Barak's Rule

Aharon Barak
The Judge in a Democracy
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Reviewed by Robert H. Bork

The Judge in a Democracy, by Aharon Barak, until recently president of the Supreme Court of Israel, advances a provocative argument about the proper role of the judiciary. The book requires attention less because of its thesis, which adds little to his discussions of the subject, than because of Barak's impact on Israeli law and his international influence, both of which strike me as regrettable.

Barak celebrates the growth in virtually all Western nations of judicial power at the expense of other governmental and private institutions. He notes approvingly that "since the end of World War II, the importance of the judiciary relative to the other branches of the state has increased. We are witnessing a strong trend toward the 'constitutionalization of democratic politics.'" The phrase is misleading. To constitutionalize democratic politics is to remove them from control by the people and turn politics over to judges. Once an issue is constitutionalized, democratic politics ends. There is a strong and all-pervasive suspicion of democracy in this book, as indeed there was in Barak's performance on the bench. He seeks to deny the authoritarian nature of the trend he applauds by re-defining democracy, which consists, according to Barak, of two parts: "Formal democracy" (the rule of the people through elected representatives) and "substantive democracy" (including an independent judiciary, the rule of law, and human rights).

Judicial vetoes of majority decisions may or may not be proper in a given case, but one thing they are not is a form of democracy. They are a *check* on democracy. Barak's assertion that both the people's decisions and the frustration of those decisions are "democracy" obliterates the distinction between rule by elected representatives and rule by judges. This, in

turn, serves to justify ever-increasing judicial power. The constitutionalization of democratic politics means that courts will govern when there is no constitutional support for their actions. That is frequently the case in the United States and, as the rulings of Barak's court show, is even more so the case in Israel.

Barak elaborates the functions of a judge in a way that makes explicit the wide-ranging legislative power he claims for the judiciary. He asserts that the judge has two major functions: (i) "Bridging the gap between law and society," and (ii) "protecting the constitution and democracy." As for gap-filling, it often turns out to be disingenuous politics: "The judge may give a statute new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself," writes Barak. "The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs." In other words, judges, not elected representatives, decide what are "new social needs" and then change the meaning of the legislature's words to implement their insight; the legislature is not consulted.

Now, it is one thing to say that a statute (or a constitution) enacts a principle that must be applied to unforeseen circumstances; it is quite another, however, to say that the judge may leave the legislature's words intact but change their meaning in order to introduce a principle that legislators never intended. The classic example of the former case is the Fourth Amendment to the United States Constitution, which forbids unreasonable searches and seizures by government. Ratified at a time when a man's home and office were to be protected from invasion by a constable, the modern Supreme Court had little difficulty in deciding that placing an electronic listening device on personal premises fell within the same rationale. On the other hand, when the court invented a general, undefined right of privacy and made abortion a constitutional right, it wrote an entirely new principle into the Constitution without changing the words of that charter. There is, simply, no excuse for that. If the public thinks that freedom to abort a pregnancy is a "new social need," it has only to enact a statute. Yet the court—much like its Israeli counterpart—had little patience with what it regarded as the retrograde views of the electorate. Consequently, it "filled gaps," which is to say it rewrote the Constitution.

Barak deals with another example of changing the law while leaving the words intact. In 1986, the United

States Supreme Court held that a state could constitutionally make homosexual intercourse a crime. Seventeen years later, it overruled that decision and instead made homosexual intercourse a fundamental right. "The difference between the two decisions," Barak writes, "did not reflect a constitutional change…. Rather, the change that occurred was in American society, which learned to recognize the nature of homosexual relationships and was prepared to treat them with tolerance."

If words have any meaning at all, it is preposterous to say that a constitution remains unchanged when one constitutional decision overrules a prior one such that what had been subject to criminal punishment becomes instead a fundamental right. In the United States, moreover, as Barak surely knows, the federal system places almost all decisions about morality in the hands of the various states. Texas, whose statute was declared unconstitutional, comprised the only constitutionally relevant society. There is no conceivable constitutional reason why Texas' moral choice should be submerged in, and cancelled by, an abstraction called "American society." In truth, what changed between the two decisions on homosexuality was simply the membership of the court. The new majority was, and presumably still is, waging a campaign to normalize homosexuality. Call it "constitutionalizing" politics if you like, but there is nothing democratic about it.

The duty to protect the constitution and democracy, the second role assigned judges by Barak, in his hands turns out to be something very different: A claim of judicial power to create a constitution the people did not choose, and then to protect the judge-made charter against the legitimate claims of democracy. "The Israeli Supreme Court," he writes, "held that the two Basic Laws passed in 1992, Basic Law: Human Dignity and Basic Law: Freedom of Occupation, are the supreme law of the land and constitute part of Israel's constitution. [The case] *Mizrahi Bank* subjects any new statute to judicial review under these Basic Laws. *I called this development a 'constitutional revolution.*'" (Emphasis mine.) Yet as Evelyn Gordon has written, the assertion that the Basic Laws had constitutional status empowering the Israeli court to strike down contradictory legislation is "dubious in itself, given that the Basic Laws underwent no constitutional ratification process and were approved by a mere quarter of the Knesset." (The small vote is probably accounted for by the fact that it was taken in the middle of the night, and nobody suggested that the revolutionary change of giving

the power to override both legislative and executive acts to the courts was in fact taking place.) In addition, Barak's "constitutional revolution" sits rather uncomfortably next to his statement a few pages later that "The court is authorized to interpret the constitution, but it is not authorized to create a constitution."

Two other features of the judges' constitution require notice. First, judges may change the constitution at will, but the people and their elected representatives may not; the judicial creation of the Israeli constitution is an open-ended process. Barak asserts that, even without any change in the Basic Laws and statutes, judges may insert "new fundamental principles." He quotes approvingly an opinion by another judge that the role of the state is to "fulfill the will of the people and to give effect to norms and standards that the people cherish." The question goes unanswered: If the people cherish these new fundamental principles so much, why haven't they enacted them as law? The judge's answer is unsettling: Not all people qualify as "the people." New fundamental principles require that "a process of 'common conviction' must first take place among *the enlightened members of society* regarding the truth and justice of those norms and standards before we can say that a general will has been reached that these should become binding with the approval and sanction of the positive law." (Emphasis mine.) The "general will" consists of the opinions dominant within the intellectual class at any given moment, so that the "people" who do the cherishing are academics, journalists, intellectuals, and, of course, judges. Judges will decide when a general will has ripened sufficiently, and then, without further ado, convert the norms and standards into positive law.

Despite this, Barak is at pains to assure us that "It is not his own subjective values that the judge imposes on the society in which he operates." Rather, he must balance various conflicting interests objectively and come to a conclusion. "The question is not what the judge wants but what society needs." Since voiding a statute requires overriding the will of the people as expressed through their elected representatives, what a judge thinks "society needs" is almost certainly what a majority of the people in that society do *not* want.

It is, in any event, incorrect to suppose that a society's "need" is a fact that can be determined by an objective balancing of interests. In truth, the most important interests are likely to be conflicting value judgments. How, for instance, does a judge know whether a society "needs" freedom of abortion, some degree of

regulation, or a prohibition of abortion altogether? How can a judge determine whether his or her society "needs" a constitutional right to homosexual marriage? How does he decide "objectively" whether religious education in state-supported schools should be required, made optional, or prohibited? The answer, of course, is that the judge does not, and cannot, "know" any of these things, though he may have strong feelings about them. Because the judge is, by definition, operating without guidance from positive law, it is almost certain that his personal opinions will turn out to be what society "needs."

Though Barak would deny it, *The Judge in a Democracy* is a textbook for judicial activists. I have written that a judge is an activist if he reaches results or announces principles that cannot plausibly be derived from the constitution he cites. Here Barak responds that my "description is not of an activist judge but rather of a judge who is not worthy of the position he occupies." I agree that such a man is unworthy to be a judge, but he is unworthy precisely *because* he is an activist. I do not see how a judge can, in accordance with Barak's philosophy, change the meaning of a statute without changing its words, or introduce new fundamental principles into a constitution without being either an activist in my terms, or unworthy in Barak's. Barak goes on to say that "None of us may turn our personal beliefs into the law of the land." But I think it is clear that the judge who follows Barak's prescriptions cannot avoid legislating, and it is highly unlikely that he will legislate beliefs other than his own.

Indeed, Barak's impatience with originalism demonstrates that his philosophy is, in fact, activist. "Why can some enlightened democratic legal systems (such as those of Canada, Australia, and Germany) extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution," he asks, "while constitutional law in the United States remains mired in these difficulties?" Originalism simply means that judges must attempt to apply the principles of the constitution as they were understood by the men who made the constitution law. When a judge departs from originalism, he necessarily legislates; he lays down law that the constitution does not contain. Judges like Barak and his counterparts in the United States are the very reason Americans continue to debate the issues Barak would have them ignore. Such judges have enlisted on the "elite" side of the transnational culture war. And while elite causes rarely win elections, they rarely lose in the American Supreme Court,

just as the "enlightened members of society" tend to do well in the Israeli Supreme Court.

It is true that Israeli, Canadian, and many American judges have extricated themselves from originalism, and the result has been overweening judicial branches. I count it as a virtue that the United States remains "mired" in the originalism debate. After all, a primary purpose of originalism is to hold judges to a standard, or a source of law external to themselves, thus preserving a democratic order—the rule of law rather than the rule of judges. In this, recent appointments to our court suggest the possibility of a return to a legitimate jurisprudence.

By contrast, built into Barak's jurisprudence are so many ways to arrive at any conclusion judges like that there is not space to analyze them all here. The actual decisions of the court demonstrate what Barak's free-wheeling approach means in practice. The results range from ludicrous to officious to dangerous. To wit:

1. The Knesset legislated local authority to limit or forbid the sale of pork. But President Barak and eight other justices held that there is a constitutional right not only to eat pork, but also to obtain one's pork without inconvenience. Thus, in an impressive show of disregard for a piece of Knesset legislation, the court ruled that a locality wishing to ban the sale of pork must examine the availability of stores selling pork nearby, the means of transportation to those stores, and the practicability of using that transportation. Only, they concluded, if this examination reveals that the alternatives are feasible may pork sales indeed be banned in a given locality.

2. The court decided that it has the authority to rule on whether welfare cuts are constitutional, effectively creating a constitutional right to a minimum income to be determined by the court—a decision that flew in the face of the manifest will of the Knesset that no such right does or should exist. Thus has the court assumed the power to tell the elected branches on what they must spend, and how much, establishing the principle that, in fact, it is judges, and not legislators, who ultimately control Israel's budget.

3. A majority of the court held that the government cannot bar immigration from hostile areas during wartime because doing so would infringe on the right of Israeli Arabs to marry Palestinians and to bring them into Israel, rather than living elsewhere. Although the court upheld, six to five, the Knesset law banning Palestinians below a certain age from immigrating on account of their being a security risk; one judge declared explicitly that he had sided with the

majority only because the law was due to expire shortly anyway, and he felt it sufficient to warn the Knesset that, barring substantial changes, the court would overturn the law next time. This, again, despite the Knesset's explicit *rejection* of a citizen's right to marry whomever he or she pleases. Thus is national security—even in wartime—superseded by an invented personal right that the legislature had rejected.

4. While upholding the government's authority to build a separation fence, the court nevertheless overruled the army's judgment on the purely military issue of the location of parts of the fence, because of disagreement about the minimally adequate level of security. Barak once said that the court has jurisdiction to judge the deployment of troops in wartime; this decision brings it closer to that.

5. The court ruled that a government official could be discharged or denied promotion on the basis of what he said during a published interview. Indeed, the court *itself* proposed to investigate whether the official's words rendered him unfit for appointment. Without any legislative mandate or guidance—and in stunning defiance of the fundamental democratic principle of free speech—the court thus determined to make the law as to an appointee's moral character. This unprecedented role as censor is simply unknown in other democracies.

6. Faced with a possible reform of immigration policy by the Knesset's adoption of a new Basic Law on the subject, President Barak wrote in an opinion that the court had the authority to invalidate a Basic Law if the justices thought it contrary to Israel's Jewish and democratic character.

In a word, Barak's court can turn ordinary legislation into a constitution, force it on the nation, and then announce that it can prevent any democratic amendment. In this, Barak surely establishes a world record for judicial hubris.

As these and other cases demonstrate, it would appear that Barak is unconcerned that the rule of law—which he praises as part of "substantive democracy"—is in fact being replaced by the rule of judges, a trend to which he himself is the major contributor. Perhaps he believes that judges are simply intellectually and morally superior to other actors in the nation's politics, and thus judicial authoritarianism is necessary. As he explains, "a branch of government should not judge itself. It is therefore appropriate that the final decision about the legality of the activities of the legislative and executive branches should be taken by a mechanism external to those branches, that is, the

judiciary." Yet the judicial branch is properly subject to no such external mechanism, "because of their [the judges'] education, profession, and role," and because they are "trained and accustomed to dealing with conflicts of interest." Judges may be trusted, moreover, since they are "not fighting for their own power." Surely anyone familiar with Barak's record will see the irony in that statement.

Alexander Hamilton, in *Federalist 78*, wrote that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution," because it "has no influence over either the sword or the purse." Hamilton badly underestimated the capacity of the Supreme Court to go well beyond its constitutional mandate, but the Israeli court, by its assertion of the power to control both sword and purse, may well be the branch most dangerous to the political rights of the nation.

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