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Topics in Ethical Practice 2006

The Judiciary as a New Moral Authority?

Each BIIJ examines issues that exist at the intersection of ethics and the work of the international judiciary. In 2006, that examination centered on what Ronald Dworkin has called the “secular papacy,” or the notion that judges have replaced – or should replace – religious figures as modern moral leaders on a national or international level.¹

The conversation was framed by opening remarks from three judges who serve as members of the BIIJ Program Committee: John Hedigan of the ECHR, Navanethem Pillay of the ICC, and Fausto Pocar of the ICTY. Daniel Terris, director of the International Center for Ethics, Justice and Public Life at Brandeis University, facilitated the discussion.

Judges who interpret the law in such a way as to broaden the protection of human rights have been labeled by some as “activist.” The 2003 decision by the Supreme Judicial Court of Massachusetts to permit same-sex marriages is a prime example; another is the Constitutional Court of South Africa’s decision declaring the death penalty to be unconstitutional. In both cases, the courts issued their rulings knowing that the values they upheld were not necessarily supported by a majority of the population.

This issue is not limited to domestic courts. The ICTR was the first court to declare rape a crime against humanity and an act of genocide, a decision based on an interpretation of the current state of customary international law. Similarly, the appeals

chamber of the ICTY revisited a decision it had made that released a defendant after a very long pretrial detention. The revision of the original judgment was made on the grounds of “new facts,” but some argued that it was done to take into account certain moral grounds. As one judge put it:

In a way, the conditions for revision of the judgment were interpreted loosely in order to revisit the decision.

Though each of these cases was based on interpretations of constitutions or charters, they all involved decisions with moral ramifications. Were the judges on these courts applying their own personal moral codes, or those of the constituents they served?

As one judge pointed out, “activism” on the part of a judge can mean different things to different people. In some cases, judges are required to “fill in the blanks” left by the legislature; in others, they are left to extrapolate an ages-old document to fit modern times. Invariably, judges are at times faced with the task of creating a ruling based, at least in part, on questions of morality. One school of thought is that, in making their decisions, judges should draw on the moral values held by the majority in their communities. Another judge eloquently captured the countervailing school of thought:

The counter argument is that they protect the rights of individuals and minorities, and thereby create an improvement on majoritarian democracy.



It is a delicate and complex issue, to be sure, and one that is compounded at the level of international courts and tribunals. If a universally accepted moral code is difficult to come by within a given country, it is virtually impossible to achieve on a bench composed of judges from several different nations. The statute that forms the basis of the ICTY requires that judges nominated to the court “shall be persons of high moral character, impartiality and integrity.” Reflecting on that passage, one judge asked:

What does that mean? The nominations are done by nations, and each nation has its own definition. Who has the definition which can be accepted?

In the United States, nominees to the Supreme Court are asked by the media and by politicians on both sides to make their stance on key issues known before being appointed. Do such declarations threaten their judicial independence, or are they regarded as “campaign promises” that may be easily cast aside? One participant observed a contradiction in this practice:

In certain ways, the current U.S. administration is having it both ways. They say they want judges who simply apply the law, but at the same time they make a big deal about the moral and religious character of the nominees. They suggest that personal views will play an important part.

It is worth noting that the participants at BIIJ 2006 unanimously balked at the suggestion of judges being “moral leaders.” The notion conjures up an image of a jurist who, on an individual basis at least, suspends universal justice in favor of his or her personal agenda. Judges the world over are understandably uncomfortable with such a scenario, having devoted their lives to the discipline of law.

However, when pressed, the participants acknowledged that judges cannot altogether avoid decisions that touch on aspects of morality. One participant noted:

It’s not because they want to make such decisions. But they inevitably have to. Courts anywhere don’t get the easy cases. I don’t think there’s much of an opportunity for a judge to impose his or her moral agenda, but judges are forced into decisions where they have to make certain kinds of ‘moral judgments.’

Several judges agreed.

That’s why we have courts. If there were no choices to be made, there would be no courts. It is possible to have conflicting value judgments or conflicting interpretations of a constitutional rule, both of which would be valid in legal terms. We have to make a choice between competing interpretations; the better way to make that choice is in terms of a set of values.

If one views the interpretation of law as an inherently moral endeavor, the distinction between judges who do and do not factor in a moral component becomes less clear. As one judge put it:

Each judgment is a day-by-day application or execution of morals. If we accept that, then there are only specific problems of immoral laws, but that is not the norm in a democracy.

Even still, all agreed that judges should avoid situations that ask them to develop moral codes in addition to applying them.

The challenge, then, is determining what value system to use. Without a consistent set of values to refer to, judgments of a moral nature will appear arbitrary or preferential, ultimately losing their validity. Within a given country, constitutions and bills of rights can provide a moral framework from which a judiciary may work. On an international level, treaties and charters may fulfill the same roles, making the body of international human rights all the more essential. Regardless of the setting, any value system used should be one based on the normative and systemic theory of the legal system being applied. That will guarantee that a court’s decisions fit into a pattern of consistency and coherence.

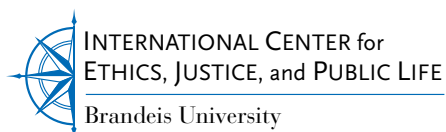


If one does expect judges to execute morality in their judgments, how can it be ensured that the morality they employ is appropriate? To whom are judges accountable? Domestically, the answer is relatively straightforward; the judiciary is typically just one branch of government, kept in check by the others. Internationally, the answer varies a bit; a court may have to answer to the United Nations or to the member states that signed the treaty bringing it into existence. Though the chain of authority differs from one court to the next, none exists in a vacuum.

There was a consensus among those who participated in this debate that judges must first and foremost apply the law and not use it to pursue their own ethical agendas. There are, of course, points of divergence on how best to decide a case when the law provides more than one compelling option. Some participants emphasized the importance of a judge's personal background, while others look to the human rights regime for guidance, especially where international courts are concerned. Questions remain as to whether the field of international human rights is sufficiently developed to provide that kind of insight. The discussion will undoubtedly continue in the years to come, as the field of international law continues to expand across the globe.

Note

¹ *Judges in Contemporary Democracy: an International Conversation* Preface, Ch. 2, Ch. 6 (Robert Badinter and Stephen Breyer, eds., New York University Press 2004).



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