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Aharon Barak: The Judge in a Democracy

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CHAPTER ONE

Bridging the Gap between Law and Society

LAW AND SOCIETY

The law regulates relationships between people. It reflects the values of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism.¹ It is based on a factual and social reality that is constantly changing.² Sometimes the change is drastic and easily identifiable. Sometimes the change is minor and gradual, and cannot be noticed without the proper distance and perspective. Law's connection to this fluid reality implies that it too is always changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. In most cases, however, a change in the law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life,³ responsiveness to change in social reality is the life of the law.

These changes in the law, caused by changes in society, are sometimes appropriate and sufficient. The legal norm is flexible enough to reflect the change in reality naturally, without the need to change the norm and without creating a rift between law and reality. For example, the legal prohibition against possessing weapons works well, without the need for change, whether the weapon is an antique pistol

¹ See Brian Dickson, "A Life in the Law: The Process of Judging," 63 *Sask. L. Rev.* 373, 388 (2000).

² See Benjamin N. Cardozo, *The Paradoxes of Legal Science* 10–11 (Greenwood Press 1970) (1928).

³ See William H. Rehnquist, "The Changing Role of the Supreme Court," 14 *Fla. St. U. L. Rev.*, 1.

or a sophisticated missile. Often, however, the legal norm is not flexible enough, and it fails to adapt to the new reality. A gap has formed between law and society. We need a new norm. For example, the norm that the owner of a carriage owes a duty of care to a pedestrian may be flexible enough to solve the problem of the duty of care that an automobile owner owes to a pedestrian. However, it is not flexible enough to solve the problem of industrialization, urbanization, and thousands of cars traveling on the streets, a situation in which proving negligence becomes more and more difficult. We need a change in law to move from negligence-based liability to strict liability in the context of an insurance regime. When changes occur in social reality, many of the old legal norms fail to adapt. The tort of negligence, which can generally deal with various changes in conventional risks, will likely prove insufficient to address an atomic risk. We would need a formal change in the norm itself.

The life of law is not just logic or experience.⁴ The life of law is renewal based on experience and logic, which adapt law to the new social reality. Indeed, there are always changes in law, caused by changes in society. The history of law is also the history of adapting law to life's changing needs. The legislative branch bears the primary role in making conscious changes in the law. It has the power to change the legislation that it itself created. It has the power to create new legal tools that can encompass the new social reality and even determine its nature and character. In the field of legislation, the legislature is the senior partner. The role of the judge is secondary and limited.

CHANGES IN LEGISLATION AND IN ITS INTERPRETATION

The judge has an important role in the legislative project: The judge interprets statutes. Statutes cannot be applied unless they are interpreted. The judge may give a statute a new meaning, a dynamic

⁴ For a different view, see Oliver Wendell Holmes, *The Common Law* 1 (1881): "The life of law has not been logic: it has been experience."

meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes, because the court has given it a new meaning that suits new social needs. The court fulfills its role as the junior partner in the legislative project. It realizes the judicial role by bridging the gap between law and life. I noted as much in a case that addressed, among other things, the question of whether Israel's civil procedure regulations recognized a class action lawsuit against the state. In answering in the affirmative, I noted:

We are concerned with the existing law, which must be given a new meaning. This is the classic role of the court. In doing so, it realizes one of its primary roles in a democracy, bridging the gap between law and life. The case before us is a simple example of the many situations in which an old tool does not fit a new reality, and the tool therefore must be given a new meaning, in order to address society's changing needs. It is no different from the many other situations in which courts today are prepared to give a dynamic meaning to old provisions, in order to adapt them to new needs.⁵

Here is an additional example: Israeli tort law is based on the Tort Ordinance, passed at the end of the period of the British Mandate in Palestine (1947). According to the Ordinance, if an act of negligence causes a person's death, his dependents are entitled to compensation from the tortfeasor. The Tort Ordinance defines dependents to include "husband, wife, parents, and children." This provision was taken from the English statute, passed in 1846. There is no doubt that the British mandatory legislature intended to refer to a husband and wife who were lawfully married. However, what of the common law wife who has lived with her common law husband for many years and even given birth to a daughter with him? The common law husband becomes the victim of a deadly work-related accident; is the common law wife entitled to damages from the tortfeasor for loss of her dependency? When

⁵ L.C.A 3126/00, *State of Israel v. A.S.T. Project Management and Manpower, Ltd.*, 47(3) P.D. 241, 286.

the question came before the Israeli Supreme Court, at a time when the phenomenon of common law marriages was prevalent, the Court answered in the affirmative. In my opinion, I wrote:

I am prepared to assume that the phrase “wife” in the 1846 English statute refers to a married woman. However, that does not mean that it is the meaning that an English court would give it today. It certainly does not mean that it is the meaning that we, in the State of Israel, would give the phrase “Husband, Wife.” Much water has flowed through the English Thames and the Israeli Jordan since 1846. As judges in Israel, our duty is to give the phrase “Husband, Wife” the meaning assigned to it in Israeli society, and not in English Victorian society of the mid-nineteenth century . . . that is mandated by our interpretive rules.⁶

Here is an additional example from public law: The Defense Regulations (State of Emergency) enacted in 1945 by the British government continue to apply in Israel. Among other things, these regulations establish military censorship of publications in Israel. The military censor is authorized to ban publications that it deems likely to harm state security, public security, or the public peace. The Supreme Court has given this provision a dynamic interpretation, based on the fundamental principles of Israeli law. In my opinion, I noted that

The meaning that should be given to the Defense Regulations in the State of Israel is not identical to the meaning that they might have taken on during the period of the Mandate. Today, the Defense Regulations are part of the laws of a democratic state. They must be interpreted against the background of the fundamental principles of the Israeli legal system.⁷

We held that the military censor may prevent publication only if the uncensored publication would create a near certainty of grave harm to state security, public security, or public peace.

⁶ C.A. 2000/97, *Lindoran v. Kranit—Accident Victim Compensation Fund*, 55(1) P.D. 12.

⁷ H.C. 680/88, *Schnitzer v. Chief Military Censor*, 42(4) P.D. 617, 628.

Characteristic of these examples and many others is the change that has taken place in the law without any change occurring in the language of the legislation. Such a change is made possible by the change in the court's interpretation. It is made possible by the court's recognition of its role to bridge the gap created between the old statute and the new social reality. The court did not say, "Adapting the law to the new reality is not my role. It is the role of the legislature. If the legislature does not do anything, it bears the responsibility." The court viewed it as its own responsibility—complementary to the responsibility of the legislature—to give the old law a new meaning that suited the social needs of modern Israel.

Statutory interpretation will facilitate the statute's adaptation to changes in the conditions of existence only if the system of interpretation allows for that. Such a system is the system of purposive interpretation.⁸ It is predicated on giving a dynamic interpretation to the statute, to allow it to fulfill its design. In one case, I addressed the way in which dynamic interpretation works:

The meaning that should be given to a phrase in a statute is not fixed for eternity. The statute is part of life, and life changes. Understanding of the statute changes with changes in reality. The language of the statute remains as it was, but the meaning changes along with "changing life conditions" . . . the statute integrates into the new reality. This is how an old statute speaks to the modern person. This is the source of the interpretive approach that "the statute always speaks" . . . interpretation is a regenerative process. Old language should be filled with modern content, in order to minimize the gap between law and life. It is therefore correct to say, as Radbruch does, that the interpreter may understand the statute better than the author of the statute, and that the statute is always wiser than its creator . . . the statute is a living creature; its interpretation must be dynamic. It must be understood in a way that integrates and advances modern reality.⁹

⁸ *Infra* p. 125.

⁹ C.A. 2000/97, *supra* p. 6, note 6 at 32. The reference is to Gustav Radbruch, "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin* 141 (20th Century Legal Philosophy Series, Vol. IV, Kurt Wilk trans., 1950).

Of course, it is not always possible to bridge the gap between law and life by giving a new and modern meaning to an old statute. Sometimes the judge lacks the power to bridge the gap between the old language of the statute and society's new reality. In such a case the judge must set aside his work tools. The judge may not act against the law. He can only hope that the legislature will do its job and repeal the old statute. The judge, as a faithful interpreter, cannot achieve such a result. For example, the court could not entirely repeal the military censorship of publications or, for that matter, civilian censorship of plays and movies, also created by the British mandatory regime. Such repeal required legislative intervention. Indeed, following a decision by the Supreme Court restricting civilian censorship, the legislature repealed censorship of plays. Censorship of movies, like military censorship, still exists. The judge lacks the power to deliver that change.

In this context, Guido Calabresi's proposition¹⁰ is noteworthy. He suggested that courts should be able to repeal legislation that has become obsolete. Of course, Calabresi's proposition cannot be implemented unless the legislature explicitly authorizes courts to repeal obsolete legislation. I personally do not think that is the proper solution to a painful problem. The right way is not to rely on judges to repeal obsolete laws but rather for the legislature to do so. Indeed, the Israeli legislature occasionally collects pieces of old legislation that are no longer necessary and repeals them. That is the right way to proceed.

CHANGES IN SOCIETY AFFECTING THE CONSTITUTIONALITY OF STATUTES

Social changes sometimes lead to a situation in which a statute passed in the context of a certain reality and that was constitutional at the time of its enactment becomes unconstitutional in light of a

¹⁰ Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

new social reality. Of course, the court will do everything it can to give the old statute a new meaning, in order to preserve its constitutionality. The limitations of interpretation, however, do not always allow that to happen. Where interpretation fails to give an old law a new meaning, the question may arise as to whether, in light of the social changes, the old statute is constitutional. Even though the court is not authorized to give a new meaning to an old statute, if such meaning deviates from the system's rules of interpretation, the court may declare the old statute, with the old meaning, unconstitutional. As an example, in 1986 the United States Supreme Court held that a statute criminalizing consensual homosexual relations between adults was constitutional.¹¹ Twenty years passed. The United States Supreme Court overturned its prior holding.¹² It held that the Constitution bars legislation criminalizing consensual sexual relations between adults. The difference between the two decisions did not reflect a constitutional change that took place during that period. 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.¹³ Justice D. Dorner of the Israeli Supreme Court discussed this social change in a case that raised the issue of employee benefits for same-sex partners:

In the past, intimate relations between members of the same sex—relations considered to be a sin by monotheistic religions—were a criminal offense . . . this treatment has gradually changed. Legal scholars have criticized the definition of a homosexual relationship as criminal and discrimination against homosexuals in all areas of life . . . movements fighting for equal rights for homosexuals have sprung up. Today, the trend—which began in the 1970s—is to a liberal

¹¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹² *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

¹³ Robert Post, "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," 117 *Harv. L. Rev.* 4 (2003).

treatment of a person's sexual tendencies, which are viewed as a private matter. . . . Israeli law concerning homosexuals reflects the social changes that have taken place over the years.¹⁴

CHANGES IN THE COMMON LAW

The court may not repeal an obsolete statute. It may, however, repeal a common law holding that has become obsolete. It may change even a non-obsolete precedent if it does not suit today's social needs. Indeed, judges created the common law. In doing so, they sought to provide a solution to the social needs of their time. As these needs change, judges must consider whether it is appropriate to change the judicial precedent itself, by expanding or restricting the existing case law or overturning an old precedent.¹⁵ Sometimes the new social reality necessitates creating new case law to resolve problems that did not arise at all in the past, where the goal of the new case law is to bridge the gap between law and the new social reality. Justice Agranat expressed this idea well:

Where a judge is presented with a set of facts based in new life conditions, for which the current law was not designed, the judge should review anew the logical premise on which the case law, created in a different background, is based. The goal is to adapt the case law to the new conditions, either by expanding or restricting it, or, where there is no other way, completely to abandon the logical premise which served as the basis for the existing law and to replace it with a different legal norm—even if the legal norm was previously unknown.¹⁶

Within the common law project, the judge is the senior partner. The judge creates the common law and bears responsibility for making sure that it fulfills its role properly. The legislature is the

¹⁴ H.C. 721/94, *El Al Israeli Airlines v. Danielovitz*, 45(5) P.D. 749, 779 (English translation available at www.court.gov.il).

¹⁵ See *infra* p. 158.

¹⁶ C.A. 150/50, *Kaufman v. Margines*, 6 P.D. 1005, 1034.

junior partner, the outside observer, who generally intervenes only when asked to correct a particular issue or replace the entire legal regime from a common law regime to a statutory regime.

CHANGE AND STABILITY

The Dilemma of Change

The need for change presents the judge with a difficult dilemma, because change sometimes harms security, certainty, and stability. The judge must balance the need for change with the need for stability. Professor Roscoe Pound expressed this well more than eighty years ago: “Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still.”¹⁷

Stability without change is degeneration. Change without stability is anarchy. The role of a judge is to help bridge the gap between the needs of society and the law without allowing the legal system to degenerate or collapse into anarchy. The judge must ensure stability with change, and change with stability. Like the eagle in the sky, which maintains its stability only when it is moving, so too is the law stable only when it is moving. Achieving this goal is very difficult. The life of the law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together. The progress of case law throughout history must be cautious. The decision is not between stability or change. It is a question of the speed of the change. The decision is not between rigidity or flexibility. It is a question of the degree of flexibility. The judge must take into account a complex array of considerations. I will discuss three such considerations that apply in the development of the law. A judge must consider (1) the coherence of the system in which he operates, (2) the powers and limitations of the institution of the judiciary as defined within that system, and (3) the way in which his role is perceived.

¹⁷ Roscoe Pound, *Interpretations of Legal History* 1 (1923).

Considerations of System

The development of law, be it common law or enacted law, must maintain normative coherence within the legal system.¹⁸ It must reflect the fundamental values of the legal system. Every ruling must be integrated into the framework of that system. As Professor Lon Fuller explained:

Those responsible for creating and administering a body of legal rules will always be confronted by a *problem of system*. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure.¹⁹

Indeed, a judge who develops the law does not perform an individual act, isolated from an existing normative system. The judge acts within the context of the system, and his ruling must integrate into it. For this reason, judges must ensure that the change is organic and the development gradual and natural.²⁰ Change generally should occur by evolution, not revolution.²¹ We are mostly concerned with continuity, not discontinuity. Judicial activity, according to the attractive analogy of Professor Ronald Dworkin, is like several co-authors taking turns in writing a book, one after another.²² Judges no longer on the bench wrote the earlier chapters. We must now write the continuation of the work. We must ground ourselves in the past while

¹⁸ See Barak, *supra* p. xiii, note 14 at 152; Neil MacCormick, *Legal Reasoning and Legal Theory* (1993).

¹⁹ Lon L. Fuller, *Anatomy of the Law* 94 (1968).

²⁰ See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); Roscoe Pound, *The Formative Era of American Law* 45 (1938); Henry J. Friendly, "Reactions of a Lawyer—Newly Become Judge," 71 *Yale L.J.* 218, 223 (1961).

²¹ See Roger J. Traynor, "The Limits of Judicial Creativity," 29 *Hastings L.J.* 1025, 1031–32 (1978) ("The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily advances though it carries the past on its back").

²² See Ronald Dworkin, "Law as Interpretation," 60 *Tex. L. Rev.* 527 (1982) (likening judges to collaborators in a vast "chain novel").

ensuring historical continuity. The chapters that we are writing become, after they are written, chapters from the past. New chapters, the creations of new judges, will be written in the future.

Likewise, we must ensure consistency.²³ In similar cases we must act similarly unless there is a proper reason for distinguishing the cases. This rule does not bar departure from existing precedent, but it does ensure that departure from precedent is proper, that it reflects reason and not fiat,²⁴ and that it is done for proper reasons of legal policy,²⁵ so that the contribution the change makes to future law outweighs any harm caused by changing the old law, including the instability and resultant uncertainty inherent in change.²⁶

Institutional Considerations

In bridging the gap between law and society, the judge must take into account the institutional limitations of the judiciary.²⁷ Admittedly, judicial lawmaking, mostly through interpretation, is central to the role of a court. But that role is incidental to deciding disputes. This is the striking difference between judge-made law and enacted law. Without a dispute there is no judicial lawmaking.²⁸ By nature, then,

²³ See Barak, *supra* p. xiii, note 14 at 166–67.

²⁴ See Lon L. Fuller, “Reason and Fiat in Case Law,” 59 *Harv. L. Rev.* 376 (1946).

²⁵ See John Bell, *Policy Arguments in Judicial Decisions* (1983).

²⁶ See *infra* p. 160.

²⁷ See Barak, *supra* p. xiii, note 14 at 172; Jon O. Newman, “Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values,” 72 *Cal. L. Rev.* 200 (1984); Lon L. Fuller, “The Forms and Limits of Adjudication,” 92 *Harv. L. Rev.* 353 (1978).

²⁸ The dispute may be of a private nature or of a public nature; it may be concrete or abstract; it may involve only situations where there is a “case and controversy” (as in the United States) or it may do without it (as in Germany); it may be—as in the Canadian reference—of an advisory nature. But there must always be a dispute. Regarding the different possibilities, see Allan-Randolph Brewer Carías, *Judicial Review in Comparative Law* (1989); C. Neal Tate and T. Vallinder, *The Global Expansion of Judicial Power* (1995).

judges create law sporadically, not systematically.²⁹ The changes they make to law are partial, limited, and reactive. The issues brought before a court are to some extent randomly selected. Many years may pass before a problem that troubles the public enters a judicial forum. A court's control over the matters it hears is negative in nature, permitting only dismissal of what the court does not want to consider. Consequently, a judge cannot plan a strategy of bridging the gap between law and society. The changes he makes to the law are partial and limited. When a comprehensive and immediate change is needed in an entire branch of law, the legislature ought to make it. Moreover, one cannot bridge the gap between society and law without having reliable information about society. The court does not always have the information about social facts that might justify a change in the law. Our laws of evidence usually look backward (adjudicative facts), providing a (partial) answer to the question of "what happened."³⁰ They usually do not look forward (legislative facts), and they do not provide an answer to the question of "what should happen." Moreover, the means at a judge's disposal are limited. The court may, in developing the common law in its legal system, impose a new duty of care in torts. It may also use the existing remedies, such as injunctions³¹ and damages, to solve new problems. But it cannot, for example, impose taxes or establish a licensing regime.

Finally, the nature of the legal policy underlying existing law should be a factor in the judge's willingness to change the law. For example, a judge is generally qualified to consider the legal policy underlying human rights protections. Naturally, he has little difficulty evaluating legal policy that can be derived from logic, a sense of justice, or existing law (enacted or case law). By contrast, a judge should beware of evaluating complex, polycentric³² questions of

²⁹ See Henry Friendly, "The Courts and Social Policy: Substance and Procedure," 33 *U. Miami L. Rev.* 21, 22 (1978).

³⁰ See Antonio Lamer, "Canada's Legal Revolution: Judging in the Age of the Charter of Rights," 28 *Isr. L. Rev.* 579 (1994).

³¹ See Owen Fiss, *The Civil Right Injunction* (1978).

³² See Hanne Peterson and Henrik Zahle, *Legal Polycentricity: Consequences of Pluralism in Law* (1995).

economic or social policy that require specialized expertise and knowledge and that may rely on assumptions concerning issues with which he is unfamiliar. I am aware of the difficulties in making this distinction. I mean to say only that a judge should be sensitive to this type of consideration. I feel much more comfortable holding that one economic plan is discriminatory compared to another than I do holding that one economic plan falls within the range of reasonableness while another does not.

Considerations of the Perception of the Judicial Role

Judicial lawmaking that bridges the gap between law and society must be consistent not only with society's basic values but also with society's fundamental perception of the role of the judiciary.³³ The power of a judge to bridge the gap between law and society in a society that, like Montesquieu,³⁴ sees the judge merely as the mouthpiece of the legislature is different from the judge's power in a society that views comprehensive judicial lawmaking as legitimate. Society's perception of the judicial role, however, is fluid. Not only is judicial activity influenced by it, it also influences that perception.

In common law systems, bridging the gap between law and society appears to be a central role of the judiciary. By their nature, common law systems view the judge as a senior partner in lawmaking. But does this perception apply beyond the confines of the

³³ See Barak, *supra* p. xiii, note 14 at 192; M.D.A. Freeman, "Standards of Adjudication, Judicial Law-Making and Prospective Overruling," 26 *Current Legal Probs.* 166, 181 (1973) ("Every institution embodies some degree of consensus about how it is to operate. To understand the judicial role and apprise the legitimacy of judicial creativity one must explore the shared expectations which define the role of judge"); Paul Weiler, "Two Models of Judicial Decision-Making," 46 *Can. B. Rev.* 406, 407-08 (1968). On the difference between the perception of the judicial role of the English judge and the American judge, see Louis L. Jaffe, *English and American Judges as Lawmakers* (1969); Richard Posner, *Law and Legal Theory in England and America* (1996). See also Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (2002).

³⁴ Montesquieu, *supra* p. xiv, note 24.

common law? And, in common law systems, is it possible to regard the judge as someone who ought to bridge the gap between law and society in the sphere of legislation?³⁵ Certainly the main actor in this bridging is the legislature. Its democratic nature (in the sense that the legislature is elected by the people), the tools at its disposal, and the ways in which it receives information about different policies and different alternatives all make the legislature chiefly responsible for bridging the gap between law and society.

But can the judge be recognized as a junior partner in such a bridging because of his role as the interpreter of legislation? The answer to this question is not at all simple. The question is whether to accept a model of partnership—albeit a limited partnership—or a model of agency.³⁶ In the agency model,³⁷ the judge is an agent of the legislature. He must act according to its instructions, just as a junior officer is bound to carry out the orders of his superior officer.³⁸ There are many problems with this approach. To my mind, a judge is not an agent who receives orders and the legislature is not a principal that gives orders to its agent.³⁹ The two are branches of the state with different roles; one is legislator and the other is

³⁵ On this question, see Guido Calabresi, *A Common Law for the Age of Statutes* 2 (1982).

³⁶ These are not the only models, and they certainly do not apply to all issues that arise. I address them because they are relevant to the two roles of a judge in a democracy that I focus on here. For an extensive discussion of these two models, see Ronald A. Cass, *The Rule of Law in America* 46–97 (2001). Cass claims that the prevailing model in American law is the “weak agency model,” in which the judge acts as a translator. *See id.* at 49, 92–97. I disagree. *See also* Kennedy, *supra* p. xi, note 8; Lucy, *supra* p. xi, note 8.

³⁷ *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 286–87 (1985); Frank H. Easterbrook, “The Supreme Court, 1983 Term—Foreword: The Court and the Economic System,” 98 *Harv. L. Rev.* 4, 60 (1984); John F. Manning, “Deriving Rules of Statutory Interpretation from the Constitution,” 101 *Colum. L. Rev.* 1648, 1648 note 1 (2001).

³⁸ For this analogy, see Richard A. Posner, *The Problems of Jurisprudence* 269 (1990).

³⁹ *See* Michael C. Dorf, “The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation,” 112 *Harv. L. Rev.* 4, 19 (1988) (noting an alternative to textualism “in which courts play a vital role as partners with, rather than mere servants of, the legislature”); William N. Eskridge, Jr., “Spinning Legislative

interpreter. Indeed, legislatures create statutes that are supposed to bridge the gap between law and society. In bridging this gap, the legislature is the senior partner, for it created the statute. But the statute itself cannot be implemented without being interpreted. The task of interpreting belongs to the judge. Through his interpretation, a judge must give effect to the purpose of the law and ensure that the law in fact bridges the gap between law and society. The judge is a partner in the legislature's creation and implementation of statutes, even if this partnership is a limited one.⁴⁰

Regarding the judge merely as an agent is too narrow an approach. That point of view isolates a particular statute and sees it as an island. But a statute is not an island. It is part of a legislative enterprise that is many years old. Moreover, legislation, together with the common law, forms part of the legal system. All parts of the law are linked. Whoever interprets one statute interprets all the statutes. Whoever enforces one statute enforces the whole legal system. Normative harmony must exist among the different parts of the legal system. An interpretation of an individual statute, such as a new common law rule, must be integrated into the system. The judge is responsible for all of this. He must interpret the individual

Supremacy," 78 *Geo. L.J.* 319, 322 (1989); Daniel A. Farber, "Statutory Interpretation and Legislative Supremacy," 78 *Geo. L.J.* 281, 284 (1989); Richard J. Pierce, Jr., "The Role of the Judiciary in Implementing an Agency Theory of Government," 64 *N.Y.U. L. Rev.* 1239, 1239 (1989) (stating that all branches are "the agent of the people").

⁴⁰ See Dworkin, *supra* p. xiii, note 20 at 313 ("[Hercules, the hypothetical ideal judge] will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began"); William D. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* 155 (1999) (viewing judges "as collaborators in the interpretive process, albeit as junior partners"); Douglas Payne, "The Intention of the Legislature in the Interpretation of Statutes," 9 *Current Legal Probs.* 96, 105 (1956) ("The proper office of a judge in statutory interpretation is not, I suggest, the lowly mechanical one implied by orthodox doctrine, but that of a junior partner in the legislative process, a partner empowered and expected within certain limits to exercise a proper discretion as to what the detailed law should be").

statute consistently with the whole system and ensure that the interpretation succeeds in bridging the gap between law and life. From this perspective, the judge's role in creating common law (as a senior partner) is similar to the judge's role in interpreting legislation (as a junior partner).⁴¹ In both cases the judge works in the interstices of legislation.⁴² Of course, he has a different degree of freedom in each situation, but his role is primarily the same: to bridge the gap between law and society. A judge must therefore consider the elements discussed above—the need to guarantee stability through change and to take systemic and institutional considerations into account—in bridging the gap between law and society, both by creating common law and by interpreting legislation. This approach directly affects the formation of a proper system of interpretation. It should be a system that bridges law and society's needs. It should be a system that ensures dynamic interpretation,⁴³ giving a statute a meaning compatible with social life in the present and, as far as can be anticipated, in the future, too.

The judge's role is to be the bridge between the law and life. He must not ignore this role. Nevertheless, the public must not expect the judge to bridge every gap between law and life. Many limitations, both substantive and procedural, are placed on the judge. His discretion is limited. He functions within a given social and legal framework. The court's ability to link life and law, therefore, is limited by its very nature. It is not wise to harbor expectations that cannot possibly be met. In this regard, we should avoid staking

⁴¹ See David A. Strauss, "Common Law Constitutional Interpretation," 63 *U. Chi. L. Rev.* 877, 879 (1996). Justice Scalia's approach is different. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 3–14 (1997). According to his view, there is a profound difference between the activity of a judge in interpreting legislation and the activity of a judge in the enterprise of the common law. See *id.* Although I agree that such a difference exists, I do not believe it is as acute as Justice Scalia describes.

⁴² See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . ."). See also Bell, *supra* p. 13, note 25 at 17–20 (1983) (outlining a model of the judge as an "interstitial legislator").

⁴³ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 9 (1994).

out extreme positions. We should not accept the claim, often raised, that the court should not be expected to make necessary changes in order to bridge the gap between law and life.⁴⁴ But at the same time, neither should we accept the claim that the judge is all-powerful and that his will alone determines the existence or nonexistence of the change.⁴⁵ Reality is infinitely more complex. Sometimes it is possible to bridge the gap between law and life's changing reality through legitimate judicial actions; at other times such a bridge cannot possibly be constructed. On this matter as on many others, one must be realistic⁴⁶ and understand both the judicial power and its limitations.

⁴⁴ See Gerald Rosenberg, *The Hollow Hope* (1991).

⁴⁵ See Gary Peller, "The Metaphysics of American Law," 73 *Cal. L. Rev.* 1151 (1985).

⁴⁶ See Mark Kozlowski, *The Myth of the Imperial Judiciary: Why the Right Is Wrong about the Courts* (2003).