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Judges as Guardians of the Constitution*

Keynote Speech

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Deciding Disputes

The principal function of the judicial branch is resolving disputes. While resolving a dispute, and as byproduct of that, the judicial branch must determine the law according to which the dispute is settled. The extent to which it determines the law while resolving the dispute varies from one legal system to another, and is derived from its tradition and culture.

In many cases, determining the law according to which the dispute is to be settled does not entail any judicial creativity whatsoever. The meaning of the law before and after the dispute's resolution is the same. In determining what that law is, the judge merely states the existing law. The judge's interpretation is declarative and not creative. Only in the small minority of cases does the interpretation of the law involve judicial creativity. In these cases, the meaning of the law prior to and after the dispute's resolution is not the same. The judges do not merely declare what the existing law says; they create new understanding of the law. In such cases, the judge engages—incidentally to deciding the case—in judicial lawmaking. Such lawmaking does not just create an individual legal norm, whose only power is in the resolution of the dispute between the parties; it creates a general legal norm, whether through the force of the principle of *stare decisis*, or other recognized techniques that obligates not only the parties to the dispute, but all branches of the government and members of the public.

Judicial lawmaking

What is the anatomy of judicial lawmaking? It varies according to the kind of legal activity being carried out. The main judicial activity in

modern times is the interpretation of a legal text (e.g., constitution, statute, regulation, contract, will), according to which the dispute is to be resolved. Interpretation is a rational activity giving legal meaning to a text. Interpretation, at times (but not always), involves judicial creativity. The meaning of a text before the act of interpretation, and its meaning afterwards, is not one and the same. The reason for this can be found in the character of normative texts, which, just like any other text, is at times ambiguous and vague regarding a given set of factual circumstances. This ambiguity and vagueness is usually clarified via the rules of interpretation, which succeed—without turning to judicial creativity—in extracting, from the various express or implied literal meanings of the normative text, a single legal meaning. However, the rules of interpretation do not always succeed in performing such extraction without any creativity whatsoever. At times, the success of the extraction—that is, the determination of a single legal meaning from the spectrum of literal meanings—requires creative judicial activity. This creativity is necessary when the employment of the rules of interpretation do not bring forth one single meaning. In such a situation, the rules of interpretation require the judge—interpreter to continue the process of interpretation—to move on from the declarative stage to the creative stage by the use of judicial discretion.

Judicial discretion

Judicial discretion does not mean mere consideration, reflection or thought. It means choosing between several legitimate opinions. As such, it is a normative process. In each legal system there are cases in which a judge faces a situation in which, on the one hand, the system requires to interpret the legal text according to which the dispute will be decided, but on the other hand, the system does not force to choose a particular

option from the spectrum of possibilities. These are the "hard cases." How will a judge know that in a certain situation, there is judicial discretion? When will a judge determine that two or more options are legal, in such a manner that the choice between them requires judicial discretion? My answer is that the existence of judicial discretion is the result of the legal community's view in a given legal system. The legal community is a normative concept that reflects the fundamental views, principles, rules of interpretation, and social consensus regarding the judicial activity in a given society at a given time. An option is legal if it is viewed as such by the legal community.

Judicial discretion is necessary. It is impossible to build a legal interpretive system without judicial discretion. If a legal norm is embodied in a literal text, the interpretation process is necessary, and every interpretation process requires the recognition of judicial discretion. Judicial interpretation without judicial discretion is a myth. The ambiguous and vague nature of language (including the language and rules of interpretation), and the lack of consensus regarding the rules of interpretation, their sources and the internal relationships between them, require the recognition of interpretative discretion. Human wisdom cannot create a general legal principle that can provide an unequivocal answer without the use of discretion, regarding the infinite amount of situations (some of which cannot be expected in advance) to which a principle may apply.

On the Role of A Judge

In exercising their discretion, judges should aim, though they are not obliged to, to achieve two main objectives: The *first* is to bridge the gap between law and life. Thus when interpreting a constitution or a

statute, the judges should give the text a dynamic meaning, one that strives to bridge the gap between law and life's changing reality without changing the text itself. In doing so, judges must balance the need for change with the need for stability. Professor Roscoe Pound expressed this well more than ninety 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."

Stability without change is decline. 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 decline or collapse into anarchy. The judge must ensure stability with change, and change with stability. Like the eagle in the sky, maintaining stability only when moving, so too is the law stable only when moving. Achieving this goal is very difficult. The law's life is complex. It is not mere logic. It is not simply experience. It is both logic and experience together. The law's evolution throughout history must be cautious. The choice is not one between stability and change. It is a question of how fast the change occurs. The choice is not between rigidity and flexibility. It is a question of the degree of flexibility.

The judge's *second* objective should be—though they are not obliged—to protect the constitution and democracy. If we want to preserve democracy, we cannot take its existence for granted. We must fight for it. The assumption that "it won't happen to us" can no longer be accepted. Anything can happen. If democracy was disallowed and destroyed in the Germany of Kant, Beethoven, and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us. I do not know whether the judges in Germany could have

prevented Hitler from coming to power in the 1930s, but I do know that the lessons of the Holocaust and of the World War II era helped promote the idea of judicial review of legislative action and made human rights crucial. These lessons led to the recognition of the defensive democracy and even the militant democracy. It shaped my belief that one of the two roles of the judge in a democracy is to maintain and protect the constitution and democracy.

I believe that the protection of democracy is a priority for many judges in modern democracies. The judicial protection of democracy, in general, and of human rights in particular, is a characteristic of most developing democracies. Legal scholars often explain this phenomenon as an increase in judicial power relative to other powers in society. This change, however, is merely a side effect. The purpose of this modern development is not to increase the power of the court in a democracy but rather to increase the protection of democracy and human rights. An increase in judicial power is an inevitable result, because judicial power is one of the many factors in the democratic balance.

The Legitimacy of the Means

The means of realizing the judicial role must be legitimate; the principle of the rule of law applies first and foremost to judges themselves, who do not share the legislature's freedom in freely creating new tools. The bricks with which judges build their structures are limited. Their power to fulfill their role depends on their ability to design new structures with the same old bricks, or to create in their limited discretion new bricks.

On Interpretation

The supreme or constitutional courts' main activity is interpretation. This is true of both civil law and in common law legal systems. The key question is what is the proper system of interpretation? Neither common law nor civil law systems have a satisfying answer to that question. It seems to me that the solution lies in the answer to another question: What is the aim of interpretation? My answer is that interpretation's aim is to realize the law's purpose. Hence, my theory of interpretation is the purposive theory of interpretation. In constitutional law it means, that the purpose of the constitutional text is its subjective-historical purpose and its objective-modern purpose. How should the constitution be interpreted when the subjective purpose conflicts with the objective purpose? The answer to that question lies in the unique character of the constitution. A constitution enshrines a special kind of norm and is found at the top of the normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the state's aspirations throughout history. It determines the state's fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one.

How does a constitution's unique character affect its interpretation? In determining the purpose of a constitution, how does its distinctive nature affect the relationship between its subjective and objective elements? My answer is this: one should take both the subjective and objective elements into account when determining the purpose of the constitution. The framers' original intent at the time of drafting and the original public understanding of that time is important. One cannot

understand the present without understanding the past. The original intent and the original public understanding lend historical depth to understanding the text in a way that honors the past. The original intent and the original public understanding, however, exist alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person and to protect human dignity. Therefore, in determining the constitution's purpose through interpretation, one must also take into account the values and principles that prevail at the time of interpretation, seeking synthesis and harmony between past understanding and present principles.

We return, then to the question: What is the proper relationship between the subjective and objective elements in determining the purpose of the constitution when the subjective and the objective pull in different directions? In my opinion, greater weight should be accorded to the objective modern purposes. Only by preferring the objective modern elements can the constitution fulfill its purpose. Only in this way is it possible to guide human behavior through generations of social change. Only in this way is it possible to balance the past, present and future. Only in this way can the constitution provide answers to modern needs. Admittedly, the past influences the present, but it does not determine it. The past guides the present, but it does not enslave it. Fundamental social views, derived from the past and woven into social and legal history, find their modern expression in the old constitutional text.

Many courts have issued opinions in the same spirit, including the Canadian Supreme Court, the Australian High Court, the Israeli Supreme Court and the German Constitutional Court. This is the purposive interpretation that I espouse. It does not ignore the subjective purpose or

the original public understanding in constitutional interpretation, but it does not give it controlling precedence either. The weight of the subjective purpose or the public original understanding decreases as the constitution ages and becomes more difficult to change. In interpreting such constitutions, the preferred objective modern purpose reflects deeply held modern views in the legal system's movement through history. The constitution thus becomes a living norm—a living tree—preventing the enslavement of the present to the past.

This approach was not adopted in the United States. There is hardly a consensus regarding the proper weight to be accorded to past interpretations. Instead, in the United States, the competing notions of original intent of the founding fathers (also known as "intentionalism"), the original public understanding of the terms used in the Constitution ("originalism"), and the "living constitution" are all sources of an ongoing debate in academic writing and on the bench. Indeed, the United States Supreme Court itself is—and has been for years—divided on this issue. The entire corpus of America constitutional law finds itself in a state of crisis due to this lack of consensus. Without accord in the legal community about the proper role that original intent, original understanding, and current notions of constitutional interpretation should play in determining the meaning of constitutional provisions today, the entire constitutional system is hanging in the balance. A crisis of this sort has been avoided in Canada, Australia, Germany and Israel. Hopefully other constitutional legal systems will successfully avoid this dangerous situation, which may tear apart the legal system as well as focus all legal energy on the crisis.

On Proportionality

Proportionality is a very important tool to realize the judicial role. The formal role of proportionality is to ensure that a sub-constitutional norm limiting a constitutional right fulfills its four elements. If those elements are not fulfilled, the sub-constitutional norm will lack the force to limit the constitutional right, for a higher norm trumps a lower norm. In effect, then, the formal role of proportionality is to overcome the results of the constitutional norm's superiority. It follows that where a constitutional right is limited by another constitutional norm, the four elements of proportionality do not apply. The clash will be resolved not on the constitutional level but on the sub-constitutional level.

Proportionality is a legal construct. It puts in place four elements whose fulfillment will allow a limitation placed on a constitutional right by a sub-constitutional norm to be found constitutional. Every legal system that adopts proportionality must determine for itself, however, how the elements of proportionality are to be satisfied. In reaching such a conclusion, the legal system will be expressing its society's understanding of democracy. The conclusion will be derived from its position on the importance of constitutional rights and their relationship to the public interest and will reflect its approach to separation of powers and the role of each branch of government. Proportionality, then, is a framework that must be filled with content. The framework sets the four elements that must be fulfilled, but the content of those elements will be determined by a set of considerations that are external to proportionality and that inform it. That content therefore may vary from one legal system to another. But note: proportionality is not neutral with respect to human rights, and it is not indifferent to their limitation. It is grounded in the need to realize human rights. The limitations that proportionality

imposes on the realization of constitutional rights draw their substance from the same source as the rights themselves; they are grounded in the society's understanding of democracy.

In sum, the elements of proportionality reflect the idea that a sub-constitutional norm may impose limits on a constitutional right, but that those limits are themselves bounded. This is the concept of "limits on the limitations".

The four elements of proportionality pertain with respect both to negative rights and to positive rights. Negative rights define the limitations on a constitutional right that the state is precluded from imposing. Positive rights define the actions that the state is obligated to take in order to protect a constitutional right. With regard to negative rights, proportionality examines whether the limitation imposed by a law on the full realization of a constitutional right is proportional. With regard to positive rights, proportionality examines whether the failure to protect the full scope of the constitutional right is proportional. In both cases, the four elements noted above apply.

1. Proper purpose

The **first** element of proportionality requires that a law limiting a constitutional right have a proper purpose. This is a threshold requirement that does not entail concrete balancing. It is generally acknowledged that a limitation on a constitutional right is constitutional if it is intended to protect other rights (constitutional or sub-constitutional). One enters a grey area with respect to proper purpose, however, when the constitutional right is to be limited to promote the public interest. What public interest can justify limiting a constitutional right? At times, the constitution itself will specify the public interests

whose realization will warrant limiting certain constitutional rights. But what does one do when the constitution says nothing in that regard? German constitutional law regards it as sufficient that the public interest not be contrary to the constitution. Canadian constitutional law, in contrast, requires that the public interest be pressing and substantial. In both systems, the requirement of proper purpose applies to all constitutional rights, without any effort to distinguish among rights on the basis of their importance.

2. Rational Connection

The **second** component of proportionality is that the means adopted by the law must be capable of advancing the realization of its proper purpose. This does not require that the means be the only one that can attain the purpose, or that it realize the purpose in full, or that it do so efficiently. The requirement is that the means have the potential to advance the purpose to some extent that is not merely marginal, scant, or theoretical.

3. Necessity

The **third** component of proportionality requires that the proper purpose not be attainable by some other means less restrictive of the constitutional right. If there exists some equally effective alternative that would entail less of a limitation on the constitutional right, the law in question is not necessary. If, however, the alternative would intrude less on the constitutional right but would be able to attain the law's proper purpose only in part, the law would be necessary. It would be necessary as well if the alternative, though able to attain the law's proper purpose in full, would limit some other right or impair some other public interest. Accordingly, the law is necessary if an alternative is less restrictive of

the constitutional right but more costly. Of course, rejection of those alternatives may not pass muster under the balancing test required by the fourth element of proportionality (proportionality *stricto sensu*).

The necessity test requires that the means selected by the law be tailored to realizing the proper purpose. One "cannot shoot a sparraws with a canon"; The means must be suited to the ends. When the purpose can be attained by a means less restrictive of constitutional rights that means should be selected, and there is no necessity for the law under review. But while over-inclusiveness should be avoided, it becomes necessary when it is impossible to separate the narrower measures needed to realize the law's purpose from those that are over-inclusive. In these circumstances, the over-inclusiveness is dealt with in the context of the fourth component, that of balancing. As an example, consider a law whose purpose is to protect the public interest and the rights of the individual against terrorists. Given the inability to distinguish a terrorist from a non-terrorist by individual examination, a general prohibition may be imposed that affects the rights of non-terrorists as well. That inability to rely on individual examination (which imposes less of a limitation on the constitutional right) transforms the general prohibition (which limits the constitutional right comprehensively) into something necessary.

4. Proportionality *Stricto Sensu*—Balancing

a. The Social Importance of the Purpose and of Avoiding the Limitation on the Constitutional right

The **fourth** element of proportionality requires a proper relationship between the social benefit of realizing the proper purpose and the social benefit of avoiding the limitation of the constitutional right. The element

of rational connection and the element of necessity deal with the relationship between the law's purpose and the means it adopts for realizing that purpose. The means-ends analysis conducted at that stage does not consider whether attaining the purpose is worth the associated limitation on the constitutional right; it is not based on balancing. But things are quite different when we come to proportionality *stricto sensu*. At that stage, we examine the relationship between the law's purpose and the constitutional rights that are affected, and that examination entails balancing.

To speak of "balancing" is to speak metaphorically, but the mode of thought is normative. It is based on legal rules that determine when a proper purpose may be realized despite the limitation on a constitutional right. There is no consensus, however, regarding the substance of those legal rules. In my view, they should be based on a balancing of the social importance of the benefit gained by realizing the purpose (protecting rights or promoting the public interest) on the one hand and, on the other, the social importance of avoiding the limitation on the constitutional right.

The comparison does not consider the overall importance of the purpose or the overall importance of the constitutional right being limited. Rather, the comparison is between the status of the purpose and the status of the right before and after the limiting law. The social importance of the law's marginal effect on attainment of the purpose is balanced against the social importance of avoiding the law's marginal limitation of the right. The comparison, then, is made in terms of marginal social utility.

On occasion, the scope of the comparison is even narrower. That is

so when the inquiry into necessity considers an alternative less restrictive of the constitutional right but unable to realize in full the purpose of the law. Because it cannot realize the purpose in full, the less restrictive alternative does not preclude a finding of necessity. Nevertheless, insofar as the alternative is proportional, it may strike the proper balance between the importance of the marginal utility of realizing the purpose and the importance of the marginal utility of avoiding limitation of the right.

The social importance of the marginal benefit in realizing the purpose depends on the nature of the purpose. Not all proper purposes are of equal social importance. When the purpose is protection of a constitutional right, the marginal social benefit depends on the importance of the protected right. When the purpose is protection of a public interest, the marginal social benefit depends on the importance of attaining the purpose. That importance—with respect both to the protection of constitutional rights and to the advancing of the public interest—will be a function of the social history of the state, its socio-political ideology, its political and governmental structure, and its commitment to democratic values. In dealing with these matters, it is necessary to see society and its normative structure as a whole.

In determining the social importance of the marginal benefit in realizing the purpose, we must take account—when the purpose is protection of human rights—of the degree of protection these rights enjoyed before the law and the protection they will be afforded under the law. That is the case as well with social purposes related to promoting a public interest. In all of these, we should consider the likelihood that the purpose will be realized if the law is allowed to stand. That likelihood depends on the factual situation and on a prognosis regarding the

possibility that the purpose will be realized.

The social importance of avoiding the limitation of the constitutional right depends on the social importance of the right. The key question here is whether all constitutional rights are of equal social importance. That is an issue on which there is no consensus. I believe that all constitutional rights are not equal with respect to their social importance. The importance of a constitutional right is determined on the basis of both external and internal considerations. External considerations include the society's basic concepts, its social and cultural history, and its particular character. That sort of external background allows us, for example, to understand the great importance assigned in post-Nazi Germany and post-apartheid South Africa to the values of human dignity and equality. Internal considerations take account of the relationships among the various rights. In that sense, a right that serves as a precondition to the existence and operation of another right is regarded as the more important of the two. Hence the high social importance of the rights to life, dignity, equality, and political expression.

The social importance of avoiding the limitation of a right is influenced by the scope of the limitation and its extent. The severity of the limitation also bears on the social importance of avoiding it. A limitation on one right, accordingly, is not the same as a limitation on several; a limitation that approaches the core of a right is not the same as one that affects it only on its margins; a permanent limitation is not the same as a temporary one; and a limitation very likely to eventuate is not the same as one whose probability of realization is more remote.

b. The Rule of Balancing

The balance between the marginal social benefit in realizing the

purpose and the marginal social benefit in avoiding the limitation on the constitutional right can be expressed as follows: as the importance of avoiding the marginal limitation on the constitutional right and the likelihood of the limitation coming to pass increase, so do the required importance of the marginal benefit to the public interest or the competing private right and the required likelihood of that benefit being realized.

What happens if the balance is even, and the marginal social importance of achieving the purpose equals the marginal importance of avoiding the limitation on the constitutional right? The solution flows from fundamental concepts of constitutional democracy, regarding which there are likely to be differing and even conflicting opinions. It seems to me that where one constitutional right is limited in order to protect another, there is no reason to impugn the constitutionality of the limiting legislation. Where, however, the constitutional right is limited in order to advance the public interest, the constitutional right should be afforded priority: *in dubio pro libertate*.

Many may disagree with me on proportionality and the role of the court in proportionality. To these critics, my only answer is: I am aware of your criticism, but I have not found a better system. It is my view that if we take human rights seriously, we should accept proportionality and judicial discretion in proportionality.

On Standing

The rules of standing are central in the performance of the judicial role. They are a vital tool in bridging the gap between law and society, and in protecting the constitution and democracy. Tell me what your views on standing are and I will tell you what your views on judging are.

My position is that anyone should have legal standing to question the legality of any state action. Locking the gates of the court before a petitioner without any special interest who is arguing against an illegal state action harms the enforcement of the law. Where there is no rule by judge, there is no rule of law. Law is replaced by power. The ability to access the court is the cornerstone of democracy. A public agency is a fiduciary that acts for the sake of the individual. In the areas of public law, each individual has the right that state actins remain within the framework of the law. The constitution of South Africa makes it clear by providing that:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

The South African Constitution goes on to state that "anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened."

Behind my views about standing is the recognition that every individual has an interest in a government that acts according to the law, and that such an interest is protected by the law. Indeed, the laws of standing turn the individual's interest in a government that acts according to the law, into the constitutional right of the individual that the government act legally. This is the importance of the laws of standing. They are not simply a procedural means to regulate the flow of the court's docket. They are a central tool for ensuring the bridging of law and life and protecting the constitution and democracy.

Comparative law

I have found comparative law to be of great assistance in realizing my role as a judge. The case law of the courts of the United States, Australia, Canada, the United Kingdom and Germany have helped me significantly in finding the right path to follow. Indeed, comparing oneself to others allows for greater self-awareness. With comparative law, the judge expands the horizon and the interpretive landscape. Comparative law enriches the options available to us. In different legal systems, similar legal institutions often fulfill corresponding roles, and similar legal problems (such as hate speech, privacy, abortion and the fight against terrorism) arise. To the extent that these similarities exist, comparative law becomes an important tool with which judges fulfill their role in democracy. Moreover, because many of the basic principles of democracy are common to democratic countries, there is good reason to compare them as well. Indeed, different democratic legal systems often encounter similar problems. Examining a foreign solution may help a judge choose the best local solution. This usefulness applies both to the development of the common law and to the interpretation of legal texts.

Naturally, one must approach comparative law cautiously, remaining cognizant of its limitations. Comparative law is not merely the comparison of laws. A useful comparison can exist only if the legal systems have a common ideological foundation. The judge must be sensitive to the uniqueness of each legal system. Nonetheless, when the judge is convinced that the relative social, historical and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration. Indeed, the importance of comparative law lies in extending the judge's

horizons. Comparative law awakens judges to the latent potential of their own legal systems. It informs judges about the successes and failures that may result from adopting a particular legal solution. It refers judges to the relationship between a solution to the legal problem before them and other legal problems. Thus, comparative law acts as an experienced friend. Of course, there is no obligation to refer to comparative law. Thus the South African Constitution provides that when courts interpret the Bill of Rights they "must consider international law and may consider foreign law." Additionally, even when comparative law is consulted, the final decision must always be local. The benefit of comparative law is an expanding judicial thinking about the possible arguments, legal trends, and decision-making structures available.

This measured approach towards the use of comparative constitutional law is not shared by all; in particular, the issue has created a deep rift within the American legal system. There, the "originalist" camp—supporting the notion that the original understanding should govern the interpretation of the constitutional text—strenuously opposes the idea of considering any comparative or foreign law not part of such understanding. Despite that, the pattern in American law seems to have moved in the direction of more openness towards foreign and comparative law. It is hoped the Court will proceed in this direction.

On Legal and Judicial philosophy

While working as a judge, I have found that a good philosophy is a very practical tool in solving hard cases. A philosophy of life and a philosophy of law assists the judge in understanding life and law. As to philosophy of law, I found myself having an eclectic approach. It contains components from each of the main theoretical doctrines. In my

opinion, the relationship between members of society, and between society and its members, is complicated and complex to the extent that it cannot be described by one single point of view. Human experience is too rich to be limited to one theory. In my opinion, the naturalists, the positivists, the realists and the neo-realists, the members of the historical—economic or sociological schools—all reflect, from different angles, the amassed human experience. Each of them has truth in it. One can "theoretically" agree with each of them, but there arises a need to balance between the various views. According to my approach, the solution is not found in one single independent theory. One must take certain components from each of the main theories, while determining a proper balance between them. None of the theories can remain pure. Balancing is always needed. It may be that this eclectic philosophy is a philosophy in and of itself. Whatever the case may be, in my opinion, the law, as a normative system, has a role in society. It is intended to ensure functional social life. It contains order and security alongside justice and morals. My pluralistic approach teaches me that there is no consensus regarding the relative weight of these values, and that different people have different opinions on the subject. The democratic form of government determines which institutions and organs are assigned the role of determining such relative weight.

Most importantly for judges is to articulate to themselves their judicial philosophy. By judicial philosophy I mean a system of nonobligatory considerations that will guide the judge in exercising his discretion. These are a set of thoughts about how to exercise discretion in hard cases. Judicial philosophy is an organized thought about the way in which a judge is to contend with the complexities of a hard case. In my experience, the majority of judges have such a judicial philosophy.

For most, it is an unconscious philosophy. I strived to raise judicial philosophy into the realm of consciousness and subject it to public critique.

Judge's judicial philosophy is closely intertwined with their personal experience. It is influenced by their education and personality. Some judges are more cautious and others are less so. There are judges that are more readily influenced by a certain kind of claim than others. Some judges require a heavy 'burden of proof' in order to depart from existing law, while others require a lighter 'burden of proof' in order to do so. Every judge has a complex life experience that influences his or her approach to life, and therefore influences their approach to law. There are judges for whom considerations of national security or individual freedoms are weightier than for other judges. There are judges whose personal makeup obligates order, and as a result, they require an organic development and evolution of the law. There are judges whose personalities place great importance on the proper solution, even if they reach that solution in a non-evolutionary fashion. There are judges who give special weight to considerations of justice in the general sphere, even if it creates injustice in the individual case. Other judges emphasize justice in the individual case even if it does not fit in with the general justice found at the basis of the norm.

One must always remember that judicial philosophy is relevant only if the judge has judicial discretion. It works only in those cases where the legal problem has more than one legal solution. It is relevant only in the hard cases. It is the main compass that directs judges (consciously or unconsciously) in shaping the solution to the hard cases with which they are confronted. Professor Freund wrote that "the most important thing about a judge is his philosophy; and if it be dangerous

for him to have one, it is at all events less dangerous than the self-deception of having none."

Final Remarks

I regarded myself as a judge who was sensitive to his role in a democracy. I took seriously the tasks imposed upon me; to bridge the gap between law and society and to protect the constitution and democracy. Despite frequent criticism—and it frequently descends to the level of personal attacks and threats of violence—I have continued on this path for twenty eight years. I hope that by doing so, I was serving my legal system properly. Indeed, judges in highest courts must continue on their paths according to their consciences. Judges are guided by their North Star: the fundamental values and principles of constitutional democracy. They bear a heavy responsibility on their shoulders. But even in hard times, they must remain true to themselves. I discussed this duty in an opinion considering whether torture may be used on a terrorist in "ticking bomb" situations. My answer—and the answer of the court—was *no*. In my judgment I wrote:

Deciding these applications has been difficult for us. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. We know its problems and we live its history. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The fear that our ruling will prevent us from properly dealing with terrorists troubles us. But we are judges. We demand that others act according to law. This too, is the demand we make of ourselves. When we sit at trial, we stand on trial.