

A Legal Buccaneer?

Review of Aharon Barak “The Judge in a Democracy” (Princeton University Press 2006) and
Richard Posner “Enlightened Despot” (*The New Republic*, April 23, 2007).

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I. Introduction

Aharon Barak, former president of the Supreme Court of Israel, presented his judicial philosophy in his recent book titled “The Judge in a Democracy”. Writings of a person considered as “the world’s greatest living jurist” or “The John Marshall of Israel” are always subject to controversy. One of the most famous critical reviews of this book was written by Richard Posner, a judge on the United States Court of Appeals for the Seventh Circuit, who called Barak “a legal buccaneer” and “an enlightened despot” whose writings are somewhat “hubristic”¹.

The aim of this article is to present the most controversial parts of Barak’s judicial philosophy and the comments given by Posner on them. The arguments come from writings of both authors, but also – in order to add some piquancy to this conflict – from their meeting at Hebrew University in Jerusalem which took place in December 2007 where those two legal giants clashed in an oral battle².

II. What is Democracy and Role of Judges?

The basis for the judicial philosophy of Barak is the definition of democracy. He contends that democracy is not only a procedure for decision-making in accordance with the rule of majority. *Democracy is not satisfied merely by abiding by proper elections and legislative*

¹ It is available at <http://www.shalemcenter.org.il/media/?did=64&aid=2cebedd70332e20f1adca1cd1c99e209>
There were many answers to R. Posner’s critical review. See Barak Medina “Four Myths of Judicial Review: A Response to Richard Posner’s Critique of Aharon Barak’s Judicial Activism”, 49 Harv. Int’l L.J. Online 1 (2007) available at <http://www.harvardilj.org/online/116>; Richard Goldstone (Justice of the Constitutional Court of South Africa and chief prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia) “The Jurisprudential Legacy of Justice Aharon Barak”, 48 Harv. Int’l L.J. Online 54 (2007) available at <http://www.harvardilj.org/online/108>; Saul Levmore (Dean of School of Law at the University of Chicago) “Posner, Barak, and Judicial Activism”, April 20, 2007 available at: http://uchicagolaw.typepad.com/faculty/2007/04/posner_barak_an.html. Webcast of A. Barak’s lecture at the Warsaw University “In Search of Common Sense – Proportionately and Balancing Interests in Constitutional Adjudication” is available at <http://amerykanska.wordpress.com/2007/12/16/president-baraks-lecture-webcasted/>

² Press release on this event is available at http://www.huji.ac.il/cgi-bin/dovrut/dovrut_search_eng.pl?mesge119849692832688760

supremacy. Apart from its formal aspect, there is also a substantive element. *Democracy is also about limiting the force of the majority's decisions, by virtue of certain fundamental principles such as separation of powers, the rule of law and independence of the judiciary*. Those principles are based on fundamental values such as tolerance, good faith, justice, reasonableness, public order and – the most important – human rights. Barak does not agree with a contention that formal aspect can define democracy itself, whereas the substantive aspect defines the quality of the democracy – whether it is a worthy one or not. He rather stresses that without the *internal morality*, the regime is no longer democratic.

In one of his cases, Barak argued that *Democracy is a delicate balance between majority rule* [“formal” aspect] *and society's basic values, which rule the majority* [“substantive” aspect]... *When the majority denies minority human rights, it harms democracy... Take majority rule from constitutional democracy, and you have struck at its very essence. Take the rule of basic values away from constitutional democracy, and you have struck at its very existence*. To sum up, democracy has dual nature and is based on simultaneous existence of both the rule of the majority and the fundamental values.

At this point a new question arises: who is going to protect this delicate balance? The answer is clear for Barak: *it is only the judge who can give effect to substantive democracy*. And on the basis of this contention, he lays the foundation for two central elements of the judicial role beyond deciding the dispute. First, the judge has to bridge the gap between the law and society, i.e. he must understand the purpose of law in society and help the law to achieve its purpose. Second, the judge must protect the constitution and democracy³, bearing in mind that if democracy is to be preserved, one cannot take its existence for granted, but rather fight for it. Therefore, a court composed of judges should function *as an educational institution whose judges are teachers participating in a vital national seminar, where judges give expression to democracy in its richest sense in their rulings, so that the public will understand it*. It means that judges, when interpreting the statute, should not only consider the language and background and apparent purpose of

³ It should be noted that Israel itself does not have any formal constitution, but rather “Basic Laws” passed by the Knesset, Israel’s parliament. Interestingly, the Israeli Supreme Court held in C.A. 6821/93 *United Mizrahi Bank Ltd. V. Migdal Cooperative Village*, 49(4) P.D. 221, that the two Basic Laws passed in 1992, Basic Law: Human Dignity and Basic Law: Freedom of Occupation, are the supreme law on the land and constitute part of Israel’s constitution. This is called by Justice Barak a “constitutional revolution”.

the statute, but also they should consider statute's *objective purpose ... to realize the fundamental values of democracy*.

Posner would say that above description is based on rather abstract principles and it is better to check how this definition is applied into practice. In Israel – he argues – such a way of thinking makes it possible that any citizen can ask a court to block illegal action by a government official, even if the citizen is not personally affected by it (or lacks *standing* to sue, in the American sense); if any government action is *unreasonable* it is then illegal (*the executive must act reasonably, for an unreasonable act is an unlawful act*); a court and not a parliament can forbid the government to appoint an official who had committed a crime (even though he had been pardoned) or is otherwise ethically challenged. Posner argues that such events are unthinkable in the United States. *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.*

Moreover, Posner contends that political democracy in the modern sense is rather only 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 in the name of defending *substantive* democracy in fact curtails democracy. The *substantive* component, namely a set of rights, if enforced by the judiciary, clips the wings of the elected officials. *Democracy is rule by the people. The presumption is that their will should prevail* – he said in Jerusalem. Moreover, Posner asserted that justice, or fairness, or civil rights are abstract concepts of uncertain meaning, and in his opinion a judge does not necessarily understand those concepts better than anyone else. Therefore, there is no need to place so much confidence into judges, thinking that they can protect democracy and justice better than the people.

Posner opposes also the point of view that judges when interpreting statute should apart from its language, background and apparent purpose, consider also statute's *objective purpose ... to realize the fundamental values of democracy*, saying that such an attitude

opens up a vast realm for discretionary judgment. He does not agree with Barak's advice that when a judge has discretion in interpreting a statute, *the judge should aspire to achieve* abstract principles such as *justice*, because in practice it may lead to opposite results: not to rule of law but rule by judges. Posner gives an example of Israel's regulation that authorizes military censorship of publications that the censor *deems likely to harm state security, public security, or the public peace*. This definition was interpreted by Barak's court to mean *would create a near certainty of grave harm to state security, public security, or public peace*. By such an interpretation – Posner argues – *the court becomes the one that makes Israel's statutory law, using the statutes themselves as first drafts that the court is free to rewrite*.

III. Separation of Powers

Another aspect of the conflict revolves around the issue of separation of powers, based on the concept that each branch should perform its function according to its outlook and its discretion and that there are reciprocal relations between the different branches of power such that each branch checks and balances the other branches.

Barak asserts that one of the foundations of the principle of separation of powers is means for its protection, i.e. checks and balances. Barak contemplates what would be the best system of deciding whether one branch has deviated from its authority or exercised it illegally. *If this system were located within legislative or executive branch, one of those branches would enjoy absolutism*. In order to avoid it, there should be a system independent of the executive and legislative branch. Thus, he comes to the conclusion that *judges have the best qualifications to fulfill the function of supervising the separation of powers... Therefore the final authority to decide legality of any branch's acts shall be vested in the judicial branch*.

At this point, however, a new question arises: should the mechanism for making a final decision about whether the judiciary deviated from its authority or exercised it illegally be external to the judicial branch itself? If the judiciary are the guardians of democracy, then *quis custodiet ipsos custodes* – who guards the guardians? The answer Barak gives is that *more than any other branch, judges can be trusted to adjudicate objectively or appropriately*. When there is a conflict of interest *judges, because of their education, profession, and role and because of the procedural and substantive restrictions on their*

discretion, are trained and accustomed to dealing with conflicts of interest. Even though Barak knows that such a solution is not a perfect one because there cannot be a complete trust for the judge's actions, he admits there is no better solution (...) and the current one is optimal.

Posner opposes this way of thinking. He asserts that checks and balances imply that the judicial branch not just do the checking, but it has to be checked by the other branches. Therefore in the United States *the judiciary is not a self-perpetuating oligarchy; the president nominates and the Senate confirms (or rejects) federal judges, and Congress fixes their salaries, regulates the Supreme Court's appellate jurisdiction, decides whether to create other federal courts, determines the federal judiciary's budget, and can remove judges by means of the impeachment process (...)* In Barak's conception of the separation of powers, *the judicial power is unlimited and the legislature cannot remove judges. (And in Israel, judges participate in the selection of judges.)* Moreover, Posner stresses that because the judicial power is not the only federal power – there are executive and legislative powers of constitutional dignity as well – the judiciary cannot tell the president whom to appoint to his cabinet, as it happens in Israel.

IV. Standing

Standing is the ability of a party to bring a lawsuit if a party has experienced an injury or his rights has been violated. Barak treats rules of standing as a hallmark for determining judge's approach to their judicial role. In this respect, Barak asserts that *a judge who regards his judicial role as bridging the gap between the law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing (...)* *I believe that my role as a judge is to bridge the gap between law and society and to protect democracy. It follows that I also favor expanding the rules of standing and releasing them from the requirement of an injury.* As a matter of fact, the Supreme Court of Israel eventually has adopted this approach⁴.

Posner finds quite odd the idea that courts may adjudicate disputes if a party who brings a case had not incurred any injury or his rights had not been violated. Contrary to what is in

⁴ This approach has been adopted not only by the Supreme Court of Israel, but also by the Republic of South Africa (section 38 of the Constitution) and the Supreme Court of India in the case *Gupta v. Union of India*, A.I.R. 1981 S.C. 87, 218-20; see also Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible", 37 *Am. J. Comp. L.* 495, 498-99 (1989).

Israel, the judicial power of the United States can be exercised only in suits brought by persons who have standing to sue in the sense of having a tangible grievance that can be remedied by the court. Requirement for standing is a prerequisite for limitation the judicial power and desire to abuse its use.

V. When the cannons speak, the Muses are silent

In the times of war are the laws silent? How to find the balance between national security and civil rights is a question which must be answered by democracy under threat, especially under the contemporary threat of terrorism.

Barak states that even in times of war, it is possible and indeed even essential for the court to intervene in issues involving human rights. *Judges as experts in civil rights and in interpreting the law are uniquely equipped to determine the find the proper balance.* Barak asserts that the role of the judge is to be the guardian of democracy and civil rights, and that the law cannot be one thing in wartime and another in peacetime. The decisions of judges in wartime are more important than those of generals and politicians, because judicial compromises on civil rights leave a legacy while political and military decisions in wartime are passing phenomena. However, there might be a somewhat devastating aspect of such an attitude: when someone dies because the court prevented his country from defending him effectively, that death is as permanent as any judicial decision. Therefore, there is always a struggle whether whole countries can – in the name of human rights protection – die from lack of an effective defense.

It is absurd, said Posner, to assume the law must be the same in peace and war. *In The American Civil War Lincoln suspended the right of habeas corpus, probably illegally, but that was justified by the war situation and few made an issue of it.* For United States President Lincoln it was more important to protect the nation rather than civil rights during the civil war. When the war ended the situation returned to normal and democracy continued to evolve in the United States, *while the American people's commitment to liberty returned stronger than ever.* Posner differs with Barak and argues that in times of war the judiciary must permit the executive branch to carry out its work and only afterwards to take up judicial issues connected with the events.

Posner, however, admits that Barak rightly observed that judicial decisions restricting civil liberties in wartime may serve as precedents for restricting such liberties in peacetime, which to some extent has happened in the United States since September 11. Posner agrees that we do not need two systems of balancing security and liberty, one for wartime and one for peacetime – *we can use one system, while recognizing that security does have more weight in time of war.*

Barak responded by saying that what is acceptable in America is not acceptable in Israel. *Israel is a small state and it does not have the privilege of long periods of peace. Israel is being tested every day. In Israel we have not only an 11th of September, but rather also a 10th and a 12th.* Despite this situation, he said, there is a line which democracy cannot permit itself to cross. Only a strong democracy can fight for human rights even in times of war. *I do believe in justice, fairness and civil rights* he said. Barak had harsh criticism for the Patriot Act: *You Americans lectured Israel for years on how we ought and ought not to conduct our wars, and then when you got into a war yourselves—you lost your trousers.* This was somewhat a payback time for the harsh review. Barak called Posner's view of the role of a judge in democracy *narrow and shallow. I am disappointed by your criticism of my theory of judging. I can survive that criticism very well.*

VI. Summary

Barak and Posner differ on almost every fundamental principle: the meaning of democracy, the role of judges in this system, the doctrine of separation of powers, rules of standing, application of law and protection of human rights in the time of peace and war. Given those differences, should we let them call each other *legal buccaneers* or rather try to reconcile them? It must be noted that even though they use different tools, they are both preoccupied about the same thing: protection of democracy and freedom of people. And while caring about *this delicate balance*, they point out on different aspects of it.

Posner is skeptical about the unique wisdom of judges and afraid that it may lead not to rule of law but to rule by judges. Thus, he is not willing to place too much power to judges as they are not all-knowing with greater insight than others and their role is a limited one. In Posner's opinion, judges are pretentious in dealing with big issues, and that their use of such terms as justice, fairness and human rights amount to empty words, since the judges themselves have a limited understanding of them. *Judges must see matters within a proper*

context and demonstrate flexibility (...) Judicial independence does not mean omnipotence. It should be noted that Posner's position is not based on the lack of trust to the judiciary, but rather on his immense confidence in the American people's wisdom and love of liberty.

This attitude though can be considered as diluted from values and principles, which inevitably leads to abdication from doing justice. *It does not mean, Barak said, that judges have to administer the state, but they must conduct themselves on the basis of values and history and strive for coexistence.* In Barak's view, it is impossible to judge without speaking of justice, because otherwise adjudication is emptied of its content. *There is no law without justice, there is no adjudication without fairness, and there is no democracy without human rights.*

On the other hand, Barak's position on the important role of a judge in a democracy and the need for the constraints placed upon the power of the majority is based on the belief that abandoning substantive aspect of democracy may put at risk freedom of the people. Bearing in mind that the Nazi Party came to power in Germany through democratic elections, democracy itself without substantive layer can turn into totalitarianism. Therefore, the role of judges is to prevent this from happening.

Barak though may be accused that his viewpoint is a fundamental lack of confidence that Israel's people can be trusted to maintain their own liberty and that they need to be supplied with the necessary virtues *from above*. Maybe he believes that an Israeli society founded on modern/postmodern secular culture may not possess the reserves of virtue necessary to survive, but both traditional philosophy and modern historical experience should be a warning that it is not always possible to fix the world.