

# **Facing the Challenges of the 21st Century: The Role of Courts**

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*Shalom and Namaste*

Please let me begin by thanking the Organizers of the Conference for inviting me to speak here today.

India enjoys a rich constitution, which was recently described in a note I read as "one of the most glorious constitutions in the world".

Therefore, it is doubtlessly a suitable venue for discussing constitutional issues – and particularly – the role of courts in facing the challenges of the 21<sup>st</sup> century.

The issue I would like to concentrate on during this conversation, is the legitimacy of courts to

enforce the concept of Rule of Law in the 21<sup>st</sup> century.

Essentially, the question is how the judiciary should protect its independence and its historical balance between the executive and legislative powers.

More specifically, to what extent *should* the Judicial Branch be independent? Other important questions also arise, such as who should appoint judges and to what extent should the executive and legislative branches be involved in appointing judges – if at all?

In one of the most important rulings of the Israeli Supreme Court regarding this issue, known as *Ressler v. The Minister of Defense*, the late Chief Justice *Shamgar*, one of the most prominent Chief Justices ever in Israel, emphasized the importance of these concepts:

"Separation of powers was created  
so as to bring about a balance

between the powers, since it is only in this way, that is, by preventing an excessive concentration of power exclusively in the hands of one authority, that democracy is ensured and the freedom of the individual and of society is preserved. [...]"

Strong and independent courts are essential for protecting human and civil rights. They are also crucial for ensuring that both the executive and the legislative branches maintain a significant role – and that one does not prevail over the other.

In recent decades governments encounter new challenges which are partially a result of the process of globalization – and seek swift and effective solutions for these challenges.

However, these do not always go together with the concept of the Rule of Law as they undermine civil and human rights.

For example, governments are increasingly examining how they should cope with the current refugee crisis in a way that would not have negative effects on local populations.

At times, these solutions undermine the rights of refugees – and Courts are required to impose constraints on the governments and intervene in their policies.

Similarly, Governments all over the world are still struggling to find solutions that will protect their local population from terror and hate crimes.

These have become more complex since terror has become more globalized and its concepts have become more accessible through the internet.

Some of the proposed solutions hinder basic rights while ensuring security interests. Courts are required to ensure these solutions are carried in a lawful manner.

This causes inevitable clashes between the Executive and Judicial branches, which fuel efforts to undermine the powers of the judicial branch.

Consequently, in some countries, public opinion seems to change – and the role of the Judiciary is constantly being questioned.

This subject raises many important issues and questions to which I am afraid there are no "right" answers; It calls for examining the warranted balance between the executive and legislative branches as part of the application of the concept of "separation of powers".

Indeed, "clashes" between the executive, legislative and judicial branches are apparent in all modern democracies.

As some of you may know, these debates are drawing increasing attention in Israel as well.

Almost three decades ago Israel adopted several "basic laws" which serve as a form of a "partial constitution", so to speak.

Among these, is the "Basic Law on Human Dignity and Liberty", which establishes that "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required".

This was applied by the Israeli Supreme Court in various contexts, and in several cases policies and measures were overturned by the Court.

The judicial review carried by the Supreme Court is the basis of the ongoing tensions between the Judicial and Executive branches in Israel – and raised public criticism against the Judicial Branch.

Consequently, the role of Courts has received significant attention in public discourse in Israel during the past few years – and was at the center of debate during these past elections.

This emphasized the independence of the Judicial System, while imposing an enduring challenge to maintain its independence.

These occurrences demonstrate how the current challenges imposed on us in the 21<sup>st</sup> century cause countries to question the proper balance between the Judiciary, and the executive and legislative branches, and generate attempts to bypass Court decisions while undermining their independence.

Efforts to undermine the Judiciary are not always driven by improper motives, but rather, by a sincere attempt to cope with some of the challenges governments are currently confronted with.

Nevertheless, when these intentions undermine the independence of courts, we are at risk that courts might lose their ability to enforce the Rule of Law.

Indeed, the important principles derived from the concept of the Rule of Law are not easily achieved.

They require, among other things, a strong and independent judicial system, in which judges and justices are appointed in a due process which does

not require them to appease the government or the parliament in their rulings.

This is crucial since the "politzation" of the appointing process of judges could have a grave influence on their rulings.

Judges might feel they are expected to appease certain sections of the population – or worse – certain politicians. Their ability to enforce the concept of the Rule of Law could therefore be severely limited.

In my view, this is one of the main challenges the Judiciary is faced with in the 21<sup>st</sup> century.

I believe that this concern does not merely require governments to respect the role of courts in enforcing the Rule of Law.

It also requires courts to apply their authority in accordance to the concept of the Rule of Law.

Courts are therefore required to enforce the Rule of Law while respecting a significant margin of

appreciation which allows governments to cope with the challenges they are confronted with.

This is not to say that the Rule of Law should be second to these pragmatic considerations – but rather, that while enforcing the Rule of Law judges should be careful and mindful that they do not apply their own beliefs and personal judgment instead of governments' legitimate considerations.

I pray we will overcome this challenge and ensure our children will grow into a safe world, where the Rule of Law is effectively enforced by courts and all are equal before the law.