of the judiciary relative to the other branches of the

[7] *See infra* p. 283.

[8] *See generally* Brian Bix, *Jurisprudence: Theory and Context* (3d ed. 2003). *See also* Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (1977); William Lucy, *Understanding and Explaining Adjudication* (1999).

[9] *See generally* William Twining, *Globalisation and Legal Theory* (2000).

state has increased.[10] We are witnessing a strong trend toward "the constitutionalization of democratic politics."[11] People increasingly turn to the judiciary, hoping it can solve pressing social problems. Several questions therefore arise: Is this enhanced judicial status appropriate? Have judges taken on too much power? Has the separation of powers become blurred? Indeed, some claim that in recent years, the gap has widened between the practices and public expectations of democratic courts, on the one hand, and the intellectual-normative principles that are supposed to guide the courts on the other. This gap is dangerous, because over time, it will likely undermine public confidence in judges. Some now argue that judges are too active and that the constitution should be taken away from the courts.[12] Others argue that they are too self-restrained. These criticisms come from all corners of society. In recent years, for example, accusations that the U.S. Supreme Court is too activist have swelled.[13] Such allegations should be evaluated within the framework of a court's role in a democracy. A reexamination is therefore needed, and conclusions must be drawn, both about what can be demanded of judges and about what can be expected from the normative frameworks within which they operate.

[10] *See The Power of Judges: A Comparative Study of Courts and Democracy* (Carlo Guarnieri and Patrizia Pederzolil eds., C.A. Thomas (English ed.), 2002); Alec Stone Sweet, *The Judicial Construction of Europe* (2004); Ran Hirshl, "Restituting the Judicialization of Politics: *Bush v. Gore* as a Global Trend," 15 *Can. J.L & Jons* 191 (2002); Ran Hirshl, *Towards Juristocracy: The Origin and Consequences of the New Constitution* (2004); Tim Koopmans, *Courts and Political Institutions: A Comparative View* (2003). As to the Hungarian experience after the fall of communism, *see Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (László Sólyon and Georg Brunner eds., 2000); Richard Hodder-Williams, *Judges and Politics in the Contemporary Age* (1996).

[11] Richard Pildes, "The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics," 118 *Harv. L. Rev.* 28, 31 (2004).

[12] *See* Mark Tushnet, *Taking the Constitution Away from the Courts* (1994). *See also* Mark Tushnet, *The New Constitutional Order* (2003). *Compare also* Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

[13] *See, e.g.*, Larry D. Kramer, "The Supreme Court, 2000 Term—Foreword: We the Court," 115 *Harv. L. Rev.* 4, 130–58 (2001).

These questions do not arise in the "easy cases"[14] in which there is only one answer to the legal problem and the judge has no choice but to choose it. Such cases do not generally reach the highest court at all. But how am I to decide the "hard cases,"[15] the cases in which the legal problem has more than one legal answer? These are the cases that find their way to the highest court, and I have discretion[16] in resolving them.[17] My decision may be legitimate, but how do I know if it is the proper one? What must I do in order to fulfill my role? What *is* my role?

One might try to dismiss my question with the philosophical argument that there are no "hard cases", and that judicial discretion in this sense does not exist. This answer is far from satisfactory. Even Professor Ronald Dworkin, proponent of the theory that every legal problem has only one correct answer,[18] merely says that there are better and worse judicial decisions.[19] He propounds a complete theory describing how Judge Hercules should make the better decision in "hard cases." Is Hercules the proper model by which we should judge?[20] Whatever the philosophical answer may

[14] With respect to the easy cases, *see* Aharon Barak, *Judicial Discretion* 36–39 (Yadin Kaufmann trans., 1989).

[15] I define a "hard case" as a case in which a judge has the power to choose between two alternatives, both of which are lawful. The power to choose is judicial discretion. This discretion is not a psychological concept. It reflects a normative situation. It expresses the legal community's position on the distinction between lawful and nonlawful. *See* Barak, *supra* p. xiii, note 14 at 20. *See also* Tom Bingham, *The Business of Judging: Selected Essays and Speeches* 35 (2000); Kenneth Davis, *Discretionary Justice* (1969).

[16] On discretion generally, *see The Uses of Discretion* (Keith Hawkins ed., 1992); D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986).

[17] *See generally* Marisa Iglesias Vila, *Facing Judicial Discretion: Legal Knowledge and Right Answers Revisited* (2001).

[18] *See* Ronald Dworkin, *Taking Rights Seriously* 81 (1977); Ronald Dworkin, "Judicial Discretion," 60 *J. Phil.* 624, 624–25 (1963).

[19] Ronald Dworkin, "Pragmatism, Right Answers, and True Banality," in *Pragmatism in Law and Society* 359, 367 (Michael Brint and William Weaver eds., 1991). *See also* Bingham, *supra* p. xiii, note 15 at 25.

[20] On Dworkin's Hercules, *see* Ronald Dworkin, *Law's Empire* 239–40 (1986). On other models, *see Judges in Contemporary Democracy: An International Conversation* (Robert Badinter and Stephen Breyer eds., 2004).

be, the reality is that the large majority of judges think, as I do, that in some cases they do have a choice.[21] This thought is not an expression of judicial delusions of grandeur, nor is it the result of judicial imperialism. It reflects the uncertainty inherent in law. The source of this uncertainty is the uncertainty of language, the limitations of the creator of the legal text, and the uncertainty of interpretive rules.[22] Of course, the power to choose— judicial discretion—is never absolute. It is always subject to procedural limitations (such as fairness) and substantive limitations (such as reasonability, coherency, consistency, and rationality). But what should the judge do when the scales are balanced? In such cases, it is not that their decisions legitimate their rulings, but rather that their decisions are based on a legitimacy that precedes the rulings. Their judicial discretion is an expression of this legitimacy. How, then, should judicial discretion be exercised? When does exercising judicial discretion advance the role of a judge, and when does it depart from the proper path? What is the proper path?

I reject the contention that the judge merely states the law and does not create it. It is a fictitious, even childish approach.[23] Montesquieu's theory that the judge is "no more . . . than the mouth that produces the words of the law"[24] is similarly discredited. I suspect that most judges believe that, in addition to stating the law, they sometimes create law. Regarding the common law, this is certainly true: no common law system is the same today as it was fifty years ago, and judges are responsible for these changes. This change involves creation. The same is true of the interpretation of a legal

[21] *See* Alan Paterson, *The Law Lords* 190–95 (1982).

[22] *See* Brian Bix, *Law, Language and Legal Determinacy* (1993).

[23] *See* Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada," 53 *Can. B. Rev.* 469, 477–80 (1975); Anthony Lester, "English Judges as Law Makers," 1993 *Pub. L.* 269, 269 (quoting Reid, *infra*, at 22); Lord Reid, "The Judge as Law Maker," 12 *J. Soc'y Pub. Tchrs. L.* 22 (1973); Tom Bingham, "The Judge as Lawmaker: An English Perspective," in *The Struggle for Simplicity in the Law: Essays for Lord Cook of Thorndon* 3 (Paul Rishworth ed., 1997).

[24] Montesquieu, *The Spirit of the Laws* 209 (Thomas Nugent trans., Univ. Cal. Press 1977) (1750).

text. The meaning of the law before and after a judicial decision is not the same. Before the ruling, there were, in the hard cases, several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed. New law has been created. What is my role, as a judge, in this creative process?

When I refer to the role of the judge, I do not mean to suggest that the judge has a political agenda. As a judge, I have no political agenda. I do not engage in party politics or in politics of any other kind. My concern is with judicial policy, that is, with formulating a systematic and principled approach to exercising my discretion. I ask whether judges, who set precedent for other courts, have (or should have) a judicial policy with regard to the way we exercise our discretion. I wish to examine the judicial philosophy underlying our role as judges in our democracies.[25]

Different judges have varying answers to the question that I am posing.[26] These differences stem from variances in education, personalities, responses to the world around us, and outlooks on the world in which we live. This is only natural. Each judge is a distinct world unto himself, and we would not wish it otherwise. Ideological pluralism, not ideological uniformity, is the hallmark of judges in democratic legal systems. Diverse judges reflect—but do not represent—the different opinions that exist in their societies. But I think many of us agree that the question I have posed is central to our function as judges, even if we disagree about its answer. Our judicial policy and our judicial philosophy are fundamental to us, since they guide us in our most difficult hours. Every judge has difficult hours. They mold us and give us self-confidence. They inform us that our strength as judges is in understanding our limitations. They teach us

[25] Justice Cardozo performed similar examinations—with great success—in his books, particularly in Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). *See* Posner, *supra* p. ix, 2 at 32 (noting that Cardozo's nonjudicial writings are a contribution to jurisprudence, but adding that "they are not only that. They are also a judge's effort to articulate his methods of judging"). *The Nature of the Judicial Process* is the first systemic effort by a judge to explain how judges reason and to articulate a judicial philosophy.

[26] For the views of leading English judges, see Bingham, *supra* p. xiii, note 15; Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments* (2004).

that, more than we have answers to the difficult legal problems that confront us, we have questions regarding the path we should take. They make us understand that, like all human beings, we err, and we must have the courage to admit our mistakes. And they lead us to the judicial philosophy that is proper for us, for there is nothing more practical than good judicial philosophy.

My purpose in this book is to suggest answers to the questions I have posed. I wish to present my views on the role of a court and its judges in a democracy. My aim is to describe the judicial policy and judicial philosophy that guide me. I do not naively claim that my position reflects an absolute truth. Democratic countries differ from one another, and what is good and proper for one may not be good and proper for another.[27]

My proposed judicial philosophy applies only to the judge in democracies. I do not address societies that are not democratic.[28] The democratic nature of a regime shapes the role of all branches of the state. It also directly affects the judiciary. Furthermore, the character of the regime affects the interpretive system that the judge should adopt. A judge should not advance the intent of an undemocratic legislator. He or she must avoid giving expression to undemocratic fundamental values. Indeed, my entire theory about the role of the judge and the means he or she employs is grounded in the character of a democratic regime. With a regime change, the view of the judge's role and the way it is exercised also change. Moreover, I am examining my role as a judge in a modern democracy—that is, as a judge at the beginning of the twenty-first century. I do not think that

[27] *See* Ruth Gavison, "The Role of Courts in Rifted Democracies," 33 *Isr. L. Rev.* 216 (1999).

[28] For discussions of this topic, see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Deborah Lucas Schneider trans., 1991) (1987); and Michael Stolleis, *The Law Under the Swastika: Studies in Legal History in Nazi Germany* (Thomas Dunlap trans., 1998) (1994). South Africa is an additional example. For a discussion of the functioning of its judges during apartheid, their behavior, and the way they should have behaved, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).

it would have been possible to formulate a judicial philosophy like my own a hundred years ago or more.[29] And my philosophy will inevitably no longer be valid in a hundred years' time. Indeed, any perspective on the judicial role is a function of place and time. It is influenced by its environment. It is relative and incomplete. It changes periodically. Therefore, recognition and realization of the judicial role will vary with different democracies at different times.

Although I focus mainly on courts of legal systems that belong to the common law family, such as the United States, England, Canada, Australia, and a number of mixed jurisdictions, such as South Africa, Scotland, Cyprus, and Israel, I think that what I have to say also applies substantially to other legal systems, such as the Roman-Germanic family, including France, Italy, Germany, Austria, and the family of Scandinavian systems. I believe that my approach is also valid for legal systems that have emerged from the family of socialist systems, such as Russia, Hungary,[30] Poland, and the Czech Republic.[31]

After this introduction, in Part 1 of this book I lay the foundation for the two central elements of the judicial role beyond actually deciding the dispute, as I see them.[32]

One element is bridging the gap between law and society. I regard the judge as a partner in creating law. As a partner, the judge must maintain the coherence of the legal system as a whole. Each particular creation of laws has general implications. The development of a specific common law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all

[29] Of course, many aspects of my approach are not unique to contemporary life. The need to bridge the gap between law and society, for example, is not unique to the present. In the past, too, this was understood to be central to the role of judging.

[30] *See generally Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (László Sólyom and Georg Brunner *eds.* 2000).

[31] *See generally* Schwartz, *supra* p. x, note 6; Teitel, *supra* p. x, note 6.

[32] Of course, courts have other roles. *See* Helen Hershkoff, "State Courts and the 'Passive Virtues': Rethinking the Judicial Function," 114 *Harv. L. Rev.* 1833, 1852–76 (2001) (surveying U.S. state court practices such as issuing advisory opinions, deciding political questions, and engaging in judicial administration).

statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked. The judge is a partner in creating this system of law. The extent of this partnership varies with the type of law being created. In creating common law, the judge is a senior partner. In creating enacted law, the judge is a junior partner. Nonetheless, he or she is a partner, and not merely an agent who carries out the orders of his or her principal.

The second major task of the judge is to protect the constitution and democracy. In my opinion, every branch of government, including the judiciary, must use the power granted it to protect the constitution and democracy. The judiciary and each of its judges must safeguard both formal democracy, as expressed in legislative supremacy and proper elections, and substantive democracy, as expressed in the concepts of separation of power, the rule of law, fundamental principles, independence of the judiciary, and human rights.

The judge is charged with both jobs simultaneously, and in most cases they are complementary.[33] But during various periods of history, one of them has taken precedence over the other. I think that in light of the increasing recognition of judicial review of the constitutionality of statutes since World War II and of the inclusion of human rights provisions in new constitutions, the second role, preserving democracy, has grown in importance. This is certainly the case in the current age of defensive democracy, although the second role has always existed, particularly in the field of private law. Of course, these two roles are not unique to the judiciary. Every branch of government in a constitutional democracy must protect that institution and work to bridge the gap between law and society. The individual branches of government are partners in fulfilling

[33] It can be argued that there is a discrepancy between these two roles. According to this view, bridging the gap between law and society requires the judge to give expression to modern developments, whereas in protecting the constitution and democracy, the judge must protect *against* modern developments. *See* Antonin Scalia, "Modernity and the Constitution," in *Constitutional Justice Under Old Constitutions* 313, 315 (Eivind Smith ed., 1995). This outlook is unacceptable. The two roles require a recognition of modern developments while giving expression to principles and fundamentals, and not to passing vogues.

these roles.[34] I emphasize the role of the judiciary to point out that the judiciary shares responsibility for these tasks, and I wish to examine the methods that the judiciary employs to carry them out.

I conclude Part 1 by considering a critique of this view and the responses to it.

In Part 2, I explore the means by which the court can fulfill its role. These means are bounded. Judges have only a few basic materials with which to build legal structures. I begin by considering the preconditions for carrying out the complex role of the judge, including judicial impartiality and objectivity, acting within the social consensus and the maintenance of public confidence in the judiciary. I then focus on constitutional and statutory interpretation as instruments for realizing the judicial role by presenting purposive interpretation as the proper system of interpretation. I then discuss the means available to a judge within the common law. Furthermore, I analyze the theory of balancing as a complex and sensitive judicial tool. I also discuss a number of tools and concepts that help judges fulfill their role, including justiciability, standing, comparative law, and the writing of the judgment.

In Part 3, I discuss the reciprocal relationship between the court and other branches of the state in a democracy. I consider the relationships among the judiciary, the legislature, and the executive. This relationship is perpetually tense because each branch constitutes a separate but interconnected part of the state. This tension should be based on each branch's respect for the other branches and a recognition of their centrality. The court must engage in a dialogue with the legislature and executive. In this context, I analyze the scope of judicial review over legislative (statutory and non-statutory) and administrative activity. I look into the role of reasonableness and proportionality in those matters.

In Part 4, I evaluate the role of the judge in a democracy. I concentrate on the general distinction between activism and self-restraint. In particular, I discuss the role of the judge when a democracy is

[34] *See* Lorraine E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" 6 *Rev. Const. Stud.* 119, 124 (2002).

fighting terror, which is one of the most important problems that courts in democracies face today. In this context, I develop the concept of a defensive democracy, with the court at its center, as a response to the phenomenon of modern terrorism. In this area, regrettably, Israeli courts have acquired a certain expertise. Numerous legal problems related to a defensive democracy's battle with terrorism reach the doors of Israeli courts.

In the concluding segment, I make some final observations about the theory, the practice, and the future of the role of the judge in a democracy.

It goes without saying that the opinions expressed in this book are my personal opinions. They do not reflect the opinions of the Supreme Court of Israel. As is evident from the decisions I cite, in some cases my view reflects Israeli case law, while in other cases I write a minority opinion.

In this book, I cite many opinions that I have written—perhaps more than is customary. I have done so to indicate that I have put my theoretical viewpoints to the test of judicial reality by applying them in actual opinions. In some instances, my views have become binding case law. In others, they were merely obiter dicta. In still others, they were in minority opinions.

This book is a substantial expansion of an article that originally appeared in the *Harvard Law Review*.[35] I am grateful to the editors of the *Harvard Law Review* for their thoughtful and thorough work on the original manuscript. Chapter 10 was published in 80 *Tul. L. Rev* (2005–2006). A substantial part of Chapter 16 was published in the *University of Miami Law Review*.[36]

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[35] Aharon Barak, "Foreword: The Role of a Supreme Court in a Democracy," 116 *Harv. L. Rev.* 16 (2002)

[36] Aharon Barak, "The Role of a Supereme Court in a Democracy, and the Fight Against Terrorism," 58 *U. Miam. L. Rev.* 125 (2003).

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